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JUNE 1, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No.
Plaintiff/Appellee,	)	20170421
	)	
vs.	)	Grand Forks
	)	County District No.
Bejan David Etemad,	)	18-2016-CR-01535
	)	
Defendant/Appellant.	)	

ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE
FROM THE DISTRICT COURT
FOR THE NORTHEAST Central JUDICIAL DISTRICT
~~STARK~~ Grand Forks COUNTY, NORTH DAKOTA
THE HONORABLE LOLITA G. HARTL ROMANICK, PRESIDING

BRIEF OF APPELLANT

Russell J. Myhre (ND ID 03180)
Myhre Law Office
341 Central Ave. N, Ste. 3
P.O. Box 475
Valley City, ND 58072
Telephone: (701) 845-1444
Email: russell.myhre@myhrelaw.com
Eservice: efile@myhrelaw.com
Attorney for Defendant/Appellant

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[¶1] STATEMENT OF THE ISSUES

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

[¶3] STATEMENT OF THE CASE

[¶4] This is an appeal arising from verdict of guilty following a jury trial and sentence in Grand Forks County District Court for the offense of Terrorizing, a violation of § 12.1-17-04, N.D.C.C.

[¶5] On August 4, 2016, Bejan David Etemad (hereinafter "Etemad") was charged by criminal information and accompanying affidavit of probable cause in Grand Forks County district court with Terrorizing, a violation of § 12.1-17-04, N.D.C.C. Register of Actions, Index # 1, 2. Etemad made his Initial Appearance on August 5, 2016. Register of Actions at 08/05/2017. A Preliminary Hearing was waived by Etemad on August 31, 2016, and was cancelled on September 9, 2016.

[¶6] It was alleged that on or about August 4, 2016, Etemad made a bomb threat to a receptionist at Altru Hospital in Grand Forks, North Dakota. The caller told the receptionist that there were seven (7) bombs inside the building which would explode if not found within two (2) hours. The receptionist identified Etemad's voice from previous contacts with him, and the call was traced to a motel in Grand Forks where Etemad was staying, the America's Best Value Inn. When police arrived at the motel, the manager identified the room where Etemad was staying, and police entered the room. Etemad made a confession to police, which was taped on body cameras which were on the police officers. A motion entitled an Ex Parte Motion for Mental Health Evaluation and Brief were filed on November 16, 2016. Register of Actions, Index # 16, 17. On November

17, 2016, the order was granted. Register of Actions, Index # 22. A Psychological Evaluation and Criminal Responsibility Evaluation was filed to the court on February 3, 2017. Register of Actions, Index # 28. The psychological evaluation essentially stated that while Etemad was mentally ill, he was criminally responsible for his actions and did not meet the legal criterion for a lack of criminal responsibility. On July 14, 2017, a Brief Regarding Potential Second Psychological Evaluation of Defendant was filed. Register of Actions, Index # 115. *See also* Register of Actions, Index # 122, 123, 129, 133. Etemad dismissed several attorneys prior to trial. At trial, he represented himself pro se, although the trial court appointed a standby counsel. Etemad was convicted by a jury after a three-day trial on November 14, 15, and 16, 2017. A Criminal Judgment was entered on November 20, 2017. Register of Actions, Index # 252. Etemad filed an appeal on November 30, 2017. Register of Actions, Index # 263, 264. He filed a Second Notice of Appeal by Bejan D. Etemad on February 7, 2018. Register of Actions, Index # 282, 283. Contemporaneously, Etemad filed a Motion to Set Aside Jury Verdict. Register of Actions, Index # 262. The State filed a Brief in Opposition to Defendant's Motion to Set Aside Jury Verdict. Register of Actions, Index # 273. The Supreme Court temporarily remanded the case to resolve the motion to set aside jury verdict, and on January 12, 2018, the court entered an Order on Remand Denying Defendant's Motion to Set Aside Jury Verdict and Regarding Request for "PR" Bond. Register of Actions, Index 267, 279. An Order upon a Motion and Order Granting Extension of Time for Appeal Transcript Deadline was entered on February 15, 2018. Register of Actions, Index # 286.

[¶7] Numerous additional pretrial and post-trial motions, both procedural and substantive, were filed in this action.

[¶8] At trial, Etemad admitted that he had made the telephone call to Altru Hospital in which a bomb threat was made, but he contended that he lacked criminal responsibility for his actions. Etemad contended that he lacked criminal responsibility due to mental disease or defect. Etemad represented himself at trial, with the assistance of standby counsel.

[¶9] A 12-person, three-day jury trial was held from November 14, through November 16, 2017, after which Etemad was found guilty of Terrorizing.

[¶10] After the guilty verdict upon the criminal charge, a sentencing hearing was held November 20, 2017. The Criminal Judgment was filed on November 20, 2017. Etemad was sentenced as follows:

> 1. Incarceration with the North Dakota Department of Corrections for a period of five (5) years, with two (2) years of this sentence suspended.
> 2. Supervised probation following release from incarceration for a period of three (3) years, and to comply with conditions set forth in an Appendix A to the Criminal Judgment.
> 3. Credit for three hundred five (305) days previously served.
> 4. Fees in the total amount of Five Hundred Sixty Dollars ($560).
> 5. Undergo and complete a chemical dependency evaluation, and file an alcohol evaluation with the court within sixty (60) days upon release
> 6. Comply with conditions contained in Appendix A.
> 7. Notify the Court of a Change of Address.
> 8. Set up a payment schedule.
> 9. Restitution to be determined within sixty (60) days.
> 10. Complete a mental health evaluation and file proof with the court within sixty (60) days of release and within one hundred eighty (180) days file proof of completion of any recommendations.

[¶11] Etemad filed a timely filed a notice of appeal on November 20, 2017, and on February 7, 2018.

[¶12] Etemad argues he lacked capacity to understand the proceedings against him and was unable to assist in his own defense.

[¶13] STATEMENT OF THE FACTS

[¶14] Jessica Amundson, a certified nursing assistant (CAN), testified she was on duty at Altru Hospital on August 3, 2016, at or around 3:03 p.m. As part of her duties, Amundson answered the telephone at the Nurse's Station on her floor. She answered a telephone call from a man who was calling in a bomb threat. Amundson testified she recognized the voice of the caller and identified the caller as Etemad. She testified there were seven (7) bombs placed within Altru and if the staff did not find them within two hours, he would ignite the bombs. Although Amundson repeatedly asked who was calling, the caller did not identify himself, even though she recognized his voice. The caller identification system (caller ID) showed the number which he was calling from. The caller repeatedly told her to come find him. On cross-examination, Amundson testified she recognized Etemad's voice from previous contacts at Altru. Tr. 27-42.

[¶15] Grand Forks Police Officer Corporal Justin Holweiger testified he was on duty on August 3, 2016, and was dispatched to Altru Hospital to investigate a bomb threat. He testified Officer Gangruth also arrived at the hospital earlier, and gathered information to identify the caller of the bomb threat. Holweiger was directed to go to the identified motel with Officer Bullinger. Holweiger testified he spoke with the motel manager, asked which room Etemad was in, and was directed to Room 165. The manager unlocked the door, Bullinger knocked and identified themselves as police officers, and entered the room after Etemad replied, "Come in. Arrest me. I know what I did. It wasn't right." After a search of the room for weapons, the officers Mirandized

Etemad and interviewed him. During the ensuing conversation, Etemad stated that he was the one who made the call to Altru for the bomb threats, he knew that was wrong, he shouldn't have done that, but he was upset. Holweiger confirmed with Etemad that there were, in fact, no bombs at Altru. A body cam video was entered into evidence without objection. After the video was entered into evidence, Etemad objected to its introduction on the grounds that only a "snippet" of the video was played for the jury, not its entirety. Etemad claimed out of the hearing of the jury that he had not been provided the video, but the State claimed he had been given a copy of the recording on a compact disc as part of discovery. Etemad was allowed to present the entire video in the presentation of his case in chief. Etemad played the portions of the videos upon cross-examination. Tr. 43-76, 100-122.

[¶16] Grand Forks Patrol Officer Matthew John Bullinger testified he accompanied Officer Holweiger in the motel on August 3, 2016, to investigate the bomb threat. Prior to being Mirandized and after being identified as the sole occupant of Room 165, Bullinger testified that Etemad said something similar to the following: "I need to go to jail. I need to go to jail for a felony. You wouldn't believe the threatening phone call I just made." After Etemad was Mirandized, Etemad stated he had made the call to Altru and told the nurses that he said something to the effect that if he didn't hit a reset button every two hours, the building would blow up. Etemad also stated there were not any bombs at Altru. Etemad was then placed under arrest and was transported to the jail. Etemad continued to speak and said the phone call could not be traced. An abbreviated clip of Officer Bullinger's body cam video was entered into evidence over Etemad's objection. An abbreviated clip of Officer Bullinger's in-car video was also entered into

evidence, again over Etemad's objection. These objections were similar to the objection previously made, that the portions which were played did not include the entire video. On cross examination, Officer Bullinger testified that while he had received training on the use of his body cam, there were times when he inadvertently did not turn the video on or off properly. He also testified he was not required to inform people he was videoing that he was doing so. The videos were played at length. Etemad asked whether he had mentioned the various drugs he was taking to Officer Bullinger, but Officer Bullinger did not know what these drugs were for. Tr. 123-180.

[¶17] Blackduck, Minnesota, Police Chief Jace Gungruth, who was formerly a patrol officer for the Grand Forks Police Department, stated he was on patrol in Grand Forks on August 3, 2016, at approximately 3:03 p.m. when he was dispatched to Altru Hospital for a possible bomb threat. When he arrived, he conducted an initial investigation and questioned witnesses. He verified that a witness had identified Etemad as the caller, and that the call had come from the Americas Best Value Inn. He testified that the investigation had proceeded unexpectedly quickly. He testified he interrogated Etemad after he had been arrested, and a video was entered into evidence without objection. On cross-examination, Gungruth testified that he had a correctional center nurse call ahead for Etemad's medications. Tr. 180-212.

[¶18] Grand Forks Police Sergeant Kevin Scott Kallinen, who was the patrol supervisor for that patrol shift, testified he was dispatched to Altru Hospital on August 3, 2016, at three minutes after 3:00 p.m. Since Officer Gangruth had arrived earlier than Kallinen, Gangruth "filled me in on what he had done so far." Tr. 218:20. Shortly after Kallinen arrived, he was notified that a man was in custody for making the bomb threat.

Since the arrested man had stated there were no real bombs, the decision was made to allow the hospital staff to continue checking for anything suspicious. On cross-examination, the following colloquy occurred:

ETEMAD: In the course of the investigation, did I deny making the bomb threat?

KILLINEN: Not that I know of.

Tr. 222:17-19. Etemad also attempted to ask Sergeant Kallinen about the Central Intelligence Agency and the FBI, but this question was objected to and sustained by the court. Tr. 224:16-24. The State objected more fully upon the discussion of the objection, since the State pointed out that Etemad attempted to ask the same question of the previous witness. Tr. 225:1-15. Etemad also made an objection to strike the testimony of the previous four officers and to only allow the video exhibits. Tr. 225:16-256, 226:1-9. Sergeant Kallinen was then released, subject to recall as a witness. Tr. 215-227.

[¶19] In the following discussion, out of the hearing of the jury, Etemad stated that his grounds to strike the four officers' testimony was that "they've offered nothing"; they did not directly testify about the bomb threat, but rather defer to Altru or to another officer; none of the officers were allowed to discuss anything about Etemad's mental illness; and the videos admitted into evidence were mere "snippets" and out of context. Etemad also contended that the officers' testimony contradicted the physical evidence. The State contended that the officers' testimony was necessary to lay foundation for the video exhibits. This objection was overruled. Tr. 228-229.

[¶20] Dr. Robert Lisota, a forensic psychologist who had examined Etemad and made a report to the Court, was qualified as an expert without objection. Dr. Lisota testified as follows:

> My professional opinion [regarding the examination and evaluation of Etemad] is that there is nothing in the data which I reviewed which would support a defense by – not guilty by reason of insanity or lack of criminal responsibility. There does not appear to be any mental disorder present which would rise to a level consistent with causing that loss or serious distortion of reality contact and the comprehension, harmful nature consequences. It's simply not there.

Tr. 240:3-10. Dr. Lisota continued to opine that Etemad did not suffer from a mental illness that would support a finding of lacking criminal responsibility for his actions. He testified that, in his professional opinion, that Etemad was mentally ill but not so mentally ill that he lacked criminal responsibility. Tr. 240:22-25; 241:1-5. He testified that the only mental diagnoses which would be relevant would be substance abuse disorders and personality traits. Tr. 242:15-25; 243:1.

[¶21] On cross-examination, Etemad questioned Dr. Lisota's professional qualifications. Etemad also questioned Dr. Lisota regarding the dosage of Seroquel which had been administered to Etemad, which had been eight hundred (800) milligrams of Seroquel for a period of time prior to the incident on August 3, 2016. Dr. Lisota testified that he had never seen Seroquel prescribed in the amounts indicated in Etemad's reports. Tr. 252:7-15. Dr. Lisota testified that dosages of 50, 100, or 200 milligrams, as administered at the State Hospital, were referred to as "brain glue." 253:25; 254:1-8. The State objected to Etemad's questioning of Dr. Lisota regarding Etemad's previous twenty-five (25) civil commitments and whether Etemad was malingering. The objection was sustained. Tr. 261-266. Etemad also questioned Dr. Lisota about the various testing

instruments which were used to come to the conclusion that he was criminally responsible for his actions.

[¶22] On redirect examination, Dr. Lisota testified:

> Again, to a reasonable degree of psychological certainty, it is my professional opinion that Mr. Etemad should be held criminally responsible for his alleged actions if found guilty.

Tr. 258:17-20. The State also questioned Dr. Lisota regarding the testing instruments

[¶23] The State then rested.

[¶24] Etemad, who had reserved his opening statement, outlined his theory of the case for the jury:

> I submit to you that there are two crimes that have been committed, and I submit that by Terrorizing, there have been two crimes committed. I committed a crime, but Altru also committed a crime. And I hope, I hope, that by the time the evidence is shown, that you will realize that I am not the only guilty party here. Either that, or I am insane because I saw something there and I felt threatened. I felt my life was threatened.

Tr. 276:8-15.

[¶25] Etemad then called Dr. Lisota as his witness. Etemad questioned Dr. Lisota regarding his previous civil commitments and treatments for mental illness, as well as the testing assessments and evaluation instruments which were used to evaluate Etemad. There was also testimony regarding whether Etemad was malingering, or feigning his psychiatric symptoms. Dr. Lisota testified that according to the three tests which were administered to Etemad, all three strongly indicated that he was malingering. Tr. 321:12-14. Etemad questioned Dr. Lisota about the basis upon which his opinions were based and the reliability of the testing instruments.

[¶26] On redirect examination, the State continued to ask questions regarding the reliability of his opinion that Etemad was malingering, to which Dr. Lisota testified

that he was "very confident that the diagnosis is accurate." Tr. 343:5. Dr. Lisota also testified that Etemad had indicated that Etemad wanted to return to jail so he could get his medications for free. Tr. 344:3-4. He testified that he was very confident about his conclusion that Etemad was criminally responsible for his actions. Tr. 345:3-14.

[¶27] On redirect examination, Dr. Lisota testified that the mental health system had failed Etemad by failing to diagnose his malingering many years ago. Tr. 346:3-20.

[¶28] Emily Larson, the developmental disabilities program manager of the Lake Region Human Service Center in Devils Lake, North Dakota, testified she had been Etemad's case manager after he had been committed to the State Hospital in 2015. She testified that she had accompanied Etemad to a meeting with a doctor and took him to an emergency room for a lacerated toe. Tr. 349-355.

[¶29] Etemad called himself as a witness on his own behalf. He had previously been examined by the trial court to establish that he had knowingly waived his right not to testify. Etemad testified that after his release from Altru on July 26, 2016, he had called Altru six or seven times to obtain medications. On August 3, 2016, he testified that a certain nurse had "made some smart ass remarks to me" during a telephone call to Altru, and he made "some smart ass remarks" to her. He then asked for the charge nurse, but instead Jessica Amundson answered. Amundson told him if he kept calling, she would call the police. Etemad testified he told her in response that she should tell the police he had planted a bomb. He testified he was sitting in a hotel room, begging for medication, and he told her that he was "in the Central Intelligence Agency" and asked her why she was playing with him. Tr. 368:21-23. Etemad testified Amundson told him the police were going to use lethal force on him, and he told her that he had planted seven

bombs, so if the police used lethal force, they would be blowing up her hospital, not him. Tr. 369. Etemad told them when the police arrived 17 minutes later, with their guns drawn, he "had no choice but to confess." Tr. 370:5-6. Etemad testified that at that point, he was either mentally ill or he was justified in what he did. Tr. 370:7-8. He also testified that he had been drinking all day so he "could fry my brain." Tr. 371:3-6. He claimed he had a history of making bomb threats when he lived in Dallas and in Devils Lake. Tr. 371:12-17. During a lengthy break out of the hearing of the jury, Etemad attempted to introduce documents relating to his previous commitments to mental health facilities, his criminal history, restraining orders, and other matters. The State objected, and Etemad withdrew his proposed exhibits. When Etemad resumed his testimony before the jury, Etemad testified that Seroquel improves his mental health, but when he is abruptly taken away from Seroquel, that is when he "suffer the worst psychotic breaks." Tr. 432:3-4. Etemad testified in 2015 he had been subject to a civil commitment in Ramsey County, he decided to discontinue all mental health services. He testified he was doing fine until June 1, 2016, when he was arrested in Devils Lake after a three to four hour standoff with the Devils Lake Police. Tr. 432-433. Following his arrest, he was transferred to the State Hospital, where he was put on a Seroquel regimen. Tr. 433:18-24. Etemad testified he was returned to the Ramsey County Correctional Center for thirty days, where he was placed on an 800-milligram regimen of Seroquel. He was released on bond with a ten or eleven day supply of Seroquel. Tr. 434. Etemad testified his mother had been paying for him to stay in various motels, but eventually she cut him off. He testified he made threats that he would break into his mother's house, and when police came looking for him, he went to Grand Forks. Tr. 435. He went to the Altru

psychiatric ward on a civil commitment, but was discharged on July 26, 2016. Altru did not give him a supply of Seroquel upon his release. Tr. 437. Instead, Etemad was told he would have to pay for the prescription of Seroquel, which he could not afford. He went to the American Best Value Inn to stay, and thereafter called Altru to ask for a charge nurse. He testified that a prescription was issued, but there was a mix-up and it was sent to Devils Lake rather than to Grand Forks. He returned to Altru, but he only obtained one dose of Seroquel for 400 milligrams. Tr. 437-442. Etemad attempted to testify about the records of his prior civil commitments, which was objected to on the grounds of relevancy, but Etemad withdrew that portion of his testimony. Tr. 443-448. Etemad testified that on August 3, 2016, he called Altru, he feared for his life, and he feared that Grand Forks police were going to use deadly force. He also claimed he was paranoid due to his previous work with the Central Intelligence Agency. Tr. 448-449.

[¶30] On cross-examination, Etemad explained that told Altru he was going to file a complaint against it. Tr. 450. He also testified that his confession was true, but his threat in regard to a reset button which had to be pressed every two hours was to protect himself from having the police use lethal force against him. Tr. 454. Etemad also confirmed that he had confessed to his father. Tr. 455. Etemad testified that his actions saved his life. Tr. 458:25.

[¶31] Etemad briefly recalled Jessica Amundson. On cross-examination by the State, Amundson denied telling Etemad that she was sending the police to use lethal force against him. Tr. 486.

[¶32] On rebuttal, the State recalled Officer Justin Holweger, who restated his original testimony.

[¶33] For the defense's rebuttal, Etemad took the witness stand and testified that the officers who entered his room had threatened to use lethal force and had their guns drawn. Tr. 497-499.

[¶34] Both sides rested. Etemad then made a motion for a mistrial, citing the register of actions in the case and the number of attorneys who had represented him so that the court could reset the case and have a fair trial. The motion was denied. Tr. 501-503.

[¶35] The court denied a jury instruction on excuse or justification on the ground that there was no evidence sufficient to support such an instruction pursuant to Chapter 12.1-05, N.D.C.C. Tr. 503:15-21. The State then moved the court for a motion in limine to prevent Etemad from arguing excuse and jury nullification, which was granted. Tr. 504-505.

[¶36] Etemad was found guilty upon the offense of Terrorizing. Etemad now appeals from his conviction.

[¶37] JURISDICTION

[¶38] 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.

[¶39] STANDARD OF REVIEW

[¶40] "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.

[¶41] ARGUMENT

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

[¶43] This case closely resembles the factual situation in State v. Dahl, 2009 ND 204, 776 N.W.2d 37. This appeal was from two trials, which were joined for purposes of appeal, although the facts and issues were discussed separately.

[¶44] Dahl appealed from criminal judgments, sentencing him for two counts of harassment and one count of reckless endangerment. Dahl argued the evidence presented was insufficient to support the guilty verdicts. However, he argued a second issue, whether he voluntarily, knowingly, and intelligently waived his right to counsel for his second trial. This court held that competent evidence was presented at trial to allow the juries in both cases to draw inferences reasonably tending to prove Dahl's guilt and fairly warranting conviction. This Court also held that Dahl was competent to waive his right to counsel and represent himself; and that Dahl voluntarily, knowingly, and intelligently waived his right to counsel. The cases were affirmed, but were remand for correction of the criminal judgments.

[¶45] Etemad's trial was unusual in several respects. Not only did Etemad represent himself at trial, but he also presented unusual motions and objections throughout the course of the trial. His main claim at trial was that he was not criminally responsible for his criminal conduct as a result of a mental disease or defect which

existed at the time that the alleged criminal acts occurred. He also appeared to argue necessity, excuse, and justification in different forms. While the testimony and evidence, especially by Dr. Robert Lisota, indicated that Etemad suffered from a mental illness, Dr. Lisota also testified that Etemad's mental illness did not rise to a level whereby he was not criminally responsible for his criminal conduct in making a bomb threat in a telephone call to Altru Hospital. Nevertheless, Etemad contends that the testimony and other evidence presented at trial were insufficient to support a verdict of guilty.

[¶46] This 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.

[¶47] 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.

[¶48] 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. Etemad made a motion for a mistrial after both sides had rested, which was denied. Tr. 501-503. Although it is unclear whether Etemad specifically referenced N.D.R.Crim.P. 29, he did file a Motion to Set Aside Jury Verdict on November 30, 2017, which was within fourteen (14) days after a guilty verdict, as permitted by Rule 29(c)(1), NDRCrimP. The trial court denied this motion. However, by making these motions, Etemad preserved this issue of sufficiency of evidence as set forth above.

[¶49] Etemad was charged with violation of N.D.C.C. § 12.1-17-04, which states, in part:

> A person is guilty of a class C felony if, with intent to place another human being in fear for that human being's or another's safety or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious disruption or public inconvenience, or in reckless disregard of the risk of causing such terror, disruption, or inconvenience, the person:
>
> > 1. Threatens to commit any crime of violence or act dangerous to human life; or
> > 2. Falsely informs another that a situation dangerous to human life or commission of a crime of violence is imminent knowing that the information is false.

.

[¶50] Etemad did not refute the acts with which he was alleged to have committed. Rather, Etemad presented testimony by Dr. Lisota to the effect that he lacked criminal responsibility due to a mental disease or defect existing on August 3, 2016.

[¶51] Section 12.1-04.1-01, N.D.C.C., states:

> 1. An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs:

> a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and
>
> b. It is an essential element of the crime charged that the individual act willfully.
>
> 2. For purposes of this chapter, repeated criminal or similar antisocial conduct, or impairment of mental condition caused primarily by voluntary use of alcoholic beverages or controlled substances immediately before or contemporaneously with the alleged offense, does not constitute in itself mental illness or defect at the time of the alleged offense. Evidence of the conduct or impairment may be probative in conjunction with other evidence to establish mental illness or defect.

[¶52] Etemad testified that he was drinking alcohol on August 3, 2016, as well as having been cut off from what appear to be massive and possibly inappropriate levels of the drug Seroquel. Dr. Lisota testified that the dosage of Seroquel which Etemad was prescribed, some 800 milligrams daily, was significantly higher than a normal dosage and also higher than a high dosage of 500 milligrams daily. Etemad testified that when he was taken off of Seroquel, he became "psychotic." As set forth in N.D.C.C. § 12.1-04.1-01(2), intoxication does not constitute a mental illness or defect.

[¶53] In a case in which lack of criminal responsibility is claims, the prosecution bears the burden of proof.

> . . . the prosecution has the burden of proving the mental capacity of the accused beyond a reasonable doubt. However, no case has been cited to us, and we have found none, laying down the arbitrary rule that an accused is entitled to a judgment of acquittal merely because he offers expert opinion evidence on the issue of his insanity and the prosecution attempts to rebut it without expert witnesses. On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the credibility and weight of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted. The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise and balancing of opinions of expert witnesses in reaching its decisions, and that there is no rule of law that requires the judgment of witnesses to be substituted for that of the jury.

Mims v. United States, 375 F.2d 135, 140-41 (C.A. Fla. 1967); *see also* United States v. Dresser, 542 F.2d 737, 742 (C.A. Mo. 1976); State v. Klose, 2003 ND 39, ¶ 26. However, it is Etemad's contention that the State did not meet its burden of proof to refute beyond a reasonable doubt that Etemad was acting in an irrational manner.

[¶54] The jury found Etemad guilty of Terrorizing. However, Etemad contends that the evidence does not support or sustain the guilty verdict on Terrorizing. Etemad contends even when giving all reasonable inferences to the prosecution, the evidence presented at trial is not sufficient to support the guilty verdict.

[¶55] CONCLUSION

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

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

Dated this 1st day of June, 2018.

Respectfully submitted,

/s/ Russell J. Myhre

Russell J. Myhre (ND ID 03180)
Myhre Law Office
341 Central Ave. N, Ste. 3
P.O. Box 475
Valley City, ND 58072
Telephone: 701-845-1444
Email: russell.myhre@myhrelaw.com
Eservice: efile@myhrelaw.com
Attorney for Petitioner/Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs Bejan David Etemad, Defendant/Appellant.	)))))))	SUPREME COURT No. 20170421 Case no. 18-2016-CR-01535 CERTIFICATE OF SERVICE

I, Russell J. Myhre, do hereby certify that on June 1, 2018, I served the following documents:

1. Appendix of Appellant
2. Brief 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

Thomas Ghertz
Grand Forks County Assistant State's Attorney
P.O. Box 5607
Grand Forks, ND 58206-5607
E-Service: sasupportstaff@gfcounty.org

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), NDRCivP, that on the 1st day of May, 2018, 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. Appendix of Appellant
2. Brief of Appellant

To the defendant, listed at the following address:

Bejan Etemad
c/o NDSP 3100 E Railroad Ave
Bismarck, ND 58506

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 1st day of June, 2018.

/s/ Russell J. Myhre

Russell J. Myhre (ND ID 03180)
Myhre Law Office
341 Central Ave. N, Ste. 3
Valley City, ND 58072
Phone: 701-845-1444
Fax: 701-845-1888
E-service: efile@myhrelaw.com
Attorney for Defendant/Appellant