

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No.
)	20170170
vs.)	
)	
Ron Alan Montgomery,)	Stutsman County District No.
)	47-2016-CR-00526
Defendant/Appellant.)	

ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE
FROM THE DISTRICT COURT
FOR THE SOUTHEAST JUDICIAL DISTRICT
STUTSMAN COUNTY, NORTH DAKOTA
THE HONORABLE MARK BLUMER, PRESIDING

BRIEF OF APPELLANT

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REFERENCE

Black’s Law Dictionary, Sixth Ed. (1990) 279 ¶ 45

[¶ 1] STATEMENT OF THE ISSUES

[¶ 2] The evidence presented at trial was insufficient to sustain the guilty verdict.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] This is an appeal arising from verdict of guilty following a jury trial and sentence in Stutsman County District Court for the offense of violation of a disorderly conduct restraining order.

[¶ 5] On July 30, 2016, Ron Alan Montgomery (hereinafter “Montgomery”) was charged by criminal complaint in Stutsman County district court with violation of a disorderly conduct restraining order, a class A misdemeanor, in violation of N.D.C.C. § 12.1-31.2-01. It was alleged that Montgomery had violated a disorderly conduct restraining order not to have contact with the petitioner, Nicole A. Schmidt (hereinafter “Schmidt”).

[¶ 6] The disorderly conduct restraining order was issued on May 16, 2016, and was served upon Montgomery on May 16, 2016, at 9:28 a.m. The disorderly conduct restraining order stated that Montgomery was not to:

1. Have any physical contact with or come within 25 feet of Schmidt;
2. Call, write, or have messages delivered to Schmidt through anyone other than your attorney, including via email or other electronic means;
3. Take or damage any of Schmidt’s property; or
4. Other: No communication with her.

Appendix of Appellant, 4.

[¶ 7] Montgomery made his initial appearance before a magistrate on August 22, 2016. Montgomery pled not guilty, applied for and was granted an appointed attorney, and filed a demand for jury trial on September 29, 2016.

[¶8] A 12-person jury trial was held February 28, 2017, after which Montgomery was found guilty.

[¶ 9] At the conclusion of the State’s case-in-chief, Montgomery made a motion under N.D.R.Crim.P. 29 arguing there was insufficient evidence presented to sustain the State’s burden of proof. Transcript of Proceeding, February 28, 2017 (hereinafter referred to as “Transcript”), 74:16 to 75:2. The trial court denied the Rule 29 motion. Transcript, 75:18 to 76:2.

[¶ 10] A sentencing hearing was held April 27, 2017. Montgomery was sentenced on April 27, 2017, as follows:

1. Unsupervised probation from the date of sentencing until April 27, 2019.
2. As conditions of unsupervised probation, was ordered as follows:
 - a. Comply With Payment Agreement
 - b. Not Possess or Own Fire Arms
 - c. Set up Payment Schedule, \$20 monthly payments commencing 6/1/2018, due on the 1st of each month thereafter with total due by end of probation
 - d. Violate No Criminal Laws
 - f.. Pay the following fees:
 - i. Criminal Administration Fee \$200.00 Waived
 - ii. Defense/Facility Admin Fee \$100.00
 - iii. Indigent Defense Application Fee \$35.00
 - iv. Indigent Recoupment \$100.00
 - v. Victim-Witness Fee \$25.00

Fee Totals \$ \$260.00

[¶ 11] Montgomery filed a timely filed a notice of appeal on May 5, 2017. Appendix, 48-49. Montgomery argues there was not sufficient evidence to support a finding of guilt beyond a reasonable doubt.

[¶ 12] STATEMENT OF THE FACTS

[¶ 13] At trial, Schmidt testified that she had previously obtained a disorderly conduct restraining order against Montgomery on May 16, 2017. A copy of the said

restraining order was entered into the record. Transcript, 43:4-7. Schmidt testified that she worked for Corrine Brewster (hereinafter “Brewster”) and other clients, who all resided at Dewey Apartments in Jamestown, North Dakota. Dewey Apartments is a residential multi-unit apartment building for people with disabilities. Transcript, 40:18-19. Montgomery, who is confined to a wheel chair, also resided at Dewey Apartments. Transcript, 43:22-23.

[¶14] Schmidt, who does not reside at Dewey Apartments, testified that on July 30, 2016, while she was caring for Brewster, Montgomery came out of the main doorway to smoke. He positioned himself twenty-five feet (25’) away from Schmidt. This distance is accurately stated because Montgomery had someone measure the distance, which occurred at a certain crack in the sidewalk. Transcript, 43:25 to 44:1-19. Schmidt testified that as Montgomery came out to smoke, he called her a “whore.” Transcript, 44:23-25. Schmidt testified it was her impression Montgomery directed this derogatory comment to her, based upon her observations about Montgomery looking at her. Transcript, 45:12-21.

[¶15] Upon cross-examination, Schmidt testified that Montgomery said the derogatory word twice. Transcript, 47:1-4. However, Schmidt testified Montgomery did not engage in any other aggressive or passive activity which would indicate that the words were directed at her, other than to look at her. Transcript, 47:5-15.

[¶16] Brewster testified that on July 30, 2017, she was outside of Dewey Apartments with Schmidt, who was feeding Brewster at a picnic table, when Montgomery came out of Dewey Apartments and called Schmidt a “whore.” Transcript, 52:8-14.

[¶17] On cross-examination, Brewster testified that when Montgomery made the derogatory remark, her back was to him. Transcript, 53:7-10.

[¶18] Jamestown Police Officer Patrick Nelson testified that he investigated the call for service. After contacting Schmidt, who advised him of the alleged derogatory statement and of their respective distances of both Schmidt and Montgomery, Officer Nelson did not measure the exact distance between the parties on that date, but that it appeared that Montgomery was “within 20 to 25 feet.” Transcript, 57:25, 58:1. Officer Nelson also testified that Montgomery said he had no communication with Schmidt. Transcript, 57:18-25. Officer Nelson further testified that Montgomery’s demeanor appeared to be upset and “appeared to be agitated and pretty upset...(and) arrogant with the whole matter.” Transcript, 63:1-15. On cross-examination, Officer Nelson testified that he did not measure the distance between the parties. Transcript, 66:5-23. He also testified on cross-examination that rather than being agitated, pretty upset, and arrogant, he was not aggressive, but was “more agitated” and not hostile. Transcript, 65:12-18.

[¶19] Deputy Clerk of Court Jane Anundson testified as to the admissibility of the disorderly conduct restraining order which she had hand delivered to Montgomery and which he signed on May 16, 2017. Transcript, 71:3-25, 72:1-25, 73:1-2.

[¶20] The State rested, and the defense made a motion to dismiss, pursuant to Rule 29, NDRCrP. The motion was denied. *See* [¶9], above.

[¶21] Robert W. Walker, the caretaker for Dewey Apartments, which is owned by Accessible Space out of St. Paul, Minnesota, who did not witness the event, testified that there are only two doors to the main entrance, and there are two emergency exits which lock from the inside, so that once they are locked, it is not possible to reenter the

apartment building, and if these emergency doors are opened, an alarm bell will ring. Transcript, 78:20-24. As a result, there is effectively only one doorway through which a person may exit and enter the building under normal conditions. Transcript, 79:7-14.

[¶22] Walker further testified that Montgomery had talked to him about the incident with Schmidt, and Walker measured the distance which Montgomery said was between them,. This distance was 32 feet. Transcript, 81:13-23. Six (6) photographs of the area, which reflected a distance of 32 feet between the parties, which were taken by Walker, was admitted into evidence. Transcript, 82:9-25, to 93:11, inclusive.

[¶ 23] Montgomery testified on his own behalf. He said on July 30, 2016, he went outside to smoke through the main entrance/exit to Dewey Apartments. He saw Schmidt sitting with her client, and as he proceeded to a place to smoke which was at least 25 feet away from the entrance, he said, “I coughed and I used the word “whore” in there.” Transcript, 105:21-23. Montgomery testified he did not make eye contact with Schmidt. He testified he did not direct the term at Schmidt; rather he was simply thinking when he coughed. Transcript, 105:25, 106:1-16. He said he did not stare at Schmidt, although she was in his line of sight. Transcript, 108:17-20. Montgomery testified he did not direct any comments to Schmidt. Transcript, 111:18-20. He said he listened to music for approximately an hour and a half while he was smoking, went into the apartment building to go to the bathroom, then returned to his original position outside. Transcript 109:7-25. Montgomery testified that he did not communicate with Schmidt on the day in question. Transcript 113:11-25, 114:1-4.

[¶ 24] JURISDICTION

[¶ 25] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A defendant may appeal from a verdict of guilty and final judgment of conviction. N.D.C.C. § 29-28-06.

[¶ 26] STANDARD OF REVIEW

[¶ 27] “When the sufficiency of evidence to support a criminal conviction is challenged, [the Supreme] 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. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. This standard also applies to a review of the district court’s denial of a motion of judgment of acquittal under N.D.R.Crim.P. 29. State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586.

[¶ 28] ARGUMENT

[¶ 29] The evidence presented at trial was insufficient to sustain the guilty verdict.

[¶ 30] The Supreme Court reviews the record at trial “to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513. A conviction is not supported by sufficient evidence when no rational factfinder could have found the defendant guilty beyond a reasonable doubt, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution all reasonable inferences. Id. The Supreme Court should reverse a guilty verdict if no

reasonable factfinder could find the defendant guilty beyond a reasonable doubt. State v. Vantreece, 2007 ND 126, ¶ 14, 736 N.W.2d 428.

[¶ 31] It is the defendant’s burden on appeal to show the evidence does not support the verdict even when all reasonable inferences are given to the prosecution. State v. Zottnick, 2011 ND 84, ¶ 14, 796 N.W.2d 666. The Supreme Court will not reweigh conflicting evidence or judge the credibility of witnesses. Id. A jury may find a defendant guilty even if evidence exists could lead to a verdict of not guilty. Id.

[¶ 32] A defendant may move the court to enter a judgment of acquittal prior to jury deliberations if the prosecution has failed to establish its case with sufficient evidence to sustain a conviction. N.D.R.Crim.P. 29(a). A motion under Rule 29 preserves the issue of sufficiency of the evidence for appellate review. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 586. Montgomery made a motion for acquittal under N.D.R.Crim.P. 29 at the close of the State’s case-in-chief, arguing there was insufficient evidence presented to sustain the State’s burden of proof. Transcript, 74:16 to 75:2. The trial court denied the Rule 29 motion. Transcript, 75:18 to 76:2.

[¶ 33] Montgomery was charged with violation of N.D.C.C. § 12.1-31.2-01, for “violation of (a protection) order” N.D.C.C. § 12.1-31.2-01(8). That subsection requires that the respondent—in this case, Montgomery—knew that a restraining order had been issued. Id.

[¶34] Under the provisions of the disorderly conduct restraining order law, it is also required that a disorderly conduct restraining order “must contain a conspicuous notice to the respondent providing...[t]he specific conduct that constitutes a violation of the order.” N.D.C.C. § 12.1-31.2-01(7)(a).

[¶35] The disorderly conduct restraining order stated that Montgomery was not to:

1. Have any physical contact with or come within 25 feet of Schmidt;
2. Call, write, or have messages delivered to Schmidt through anyone other than your attorney, including via email or other electronic means;
3. Take or damage any of Schmidt's property; or
4. Other: No communication with her.

[¶36] Each of the following essential elements must be proven beyond a reasonable doubt to prove that Montgomery committed the offense of violation of a disorderly conduct restraining order:

1. That the Defendant had knowledge of the Disorder Conduct Restraining Order;
2. That the offense was committed on or about July 30, 2016., in Stutsman County, North Dakota;
3. That the offense was committed by the Defendant; and
4. That the defendant violated one or more provisions of the disorderly conduct restraining order.

See e.g. State v. Bertram, 2006 ND 10 ¶9, 708 N.W.2d 913.

[¶37] Here, there appear to be two specific provisions of the disorderly conduct restraining order against Montgomery upon which he was prosecuted: (1) that he came within twenty-five (25) feet of Schmidt; and (2) that he had some "communication" with her.

[¶38] At trial, there was conflicting testimony regarding whether Montgomery had come within twenty-five (25) feet of Schmidt. Other than Officer Nelson, it appears that no one disputed the distance that Montgomery maintained between himself and Schmidt.

[¶39] Schmidt herself testified as follows:

Q: Okay. And the order bars him from coming less than 25 feet from you, correct?

A: Right.

Q: So you said he (Montgomery) positioned himself 25 feet away.

A: Yeah. He had somebody measure so he knew that distance.

Q: Okay. Did he put some chalk or paint or something on the sidewalk?

A. It was a line in the sidewalk.

Q. Okay. A crack between segments of the sidewalk?

A. Yes.

Transcript, 44:7-19.

[¶40] Walker, the caretaker for Dewey Apartments, testified that he measured the distance between Montgomery and Schmidt, based upon the positioning of the parties stated by Montgomery after the incident, and he testified this distance was thirty-two (32) feet. Transcript, 81:18-23.

[¶41] Montgomery testified he was at least twenty-five (25) feet away from Schmidt and possibly thirty-two (32) feet from Schmidt. Transcript, 107.

[¶42] The only witness who testified that Montgomery could possibly be within twenty (20) to twenty-five (25) feet of Schmidt was the investigating officer, Officer Nelson. However, he testified that he did not measure “the distance between the place where she (Schmidt) said Mr. Montgomery was the picnic table” and left to answer another call. Transcript, 57:22-25. Although he was not examined as to his ability to judge distances, it would appear that Officer Nelson’s testimony was based upon mere speculation and not upon verifiable facts.

[¶43] Here, the complainant, Schmidt; the defendant, Montgomery; and Walker, an independent witness who was not present but actually measured the distance, all testified that Montgomery did not come within twenty-five (25) feet of Schmidt. Therefore, there was insufficient evidence to find that Montgomery had violated the disorderly conduct restraining order by coming within twenty-five (25) feet of Schmidt on July 30, 2016.

[¶44] There is another issue regarding whether Montgomery engaged in “communication” with Schmidt on July 30, 2016, by uttering the word “whore” once, or perhaps twice. Both Schmidt and Brewster testified that each heard Montgomery say the word “whore”. Transcript, 44:25; 46:22; 52:15. Montgomery himself testified that he “coughed...and used the word “whore. Transcript, 105:21.

[¶45] A definition of “communication” is:

Information given; the sharing of knowledge by one with another ; conference; consultation or bargaining preparatory to making a contract. Intercourse: connection. Act of or system of transmitting information. A “communication” is ordinarily considered to be a deliberate interchange of thoughts or opinions between two or more persons, as distinguished from “res gestae” expressions which are spontaneously or instinctively provoked, or made while under such shock or excitement as to preclude the possibility of design.

Black’s Law Dictionary, Sixth Ed. (1990) 279.

[¶46] It should be noted that Schmidt did not allege Montgomery engaged in any other aggressive actions or behaviors, other than to testify that Montgomery looked at her, which made her feel “very uncomfortable.” Transcript, 45:18-21. Montgomery himself testified that he did not direct the word “whore” at Schmidt. Instead, he merely said the word as part of a coughing fit:

Q: So you used the word “whore.” Did you direct that term to her? Did you just mumble it? How did that come about? What happened?

A: I was just thinking out loud to myself. And at that same time I got a coughing fit so I started coughing, and I was just thinking to myself.

Q: So from that statement, did you or did you not direct the term toward her?

A: No, I did not.

Q: Now, you went outside, you mumbled the term “whore to yourself, you didn’t approach her, you didn’t make eye contact....

Transcript, 106:5-16.

[¶47] A similar factual situation to the instant case occurred in State v. Lusby, 1998 ND 19, 574 N.W.2d 805. In that case, Lusby was found guilty of violating a disorderly conduct restraining order after the complainant, Anita Carow, secured a disorderly conduct restraining order against Lusby. The restraining order prohibited any physical contact with Carow. Lusby arrived at a medical clinic to assist her mother, who needed an injection and could not walk into the clinic. Carow was working at the medical clinic, and called the police to report a violation of the disorderly conduct restraining order because Lusby was physically present at the medical clinic where she worked. Lusby was arrested, and as she was leaving, Lusby told Carow: “I’ll see you in court. Id. ¶3. Lusby appealed, arguing insufficiency of evidence. The Supreme Court upheld the conviction and concluded that the evidence was sufficient to support the trial court’s finding of guilt. Id. ¶6. However, the Supreme Court also said that “An order defining criminal behavior should be clear and unambiguous.” Id. ¶9.

[¶48] Lusby may be distinguished from the instant case because in Lusby there was no question about whether Lusby spoke directly to Carow. However, in the instant case, the statement was simply made. It was made loud enough so that Schmidt and Brewster heard him. The statement, while not exactly a polite term, was merely that—a statement, according to Montgomery, which was not directed toward Schmidt, just a statement made on the onset of a coughing fit. The statement was made from a distance of more than twenty-five (25) feet. The statement was not accompanied by any other actions on the part of Montgomery, other than he remained removed by the requisite distance from Schmidt and perhaps looked at Schmidt.

[¶49] The State must establish proof beyond a reasonable doubt all elements of a charged offense. In this case the evidence was insufficient to prove beyond a reasonable doubt that Montgomery had reason to believe the comment was directed at Schmidt. Even when giving all reasonable inferences to the prosecution, the evidence presented at trial is not sufficient to support the guilty verdict.

[¶50] CONCLUSION

[¶51] The guilty verdict was not supported by sufficient evidence. Montgomery requests the Supreme Court to reverse the criminal judgment and remand for an entry of judgment of acquittal.

[¶52] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 9th day of August, 2017.

Respectfully submitted,

/s/ Russell J. Myhre

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State of North Dakota,)	
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Plaintiff/Appellee,)	CERTIFICATE OF SERVICE
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vs.)	Supreme Court Case No. 20170170
)	
Ron Alan Montgomery,)	Stutsman County File No.
)	47-2016-CR-00526
Defendant/Appellant.)	

I, Russell J. Myhre, do hereby certify that on August 9, 2017, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

Supreme Clerk of Court
ND Supreme Court
State Capitol
Judicial Wing, 1st Floor
600 East Blvd Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov

Frederick Fremgen
Stutsman County State's Attorney
511 2nd Ave. SE
Jamestown, ND 58401-4122
E-service: 47sa@nd.gov

by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

I, Russell J. Myhre, hereby certify that pursuant to Rules 5(b) and 5(f), NDR CivP, that on the 9th day of August, 2017, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

1. Brief of Appellant
2. Appendix of Appellant

To the defendant, listed at the following address:

Ron Alan Montgomery
1215 8th Ave NE #204
Jamestown, ND 58401

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

Dated this 9th day of August, 2017.

/s/ Russell J. Myhre

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