

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellee,)	Supreme Court No. 20120403
vs.)	District Ct. No. 09-2011-CR-03977
)	
Charles Edward Butcher,)	
)	
Defendant and Appellant.)	

Appeal of Jury Trial Verdict of June 19, 2012, and Sentencing of September 17, 2012,

Cass County District Court
East Central Judicial District
the Honorable John C. Irby Presiding

APPELLEE’S BRIEF

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[¶3] STATEMENT OF THE ISSUE

[¶4] There was sufficient evidence presented at trial for the jury to find the Defendant guilty of conspiracy to commit robbery.

[¶5] STATEMENT OF THE CASE

[¶6] On October 26, 2011, at approximately 6:15 a.m., officers from the Fargo Police Department responded to a report of a bomb threat at a school in north Fargo. (Transcript of Trial on June 19, 2012, “Tr.” 89:3-5.) The call came from a telephone in the parking lot of a south Fargo convenience store. (Tr. 89:6-7.) As officers were investigating the call, a woman drove into the parking lot and informed officers that the Stop-N-Go convenience store nearby had just been robbed at gunpoint. (Tr. 89:19-22.)

[¶7] Officers learned three armed males entered the convenience store shortly after 6:00 a.m. (Tr. 111-114.) The morning clerk was alone in the store at the time. (Tr. 266-267.) One of the armed males, later identified as Mason Peet (Peet), pointed a gun in the clerk’s face and threw her to the ground. (Tr. 266:13-25; Tr. 267:1-6.) Another male, later identified as Steven Gibson (Gibson), went around the counter to the cash register and tried to get to the cash. (Tr. 268:3-9.) The third male, later identified as Charles Butcher (Butcher), stood in front of the counter as a lookout. (Tr. 267:20-25.) When Gibson couldn’t get the cash register open, Peet went to help him and Butcher then held the clerk to the ground by pointing a gun to her head. (Tr. 268:10-15.) Shortly thereafter, a customer arrived and the three armed males fled out the back door without obtaining any money. (Tr. 268:19-21.)

[¶8] On November 15, 2011, the State charged Butcher with conspiracy to commit robbery. (Appellant’s Appendix “App.” at 6.) After a two-day trial, the

jury found Butcher guilty. (App. at 40.) The trial court sentenced Butcher to ten years in prison. (App. at 41-2.) Butcher has appealed claiming there was insufficient evidence to support the verdict. (Appellant’s Brief at ¶ 14.) The State asserts there was sufficient evidence for the jury to conclude Butcher conspired to commit robbery.

[¶9] **LAW AND ARGUMENT**

[¶10] **I. There was sufficient evidence presented at trial for the jury to find the Defendant guilty of conspiracy to commit robbery.**

[¶11] The standard review for cases in which a criminal defendant challenges the sufficiency of the evidence is well-established:

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 [trier of fact] 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 [trier of fact] may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Bruce, 2012 ND 140, ¶ 16, 818 N.W.2d 747 (quoting State v. Nakvinda, 2011 ND 217, ¶ 12, 807 N.W.2d 204 (quoting State v. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678)). “When the verdict is attacked and the evidence is legally sufficient to sustain the verdict, [this Court] will not disturb the verdict and

judgment even though the trial included conflicting evidence and testimony.”
Bruce at ¶ 16 (quoting Nakvinda).

[¶12] In order to sustain a conviction for conspiracy to commit robbery, the State must have presented evidence showing Butcher “agreed with one or more persons to engage in or cause conduct which, in fact, constituted the offense of robbery, and any one or more of such persons did an overt act to effect an objective of the conspiracy.” (App. at 6 (criminal information)); N.D.C.C. § 12.1-06-04; N.D.C.C. § 12.1-22-01. The crime of robbery occurs when “in the course of committing a theft, [a person] inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury.” N.D.C.C. § 12.1 22-01. “[I]f the robber possesses or pretends to possess a firearm, destructive device, or other dangerous weapon,” the crime is a class B felony. N.D.C.C. § 12.1 22-01(2); see also (App. at 22 (jury instruction on robbery including the dangerous weapon language)).

[¶13] In this case, the State relied in part on the testimony of co-conspirator Gibson. (Tr. 228-302.) Gibson testified that he, Butcher, and Peet went to the Days Inn Motel just before 4:30 a.m. on October 26, 2011. (Tr. 235-237.) Gibson said his drug supplier, Fred Thompson, told Gibson to take Butcher and Peet out to commit an armed robbery. (Tr. 238:10-14.) Thompson held a gun to Gibson’s mouth ordering Gibson to do the armed robbery. (Tr. 239:18-22.) At approximately 5:05 a.m, Gibson, Peet, and Butcher left the motel and went to Alysha Gibson’s residence, which is near the Stop-N-Go convenience store. (Tr.

243-245; Tr. 248:3-4.) Gibson testified the three males then positioned a getaway car near the Stop-N-Go convenience store and proceeded to the Kum & Go convenience store to call in a fake bomb threat to a north Fargo school. (Tr. 249:6-24; Tr. 251:8-11.) At one point, when the three males were at Alysha Gibson's residence, Gibson said he had Alysha Gibson take some of his jewelry off so he could not be identified. (Tr. 252:17-21.)

[¶14] Gibson further testified he, Butcher, and Peet drove to the back of the Stop-N-Go store and waited for the store to open for the day. (Tr. 258:5-20.) A male customer walked up to the building. (Tr. 259:14-5.) Gibson, Butcher, and Peet waited for the male customer to leave the store before entering. (Tr. 260:11-18.) When the male customer left, Gibson, Butcher, and Peet put on masks and entered the store. (Tr. 263:6-8.) The State introduced a video of the robbery at trial and Gibson identified the three robbers in the video as Butcher, Peet, and himself. When repeatedly questioned about the identity of Butcher at trial, Gibson consistently identified Butcher as the third person participating in the robbery. (Tr. 264:15-25; Tr. 265:1-7.) Gibson testified Butcher had a BB gun during the robbery. (Tr. 8-10.) Peet and Gibson also carried guns during the robbery. (Tr. 265:17-25; Tr. 266:1-10.)

[¶15] Gibson testified Peet went in to the store, grabbed the store clerk, threw her to the ground, and approached the cash register. (Tr. 266:13-25; Tr. 267:1-6.) Gibson held the clerk down. (Tr. 267:12-13.) Butcher acted as a lookout. (Tr. 267:2-3.) When Peet could not get the cash register to open, Gibson

walked over to help and Butcher then held the clerk down and put a gun to the back of her head. (Tr. 268:3-15.) Butcher saw a customer pull up to the store, and all three males fled out the back door to the getaway car parked nearby. (Tr. 268:15-21; Tr. 271:15-25; Tr. 272:1-11.)

[¶16] The jury in this case found the testimony of Gibson credible. Because Gibson was a co-conspirator, however, the trial court instructed the jury on the testimony of an accomplice. (App. at 30) (jury instruction on “Testimony of an Accomplice Must be Corroborated”). Despite realizing “the term accomplice is not synonymous with co-conspirator, and there is no rule requiring corroboration of a co-conspirator’s testimony,” the State did not object to the instruction. See State v. Baumgartner, 2001 ND 202, ¶ 8, 637 N.W.2d 14 (recognizing “accomplice” is not synonymous with “co-conspirator”) (quoting State v. Lind, 322 N.W.2d 826 (N.D. 1981)). “Corroboration of a witnesses’ testimony is required only where a witness is criminally responsible as an ‘accomplice’ as that term is statutorily defined.” State v. Pacheco, 506 N.W.2d 408, 409 (N.D. 1993).

[¶17] An “accomplice is one who knowingly, and with criminal intent, participates, associates, or concurs with another in commission of a crime.” State v. Anderson, 172 N.W.2d 597, 600 (N.D. 1969). “The test to determine whether or not one is an accomplice of a defendant on trial is ‘whether or not he could be indicted and punished for the crime for which the defendant is charged.’” State v. Ennis, 334 N.W.2d 827, 832 (N.D. 1983) (quoting State v. Dwyer, 172 N.W.2d

591, 596 (N.D.1969)). Under the facts of this case, the State conceded Gibson was an “accomplice” for purposes of applying the statute requiring corroboration of his testimony. See N.D.C.C. § 29-21-14 (testimony of accomplice). The trial court explained to the jury:

A Defendant cannot be found guilty based on the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the Defendant with the commission of the offense. Corroboration is not sufficient if it merely shows the offense was committed or the circumstances of committing the offense.

You must be satisfied that there is some evidence, either direct or circumstantial, aside from the testimony of the accomplice, from which you may infer not only that the crime charged was committed, but that the Defendant was implicated in it. The corroborating evidence need not extend to every material point of the accomplice’s testimony nor be sufficient in itself to support a conviction.

The sufficiency of the corroborating evidence is for you to determine. If the testimony of an accomplice is corroborated, you have a right to consider all of that testimony the same as any other testimony in the case.

(App. at 30; N.D.C.C. § 29-21-14).

[¶18] At trial, Officer Dan Hansen of the Fargo Police Department testified a bomb threat was, in fact, made from a pay phone at the Kum & Go convenience store in the early morning hours of October 26, 2011. (Tr. 89:3-11.) The State offered a video taken from the Days Inn Motel in Fargo showing Gibson, Peet, and Butcher arriving at the Days Inn at approximately 4:21 a.m. on October 26, 2011. (Tr. 174:8; State’s Exhibit 1(testimony of Detective Jason Skalicky)); see State’s Exhibit 1. In the video, Butcher is wearing the dark pants and white shoes just as

in the Stop-N-Go surveillance video. (Tr. 182-186.) The State also pointed out, by comparison photo, that Butcher is identified at the Days Inn by a long wisp of hair, styled in the back in a unique fashion. (Tr. 177-178, 224-227.) The video shows Gibson, Peet, and Butcher leaving the Days Inn at approximately 5:10 a.m. (Tr. 179:14-25; Tr. 180:1-5.) The State offered testimony from Randy Vivier who testified he was at the Stop-N-Go convenience store at approximately 6:00 a.m. on October 26, 2011, and he saw a vehicle with three males in it parked behind the store. (Tr. 123:6.) The video taken from the Stop-N-Go shows there were three armed males wearing masks who robbed the store. (State's Exhibit 2; Tr. 116:9.) All of this evidence corroborates the testimony of Gibson.

[¶19] Furthermore, Alysha Gibson testified Gibson, Peet, and Butcher were together at her residence on the morning of October 26, 2011. (Tr. 138:15-18.) She identified Butcher in the courtroom as the person who was at her residence with Peet and Gibson. (Tr. 139:15-21.) She also testified Gibson asked her to help him take off some jewelry. (Tr. 140:9-11.) She further testified they left her residence at approximately 5:50 a.m. (Tr. 142:22-5.) Alysha Gibson positively identified Butcher in a photo taken from the surveillance camera at the Stop-N-Go convenience store at the time of the robbery. (Tr. 148:4-10.) She also explained the long rifle, used by Peet as a weapon and owned by Mr. Gibson, was handled by the parties at her residence before the robbery. (Tr. 142:4-10.) Ms. Gibson further testified, consistent with Mr. Gibson, that the long rifle was placed in a guitar case. (Tr. 158:17-25; 159:1-2.) All of these facts also are corroborative

of Gibson's testimony.

[¶20] “[A]ny amount of corroboration will be sufficient to give the case to the jury to determine the sufficiency of the corroboration.” State v. Lind, 322 N.W.2d 826, 842 (N.D. 1982). Corroborating evidence “need not be sufficient, in itself, to warrant a conviction or establish a prima facie case.” Lind, at 842 (quoting State v. Thorson, 264 N.W.2d 441, 445 (N.D.1978)). “All that is required is that the evidence corroborates the accomplice as to some material fact or facts, and tends to connect the defendant with the commission of the offense.”

Id. (quoting Thorson). This Court has said:

To successfully challenge the sufficiency of the evidence on appeal, a defendant must show there is no reasonable inference of guilt when viewing the evidence in the light most favorable to the verdict.... In deciding whether there is sufficient evidence, we do not resolve conflicts in the evidence nor do we weigh the credibility of the witnesses. We determine only whether there is competent evidence which could have allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.

State v. Chacano, 2013 ND 8, ¶ 14, 826 N.W.2d 294, reh'g denied (Feb. 26, 2013)(quoting Kirkpatrick at ¶ 15 (quoting State v. Delaney, 1999 ND 189, ¶ 4, 601 N.W.2d 573)). Given the testimony of Gibson, the corroborating evidence presented at trial and viewing that evidence in the light most favorable to the verdict, the jury had sufficient evidence upon which to find Butcher guilty of conspiracy to commit robbery.

[¶21] **CONCLUSION**

[¶22] Because the State presented sufficient competent evidence for the jury to find Butcher guilty, the State respectfully requests this Court affirm the verdict.

[¶23] Respectfully submitted this 5th day of April, 2013.

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[¶24] **CERTIFICATE OF SERVICE**

[¶25] A true and correct copy of the foregoing document was sent by e-mail on the 5th day of April 2013, to: Kent M. Morrow: morrow@midconetwork.com

Tracy J. Peters

Ryan J. Younggren