

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20120403
District Court No. 09-2011-CR-03977

State of North Dakota,)
)
 Appellee,)
)
 vs.)
)
Charles Butcher,)
)
 Appellant.)

APPELLANT’S BRIEF

**APPEAL FROM JURY TRIAL, VERDICT OF JURY,
AND SENTENCING ON SEPTEMBER 17, 2012**

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1. ISSUES

2. Was the guilty verdict supported by proof beyond a reasonable doubt?

3. STATEMENT OF THE CASE.

4. On November 15, 2011, Charles Butcher (“Butcher”) was charged with Conspiracy to Commit Robbery in Cass County, North Dakota. On April 12, 2012, the State filed a Notice of Habitual Offender.

5. A jury trial was held on June 19, 2012, before the Honorable John Irby, District Judge. Following a verdict of guilty, Butcher was sentenced to ten (10) years with the North Dakota Department of Corrections.

6. On November 8, 2012, Butcher filed a Notice of Appeal with the North Dakota Supreme Court.

7. STATEMENT OF FACTS.

8. The State conceded that the evidence against Butcher was circumstantial in nature, with the exception of the testimony of Steve Gibson. The testimony of Officer Daniel Hanson established the fact that an attempt at an armed robbery of the Kum & Go convenience store at 13th Avenue & 23rd Street in Fargo occurred on October 26, 2011, around 6:16 a.m. He and another officer responded to the call. They entered the store and found nobody in the store. Angelina Nicholson, the Store Manager, was by herself at 6:00 a.m. The first customers of the day made their purchases and left the store. She continued her duties of making breakfast sandwiches when she turned to “look at who was there and theres a gun pointed in my face.” She only saw one person at first. The male then pulled her

down to the floor and he walked away in the opposite direction. Another person had his hands to her back and applied pressure to her head. She assumed the object applying the pressure to her was a gun. She was unable to get a look at either individual.

9. The first guy “was covered.” All she could see was his eyes. She never did see the second individual. She was only aware of two people in the store. The first guy tried to enter the cash register. He was unsuccessful, which cause the till to “freeze”. He requested assistance from the second guy. A cab shows up at the store. The two men ran out of the store. Ms. Nicholson ushers a customer out of the store, locks the doors and calls the police. She was unable to see the color the skin of the men. She never saw their clothing. She only heard two voices, not three. She could not state with any degree of certainty that the intruders were male. Randy Vivier was a customer of the Kum & Go on October 26, 2011. He was waiting for the store to open to purchase milk. He made his purchase and left the store. On his way out of the store, he walked past a car parked outside the rear of the store. He saw an individual jump out of the back seat and jump over a guard rail. He could see three individuals in the car. There were no lights inside the car. He looked at the individual in the back seat of the car that had look at him as being a Caucasian male.
10. Alysha Gibson testified that she was in a relationship with Steve Gibson, one of the other co-defendants. On the morning of October 26, 2011, around 2:00 in the morning, Steven Gibson came to her house. He asked to borrow her car. He left,

returned and asked her the name of the school “way up in North Fargo.” She replied, “McKinley” and Gibson left again. Gibson returned to her house with Mason Peet and Charles Butcher. Steven Gibson then said that he was going to rob somebody in North Fargo and wanted Alysha’s help to remove his earrings, because he “didn’t want them seeing him with his earrings in.” Peet and Butcher sat at the kitchen table while Gibson paced back and forth. Gibson and Peet left their jewelry at her house when they left. Butcher did not. Around 5:50 a.m., all three left her house for the last time. Charles was wearing a black coat or overcoat.

11. After her car was returned to her the following day, Alysha Gibson noticed a pair of gloves and a face mask in her car. She was unable to ascertain who the items belonged to of those three men. When informed of the Stop & Go robbery, she called Steven Gibson and accused him of the robbery. He denied committing the robbery. She did identify Peet, Gibson and Butcher in a photograph from the Stop & Go. She never heard either Peet or Gibson talk of robbing any store. On the night of the robbery, she saw Gibson with a guitar case that he used to carry guns. Detective Jason Skaliky of the Fargo Police Department was another witness. He obtained search warrant for the gloves found in Alysha Gibson’s car.
12. Jennifer Pence from the North Dakota State Crime Laboratory testified that DNA found on the face mask could not exclude Charles Butcher as a contributor but could eliminate him as a contributor to the gloves. The States first witness was Steven Gibson. He stated that Fred Thompson, an alleged drug dealer, told him

(Gibson) that he (Thompson) wanted Gibson to “take the boys and go do an armed robbery.” The “boys” were identified as Mason Peet and Charles Butcher. Butcher acted as a lookout. He spies a vehicle pulling up to the store and yells, “I just saw one just pulled up.” All three men leave the store. On cross-examination, Steve Gibson admitted that he had lied to the police about his involvement and the involvement of Butcher. Only one witness placed Charles Butcher at the robbery at the Kum & Go store, i.e., Steven Gibson. The store manager was unable to identify Mr. Butcher as being at the scene. She was only cognizant of two individuals, not three.

13. LAW AND ARGUMENT.

14. There was insufficient evidence to support the verdict.

15. On appeal, Butcher challenges the sufficiency of the States’ evidence to support his criminal conviction. Specifically, he argues that the district court erred when it denied his motion for judgment of acquittal. When a defendant challenges the sufficiency of the evidence, this Court applies the following standard of review: “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. 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. 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.”

16. State v. Dahl, 2009 ND 204, ¶6, 776 N.W.2d 37 (quoting State v. Demarais, 2009 ND 143, ¶7, 770 N.W.2d 246).
17. The State conceded that the evidence against Butcher was circumstantial in nature, with the exception of the testimony of Steve Gibson.
18. The testimony of Officer Daniel Hanson established the fact that an attempt at an armed robbery of the Kum & Go convenience store at 13th Avenue & 23rd Street in Fargo occurred on October 26, 2011, around 6:16 a.m. (Tr.p. 89, ll. 3-16). He and another officer responded to the call. They entered the store and found nobody in the store. (Tr.p. 92, ll. 19-25; p. 93, ll. 1-14).
19. Angelina Nicholson, the Store Manager, testified that she was by herself at 6:00 a.m. (Tr.p. 110, ll. 16-20). The first customers of the day made their purchases and left the store. (Tr.p. 111, ll. 6-10). She continued her duties of making breakfast sandwiches when she turned to “look at who was there and theres a gun pointed in my face.” (Tr.p. 111, ll. 11-14). She only saw one person at first. The male then pulled her down tot he floor and he walked away in the opposite direction. (Tr.p. 112, ll. 16-19). Another person had his hands to her back and applied pressure to her head. (Tr.p. 112, ll. 19-21). She assumed the object applying the pressure to her was a gun. (Tr.p. 113,ll. 1-2). She was unable to get a look at either individual. (Tr.p. 113, ll. 24-25; p. 114, l.1).

20. The first guy “was covered.” All she could see was his eyes. (Tr.p. 113, ll. 4-5). She never did see the second individual. (Tr.p. 114, ll. 6-9). She was only aware of two people in the store. (Tr.p. 114, ll. 10-12).
21. The first guy tried to enter the cash register. He was unsuccessful, which cause the till to “freeze”. (Tr.p. 115, ll. 2-4). He requested assistance from the second guy. (Tr.p. 115, ll. 7-11). A cab shows up at the store. The two men ran out of the store. (Tr.p. 115, ll. 12-16). Ms. Nicholson ushers a customer out of the store, locks the doors and calls the police. (Tr.p. 115, ll. 22-25).
22. She was unable to see the color the skin of the men. (Tr.p. 120, ll.17-20). She never saw their clothing. (Tr.p. 120, ll. 17-20). She only heard two voices, not three. (Tr.p. 121, ll. 4-7). She could not state with any degree of certainty that the intruders were male. (Tr.p. 121, ll. 11-13).
23. Randy Vivier was a customer of the Kum & Go on October 26, 2011. He was waiting for the store to open to purchase milk. (Tr.p. 123, ll. 20-25). He made his purchase and left the store. (Tr.p. 124, ll. 15-17). On his way out of the store, he walked past a car parked outside the rear of the store. He saw an individual jump out of the back seat and jump over a guard rail. (Tr.p. 125, ll. 1-2). He could see three individuals in the car. (Tr.p. 125, ll. 15-17). There were no lights inside the car. He looked at the individual in the back seat of the car that had look at him as being a Caucasian male. (Tr.p. 132, ll. 10-15).
24. Alysha Gibson testified that she was in a relationship with Steve Gibson, one of the other co-defendants. (Tr.p. 136, ll. 5-8). On the morning of October 26,

2011, around 2:00 in the morning, Steven Gibson came to her house. He asked to borrow her car. (Tr.p. 137, ll. 6-7). He then left, returned and asked her the name of the school “way up in North Fargo.” (Tr.p. 137, ll. 19-21). She replied, “McKinley” and Gibson left again. (Tr.p. 137, ll. 18-22).

25. Gibson returned to her house with Mason Peet and Charles Butcher. (Tr.p. 138, ll. 12-16). Steven Gibson then said that he was going to rob somebody in North Fargo and wanted Alysha’s help to remove his earrings, because he “didn’t want them seeing him with his earrings in.” (Tr.p. 138, ll. 20-21). Peet and Butcher sat at the kitchen table while Gibson paced back and forth. (Tr.p. 140, ll. 9-11). Gibson and Peet left their jewelry at her house when they left. Butcher did not. (Tr.p. 141, ll. 10-16). Around 5:50 a.m., all three left her house for the last time. (Tr.p. 142, ll. 22-25). Charles was wearing a black coat or overcoat. (Tr.p. 143, ll. 22-23).
26. After her car was returned to her the following day, Alysha Gibson noticed a pair of gloves and a face mask in her car. She was unable to ascertain who either item belonged to of the three men. (Tr.p. 145, ll. 12-17). When informed of the Stop & Go robbery, she called Steven Gibson and accused him of the robbery. He denied committing the robbery. (Tr.p. 146, ll. 4-14). She did identify Peet, Gibson and Butcher in a photograph from the Stop & Go. (Tr.p. 147, ll. 12-25).
27. She never heard either Peet or Gibson talk of robbing any store. (Tr.p. 154, ll. 5-10). On the night of the robbery, she saw Gibson with a guitar case that he used to carry guns. (Tr.p. 158, ll. 17-24).

28. Detective Jason Skaliky of the Fargo Police Department was another witness. He obtained search warrant for the gloves found in Alysha Gibson's car. (Tr.p. 120, ll. 7-14).
29. Jennifer Pence from the North Dakota State Crime Laboratory testified that DNA found on the face mask could not exclude Charles Butcher as a contributor but could eliminate him as a contributor to the gloves. (Tr.p. 216, ll. 21-25; p. 217, ll. 4; p. 218. ll. 3-10).
30. The States first witness was Steven Gibson. He stated that Fred Thompson, an alleged drug dealer, told him (Gibson) that he (Thompson) wanted Gibson to "take the boys and go do an armed robbery." (Tr.p. 238, ll. 10-14) The "boys" were identified as Mason Peet and Charles Butcher. He stated that, during the initial phase of the robbery:
- Q. All right. So you guys go in the front door. Who does what?
- A. Mason went around, grabbed the lady - - the poor lady who was making her sandwiches. And I went around to the office. And Charlie was basically bringing up the rear looking out.
31. (Tr.p. 166, ll. 10-16).
32. Butcher acted as a lookout. He spies a vehicle pulling up to the store and yells, "I just saw one just pulled up." (Tr.p. 218, ll. 16-20). All three men leave the store.
33. On cross-examination, Steve Gibson admitted that he had lied to the police about his involvement and the involvement of Butcher. (Tr.p. 292, ll. 21-25; p. 293, ll.

1-3).

34. Only one witness placed Charles Butcher at the robbery at the Kum & Go store, i.e., Steven Gibson. The store manager was unable to identify Mr. Butcher as being at the scene. She was only cognizant of two individuals, not three.
35. Steven Gibson was an alleged accomplice under Section 12.2-03-01(3), N.D.Cent.Code. Therefore in order to convict Butcher of being a co-conspirator, the testimony of Steven Gibson must be corroborated.

29-21-14. Testimony of accomplice - - Corroboration required. A conviction cannot be had upon the testimony of an accomplice unless the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

36. Any amount of corroboration is sufficient to give the case to the jury to determine the sufficiency of the corroboration. It is only when there is no corroborating evidence that the Supreme Court may reverse a judgment based upon the verdict of guilty. State v. Haugen, 449 N.W.2d 784 (N.D. 1989).
37. The corroboration of accomplice testimony need not establish criminal conduct, but need only corroborate the accomplice as to some material fact and tend to connect the defendant with the crime. Furthermore, the corroborating evidence need not, in isolation, be incriminating, if the combined and cumulative evidence other than the accomplice's testimony tends to connect the defendant with the

commission of the offense. State v. Burgard, 458 N.W.2d 274 (N.D. 1990).

38. Butcher's trial counsel at the conclusion of the State's case, submitted a motion for judgment of acquittal under Rule 29, N.D.R.Crim.P. (Tr.p. 305, ll. 2-7). The State's response to the issue of corroboration:

"State's Response?

MR. YOUNGGREN: Yes, Thank you, Judge. Based on the burdens at this point, looking at the evidence in a light most favorable to the State and the - - as we're considering as well the testimony Mr. Gibson, who is a co-conspirator in this case, he has certainly made the statement that he was with the Defendant when the crime was committed.

There is corroborative evidence of his statements. We've heard from Alysha Gibson who's talked about the evidence that occurred between - - before, I'm sorry, the robbery occurred, the conduct at her house with the discussions about the 3 parties that were present, including the Defendant; the bomb threat, the taking off of the jewelry and then leaving. And the timing, she also saw them dealing with a gun. The timing fits the time line here of when this crime was committed.

Then of course the before and after with the video surveillance evidence from the Days Inn. We have certainly room there to argue for Mr. Gibson's case, Mr. Steve Gibson. As he states he was there then, left and then came back after the robbery. Again the time frames fit. We can certainly make argument about who's depicted in those videos and

photographs.

Mr. Gibson has identified Mr. Butcher in those photographs. And so looking again to the totality of the case that we have I'd ask the Court to deny that motion."

39. (Tr.p. 305, ll. 10-25; p. 3056, ll. 1-10).
40. It is interesting to note that the State failed to connect Butcher to the actual crime. It was erroneous to states that Alysha Gibson saw "them dealing with a gun." She only saw Steven Gibson holding a gun, not Butcher.
41. The only corroboration of Gibson's testimony was that Butcher was seen in the company of Gibson and Peet.
42. Under N.D.R.Crim.P. 29(a), "[a]fter the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The Supreme Court reviews the denial of a motion for acquittal under the same standard as a challenge to the sufficiency of the evidence. "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. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678 (quoting State v. Wanner, 2010 ND 121, ¶9, 784 N.W.2d 143).
43. The two elements of a criminal conspiracy are an agreement to commit an offense

and an overt act to effect the offense. N.D.Cent.Code Section 12.1-06-04(1).

“The agreement not to be explicit but may be implicit in the fact of collaboration or existence of other circumstances.” Id. An agreement may be implied based on the parties’ conduct. Interest of J.A.G., 552 N.W.2d 317, 320 (N.D. 1996).

However, “an agreement ‘is not supplied by mere knowledge of an illegal activity . . . let alone by mere association with other conspirators or mere presence at the scene of the conspiratorial deeds.” State v. Serr, 1998 ND 66, ¶14, 575 N.W.2d 896 (quoting United States v. Zafiro, 945 F.2d 881, 888 (7th Cir. 1991), *aff’d*, 506 U.S. 534 (1993)). “[S]omething more” is required. Serr at 15.

44. See also State v. Cain, 2011 ND 219, 806 N.W.2d 597.

45. All of the other evidence provided by the State to show corroboration merely demonstrated Butcher’s presence at the residence of Alysha Gibson, Page Four Motel, and his presence at the scene. As stated earlier, the store manager, Angelina Nicholson, only was aware of the presence of two individuals, not three. She never heard Butcher speak or saw him long enough to identify him. Alysha Gibson never heard Butcher say anything regarding the planned robbery.

46. Detective Skaliky was also uncertain that Butcher was one of the men in the Kum & Go store.

47. CONCLUSION

48. The evidence was insufficient to corroborate Steven Gibson’s testimony and also was insufficient as to the guilty verdict against Butcher. The jury verdict should be reversed and the case remanded.

Dated this 7th day of March, 2013.

/s/ Kent M. Morrow

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CERTIFICATE OF SERVICE

On the 7th day of March, 2013, a copy of the foregoing Appellant's Brief and Appendix were served by electronic mail upon Ryan Younggren, Assistant Cass County States Attorney at younggrenr@casscountynd.gov

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/s/ Kent M. Morrow

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