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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Jeremy Hannah, Defendant and Appellant.	)	Supreme Court No. 20150144 McKenzie Co. No. 27-2014-CR-01682

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM GUILTY VERDICT ON 6 APRIL, 2015 AND DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL ON 23 JUNE, 2015

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE PAUL JACOBSON, PRESIDING

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STATEMENT OF THE ISSUES

[¶1] There was sufficient evidence for the jury to convict the Defendant of Simple Assault – Domestic and for the trial court to deny the Motion for Judgment of Acquittal.

[¶2] In this case, there is good public policy to allow testimony of a third party to form the basis of bodily injury to convict for Simple Assault – Domestic.

STATEMENT OF THE CASE

[¶3] The State would agree with the Statement of the Case as laid out by Respondent-Defendant.

STATEMENT OF THE FACTS

[¶4] On October 8th, 2014, Amy Robinson, a reporter with the McKenzie County Farmer, was leaving her office and walking down Main Street in Watford City. (T. p. 35., L. 17-25; p. 36, l. 1-21). While walking on Main Street, she noticed a truck with tinted windows parked on her side of Main Street with two occupants in a scuffle. (T. p. 36, l. 22-25; p. 37, l. 1-9). The truck has legal tint on the windows which allowed people at that time of the day with full sunlight to see clearly in the vehicle. (T. p. 96, l. 8-13; p. 91, l. 14-17). Ms. Robinson saw the driver, later identified as the Defendant, punching the passenger repeatedly. (T. p. 37, l. 11-12). The passenger was described as having short hair. (T. p. 37, l. 18).

Ms. Robinson at first believe it to be real rough roughhousing, but moved to get a better vantage point to make sure everyone was okay. (T. p. 37, l. 22-23; p. 38, l. 15-25). After the Defendant paused, she saw the Defendant hitting the passenger with both fists towards the upper body, in a whaling motion, with the passenger blocking the punches with her arms. (T. p. 39, l. 1-16). When asked, Ms. Robinson stated if she were punched like that, she would feel pain. (T. p. 39, l. 17-18). Ms. Robinson went into her office and called law enforcement but could still see the vehicle in question and noticed the passenger get out. (T. p. 40, l. 1-15). She saw the passenger, who she could see was a woman, throw something into the floor of the truck and begin to leave the scene. (T. p. 40, l. 7-19). Ms. Robinson noticed that the passenger was red in the face. (T. p. 43, l. 9-11).

[¶5] Law enforcement arrived on scene. The passenger was identified as Rebekah Pogue, who had short, buzzed cut hair at the time. (T. p. 44, l. 16-20; p. 46, l. 1; p. 50, l. 13-14; p. 58, l. 8-10). Officer Bostic, while arriving on scene, could see the Defendant within the vehicle through the tint from across the street. (T. p. 57, l. 9-21). Ms. Pogue refused to talk to the city police because she doesn't like them and only talks to county deputies. (T. p. 48, l. 4-6). Deputy Mees spoke with Ms. Pogue, who he stated refused to talk about the incident and didn't want to be bothered. (T. p. 51, l. 1-8) This was standard when dealing with her. (T. p. 50, l. 16-19). No marks were found on her, but law enforcement testified that they have investigated domestic incidents where no marks are left. (T. p. 53, l. 14-25; p. 54, l.

10-19; p. 59, l. 10-15). Law enforcement did talk to the Defendant, who stated that there was a verbal interaction with his girlfriend. (T. p. 46, l. 6-11). Officer Sherk noticed a fresh laceration on the Defendant's hand, which in his training and experience resulted from a defensive wound. (T. p. 46, l. 12-20).

[¶6] Rebekah Pogue testified that she was in a relationship at the time of the incident. (T. p. 67, l. 15-24). She admitted she was in the truck in front of the McKenzie County Farmer that day. (T. p. 68, l. 5-14). She stated a verbal argument took place in the truck and that there was a scuffle over the keys. (T. p. 69, l. 11-25). She testified that she didn't have her hands up, contrary to what Ms. Robinson saw. (T. p. 70, l. 2-7). Ms. Pogue never saw Ms. Robinson until Ms. Robinson was in her office calling law enforcement. (T. p. 70, l. 13-20). She agreed she didn't want to talk to city cops. (T. p. 71, l. 1-13). She took photos of her face, but not her arms, two hours after the incident, which were admitted as Defense Exhibits A, B, and C. (T. p. 75, l. 6-25; p. 76 l. 1-25; p. 77, l. 1-12). She admitted that she might have hit him in the altercation. (T. p. 78, l. 8-10). She testified that she did not feel any pain. (T. p. 78, l. 13-16). She also confirmed that she was convicted of providing false information to law enforcement in February of 2015. (T. p. 74, l. 12-16).

[¶7] The Defendant admitted that he and Ms. Pogue were in a relationship and they were in the truck that day when an altercation took place. (T. p. 86, l. 15-16; p. 87, l. 2-14). He admitted that he and Ms. Pogue were still close. (T. p. 89, l. 8-

23). In regards to the incident, he testified that he never hit her. (T. p. 87, l. 15-16). He did admit that there was physical contact during the altercation. (T. p. 90, l. 18-25; p. 91, l. 1). He testified that the tint on the windows were legal in nature. (T. p. 91, l. 14-17).

STANDARD OF REVIEW

[¶8] This Court has stated the standard of review for judgment of acquittals in State v. Montplaisir:

> "To grant a judgment of acquittal, the district court must find the evidence is insufficient to sustain a conviction." Brossart, 2015 ND 1, ¶ 33, 858 N.W.2d 275. The standard of review for claims of insufficient evidence is well established:
> [W]e look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses.

2015 ND 237, ¶ 35, 869 N.W.2d 435 (citing to State v. O'Toole, 2009 ND 174, ¶ 8, 773 N.W.2d 201 [quoting State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819]).

ARGUMENT

I. There was sufficient evidence for the jury to convict the Defendant of Simple Assault – Domestic and for the trial court to deny the Motion for Judgment of Acquittal.

[¶9] One of the hallmarks of our criminal justice system is the right to a jury

trial and is "the normal and preferred mode of fact-finding in criminal cases." State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987) [citing to State v. Kranz, 353 N.W.2d 748, 751 (N.D. 1984)]. Because of that, this Court looks at the evidence in a light most favorable to the verdict, but "merely review[s] the record to determine if there is competent evidence that allows the jury to draw an inference reasonably tending to prove guilt, and fairly warranting a conviction." State v. Ohnstad, 359 N.W.2d 827, 835 (N.D. 1984) [citing to State v. Hilsman, 333 N.W.2d 411, 413-414 (N.D. 1983)]. As the jury is the fact-finder, this Court does not weigh conflicting evidence or judge the credibility of witnesses.

[¶10] In this case, the Defendant was found guilty by the jury of Simple Assault – Domestic. The jury instructions in this case track with N.D.C.C. § 12.1-17-01(1)(a), which requires the Defendant to "willfully cause bodily injury to another human being." Bodily injury was defined in the jury instructions and tracks with N.D.C.C. § 12.1-01-04(4) as "any impairment of physical condition, including physical pain." What this appeal comes down to is who can determine pain. The Defendant argues that as the determination of pain is subjective, then the victim's belief and testimony of whether there is pain should be the controlling factor. But that isn't the law. The law states that the jury determines the facts on which the verdict lies. And the jury can use its own accumulated background knowledge and experiences. State v. Justin Yarbo, 2014 ND 164, ¶ 19, 851 N.W.2d 146.

[¶11] Here, the jury used their common experience and the testimony presented to determine that Ms. Pogue felt pain, thus making the Defendant guilty of Simple Assault – Domestic. The jury heard from Ms. Robinson, who could see into the truck on a sunny day, even at maximum legal tint. She was a third-party bystander who wasn't involved with the fight. She saw roughhousing and went closer to get a better look. After that, she saw whaling and the victim blocking the strikes with her arms. When asked, Ms. Robinson stated that if it has been her, she would have felt pain. This was weighed against the testimony of Ms. Pogue, who said there was an altercation, then amended that it had some physical nature to it. She didn't talk to the city cops because she doesn't trust them. She took pictures later but not of her arms, only her face. She also admitted that she was convicted of lying to police. The jury, as the fact finder, sifted through the evidence and, as seen by its unanimous guilty verdict, determined that the Defendant caused pain to Ms. Pogue through the testimony of Ms. Robinson and the common experiences of the jurors.

[¶12] The State hasn't found many cases nationwide, let alone in North Dakota, that discusses this type of situation. The closest is a case out of Texas that deals with proof of pain. In Shah v. State, 403 S.W.3d 29 (Tex. App. 2012), the Defendant argued there was insufficient evidence to prove bodily injury in an assault. The Texas Penal Code definition for bodily injury closely mirrors North Dakota's: physical pain, illness, or any impairment of physical condition. Shah, at

34 (citing to Tex. Penal Code Ann. § 1.07(8) (West Supp. 2012). The court there found that although the victim didn't expressly state he experienced pain, "because 'people of common intelligence understand pain and some of [its] natural causes,' a factfinder may infer that a victim actually felt or suffered physical pain." Shah v. State, at 35 [citing to Garcia v. State, 367 S.W.3d 683, 688 (Tex. Crim. App. 2012)]. Because the victim testified he had been head-butted and had a cut, it was reasonable for the jury to infer pain. In this case we have something similar. We have a witness who testified regarding the actions that she saw. She stated that if it were her she would be in pain. The jury also used their common intelligence to realize if they were being hit, they would feel pain. While Ms. Pogue testified she didn't feel pain, she also admitted there was a physical altercation and she was convicted of lying to police. The fact finder determined that the evidence established that the Defendant caused pain.

[¶13] Again, in order to overcome the jury verdict, the Defendant must show that no rational fact finder could find the Defendant guilty beyond a reasonable doubt when viewed in the light most favorable to the verdict. The jury may find the Defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty. State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586. The fact-finder here, namely the jury, was present for all of the testimony and evidence. They were the ones that were in the best position to wade through the conflicting testimony and weigh the credibility of the witnesses. They

determined that the evidence showed that the Defendant caused Ms. Pogue to suffer bodily injury, namely pain, by the actions as seen by the witness. The trial court agreed with this conclusion, both in the original denial of the Rule 29 motion and the second denial of the Rule 29 motion. Because the Defendant cannot meet its burden to overcome the jury's decision in this case, the verdict should stand.

II. In this case, there is good public policy to allow testimony of a third party to form the basis of bodily injury to convict for Simple Assault – Domestic.

[¶14] The Defendant argues that upholding the jury verdict in this case would be poor public policy because it would lead to various convictions based solely on the word and observation of another person. What the Defendant fails to take into account is the entire adversarial system present before the jury itself, which is designed with safeguards in mind. A jury of the Defendant's peers examines all the facts and assesses the credibility of each witness and evidence. One of the tools used in front of the jury is cross-examination; called the "greatest legal engine ever invented for the discovery of truth." California v. Green 399 U.S. 149, 158 (1970). It is "indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)." Chamber v. Mississippi, 410 U.S. 284, 295 (1973). Far from being a slippery slope as the Defendant characterizes, the type of testimony offered in a case like this is exactly why

cross-examination exists. It allows attorneys to probe the veracity and credibility of witnesses in front of the jury so the jury can use their common sense and impressions of the witnesses and evidence to come up with a fair verdict.

[¶15] For a court to find situations like the one present poor public policy would severely impact criminal cases. Victims can be reluctant or afraid to testify for variety of reasons, including in domestic violence cases. Third-party eyewitnesses can be crucial to providing testimony of the crime that occurred. The Defendant's fears that innocent, minor events can be blown out of proportion by a vengeful eyewitness. The system itself is designed to safeguard against that, with prosecutorial discretion, the right to counsel, the right to confront the accuser, and cross-examination. These safeguards currently in place provide a better check on vindictive eyewitness rather than a blanket rule against eyewitnesses testifying to subjective matters.

CONCLUSION

[¶16] This case really boils down to whether this Court will allow a third-party eyewitness to testify to someone else feeling pain. The fact finder in this case determined that such a witness was more believable than the victim herself, and used their common experiences when finding the Defendant guilty. There is sufficient evidence for a rational fact finder to find the Defendant guilty beyond a reasonable doubt. There are safeguards in place to prevent the public policy fears that the Defendant raises. The decision of the jury and the judge should stand and be affirmed.

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I certify that a true and correct copy of the **Brief of Plaintiff-Appellee** was emailed to the following parties via electronic mail on the 19th of October, 2015:

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