

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

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|-------------------------------|---|------------------------------|
| State of North Dakota, |) | |
| |) | |
| Plaintiff/Appellee, |) | Supreme Court No. |
| |) | 20190394 |
| vs. |) | |
| |) | |
| Michael T. Blake, |) | Burleigh County District No. |
| |) | 08-2019-CR-00555 |
| Defendant/Appellant. |) | |

**ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE
FROM THE DISTRICT COURT
FOR THE SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE DANIEL BORGEN, PRESIDING**

BRIEF OF APPELLANT

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[¶1] STATEMENT OF THE ISSUE

[¶2] The evidence presented at trial was insufficient to sustain the guilty verdicts on the criminal charges of Terrorizing and Unlawful Entry into a Vehicle upon which defendant Blake was found guilty.

[¶3] STATEMENT OF THE CASE

[¶4] This is an appeal arising from verdicts of guilty following a jury trial and sentence in Burleigh County District Court for the offenses of Terrorizing, a violation of § 12.1-17-04, N.D.C.C., a Class C Felony; and Unlawful Entry into a Vehicle, a violation of § 12.1-22-04(1)(b), N.D.C.C., a Class C Felony.

[¶5] On February 22, 2019, Michael T. Blake (hereinafter “Blake”) was charged by criminal information in Burleigh County district court with Terrorizing, a violation of § 12.1-17-04, N.D.C.C., and with Unlawful Entry into a Vehicle, a violation of § 12.1-22-04(1)(b), N.D.C.C. Register of Actions, Index # 2. Blake was arrested on February 21, 2019, and made his Initial Appearance on February 25, 2019. Register of Actions, 2/25/2020. A Preliminary Hearing was held on April 8, 2019. Register of Actions, 4/8/2020. *See also* Amended Information, and Third Amended Information, Register of Actions, Index # 27 and # 56.

[¶6] It was alleged that on or about 17:28 hours, or 5:28 p.m., on February 21, 2019, Blake entered the automobile of Adelann Bradford (hereinafter “Bradford”) near a Super Pumper convenience store in the northern portion of Bismarck, North Dakota. Bradford alleged that she told Blake to get out of her vehicle, but he refused. Bradford alleged she feared for her life because she believed Blake possessed a weapon, so she drove him around Bismarck by following his directions and eventually dropped him off

at the YMCA on Washington Street. Blake alleged he was invited into Bradford's vehicle and did not threaten Bradford. Affidavit of Probable Cause, Register of Actions, Index # 2.

[¶7] A bond was set for Blake and a No Contact Order was issued. Register of Actions, Index # 3, 4.

[¶8] Blake filed a Motion in Limine to limit testimony regarding Blake's prior criminal history. The State filed a Response, stating that the State did not intend to introduce Blake's prior criminal history into evidence unless the "door was opened" by the defense. Register of Actions, Index # 62, 63, and 65.

[¶9] A 12-person jury trial was held on September 12, 2019, after which Blake was found guilty of Terrorizing and of Unlawful Entry into a Vehicle.

[¶10] After the guilty verdict upon the criminal charges, Blake was sentenced on December 3, 2019, as follows:

1. Incarceration for a period of three (3) years, with all but Two Hundred Eighty-Seven Days of the sentence suspended.
2. Serve One Day at the Burleigh-Morton Detention Center.
3. Credit for Two Hundred Eight-Six Days (286) days previously served.
4. Supervised probation following release from incarceration for a period of three (3) years, and comply with conditions set forth in an Appendix A to the Criminal Judgment.
5. Fees in the total amount of Five Hundred Eighty-Five Dollars (\$585).
6. Comply with conditions contained in Appendix A.
7. Sentence concurrent upon both counts.
8. No contact order regarding the victim for a period of three (3) years.

[¶11] Blake filed a timely filed a notice of appeal on December 11, 2019.

Register of Actions, Index #84. Blake argues there was not sufficient evidence to support a finding of guilt beyond a reasonable doubt on both counts with which he was found guilty and that the evidence indicates reasonable doubt.

[¶12] STATEMENT OF THE FACTS

[¶13] Bradford testified that on February 21, 2019, she had stopped at a Unistop Super Pumper gas station and convenience store to pick up a pack of cigarettes and a single beer as she was on her way home to prepare dinner. Tr. 23:18-23. On her way into the store, she noticed a man at the checkout counter, later identified as Blake, who appeared to be intoxicated and “discombobulated.” Tr. 24:17-22. In overhearing Blake’s statements at the checkout counter, he appeared to be “slurring his words.” Tr. 25:13-15. He had a medical boot on one of his feet, and he was on crutches. Tr. 25:22-25. He was wearing a black hooded sweatshirt, black athletic pants, and a black regular shoe on his other foot. Tr. 26: 14-16. It was Bradford’s impression that he was “messed up.” Tr. 26:22. Bradford observed that Blake could put weight on his foot, despite the crutches, and could hobble fairly well as he left the convenience store. Tr. 27:7-11. Bradford paid for her purchases and left the store to go to her van. She drove her van out of the parking lot and then stopped to turn right at an intersection. Tr. 27:23-25. As Bradford was stopped at a traffic light, waiting for traffic to allow her to turn right, Blake got in her vehicle on the passenger side, which startled her. Bradford testified Blake told her to drive, and when she asked where, he said, “You need to just drive.” Tr. 28. Bradford testified she was scared and froze. She testified she attempted to introduce herself to him, and he responded, “Oh, I know who you are.” Bradford testified she had never seen Blake before in her life. Tr. 29. Bradford testified Blake was drinking a purple grape, sweet-smelling beverage from a can which contained alcohol. She testified Blake always had his other hand inside his hoodie sweatshirt. Tr. 30:11-25. However, as Blake was

pointing out directions with his hand, his hand never left the sweatshirt pocket. Bradford testified she was afraid he had a weapon or firearm in his pocket. Tr. 31. Bradford testified Blake's speech was garbled and did not make any sense. She said she thought he wanted to go to the Hilton, but his directions were unclear. Blake finished his purple drink, threw out the can, and drank the beer which she had purchased at the convenience store. Tr. 32-33. Bradford testified she did not join Blake in drinking any of the alcoholic beverages. Tr. 34:2-8. At some point, Bradford pulled into a gas station and intentionally parked in front. Blake did not get out of the van, and he got "really irritated with me." Tr. 34. Blake then directed Bradford to take him to the YMCA. She testified she did not know why she did not get out of the van when she was parked at the gas station. Tr. 35. Bradford then drove Blake to the YMCA, where Blake got out of the van. Tr. 36. Bradford said Blake got out of her van without using his crutches. Tr. 37:3-5. Bradford testified she drove directly home while she struggled not to have a panic attack. Tr. 37:10-25. When she arrived, her partner tried to calm her, and eventually she called the police. Tr. 38. Bradford testified she told Blake things about herself and was "kind of being nice" to him because she was scared and thought if she was nice and nonthreatening to Blake, he would not hurt her. Tr. 38:22-25, 39:1.

[¶14] On cross-examination, Bradford testified that while she told the 911 operator that she purchased cigarettes at the convenience store where she first encountered Blake, he admitted she did not tell the 911 operator that she had purchased a beer. She testified she also did not tell the investigating police officer that she had purchased a beer. She said she had no reason to mention the beer to the 911 operator or to the police officer. Tr. 39:9-5, 40:1-12. Bradford also testified that when she did later

discuss the incident with investigators, she told them she bought a big beer at the convenience store, but she did not drink anything with Blake. Rather, she testified she told the investigators that he drank both the purple drink and the beer, and that he offered her a drink of her beer, but she declined. Tr. 42-43. On a map of Bismarck, Bradford showed her route from the Super Pumper convenience store to the YMCA. Tr. 45-51. Bradford testified that on the day in question, there was snow, but it wasn't a very cold day; it was a rather nice day. She testified she did not know how much ice and snow there was on the sidewalks. Tr. 52:2-10. Bradford said her automatic door locks on the van had not engaged. Tr. 52:16-22. Bradford testified that when Blake exited her van, she handed him his crutches. However, Blake took her lighter when he left. Tr. 53:1-2. Bradford testified that when Blake threw the beer can and the other purple can out the window, she hoped someone would see it and report it. Tr. 53:8-21. She testified that when pulled into the gas station before they arrived at the YMCA, she deliberately parked in a no-parking space in an attempt to get police attention or to be seen on a security camera. Tr. 53:22-25; 54:1-7. Bradford testified that she later told a person identified as Ms. Shuh that Blake never threatened her and never claimed to have a weapon. Tr. 54:8-15. Bradford testified she had a baseball bat in her van for protection, but did not attempt to use it. She also did not try to call police from her cell phone. Tr. 54:16-21. However, when her cell phone rang, Blake told her, "Don't you dare answer it." Tr. 54:24-25. She testified she did not attempt to drive to the police station, park the van, or attempt to exit the van. Tr. 55:2-7. Bradford testified she did not tell the 911 operator that Blake had told her that he knew who she was; did not tell Ms. Shuh Blake of this; and did not tell Investigator Fontenot either. Tr. 55:16-25, 56:1-17.

[¶15] On redirect examination, Bradford testified that Blake never pointed a weapon at her and never said that he would kill her or hurt her, but she felt threatened by Blake. Tr. 57:1-15. She said she was unable to reach the baseball bat because she was in her seatbelt and in fact had not even thought of it. Tr. 57:16-20. Bradford again outlined her route during this episode. Tr. 58-62:1-10.

[¶16] Jason Johns, a communication specialist for Central Dakota Communications, testified that he was the 911 operator that Bradford called in to at approximately 6:31 p.m. Tr. 64. The call, which was recorded, was admitted into evidence and published to the jury. Tr. 65.

[¶17] On cross-examination, Johns was asked if it was unusual that a 911 emergency call would come in 45 minutes after the emergency had occurred. He testified that it was “fairly typical.” Tr. 66:20-25, 67:1-4.

[¶18] Bruce Shaw testified that he and Bradford considered themselves to be man and wife, although they were not legally married in North Dakota. They had lived together for nine (9) years. Tr. 68:16-22. Shaw testified that when Bradford came home on the day in question, she was “extremely agitated, somewhat hysterical, she was shaking. She appeared to be scared.” Shaw testified Bradford was crying and could not communicate effectively. He attempted to calm Bradford. She indicated she wanted to call 911, but Shaw told her to sit down and gather her thoughts because she could not even talk to him. Tr. 69:1-21.

[¶19] Bismarck Police Sergeant Cody Berger testified he directed himself to the YMCA on the day in question. He arrived at 6:44 p.m. and was looking for a black male dressed all in black and using crutches. Tr. 75:9-15. Sergeant Berger testified he

identified Blake after he turned on his video recorder. Tr. 75:12-21. Sergeant Berger testified Blake was very calm and sociable, and did not appear worried by the police officer's presence. Tr. 77:18-19. However, Sergeant Berger testified that Blake started on "random" conversations, like where he worked, where he was staying, restaurants that he liked. Tr. 78:1-3. He testified Blake smelled the odor of alcohol and told him he had purchased alcohol at the Super Pumper convenience store. Tr. 79:1-6. The conversation became nonsensical when Blake was in the back of Sergeant Berger's squad car, and in his report, Sergeant Berger said Blake was acting "weird" and was doing things that people do not normally do in that situation. Tr. 79:9-25, 80:1-12. Blake told him he had smoked marijuana that day, and Sergeant Berger found a small quantity of marijuana, a smoking device, and organic rolling papers on Blake. Tr. 80:15-25, 81:1-10. Blake told him he had purchased alcohol at the Super Pumper, and as he was walking away a lady waved him down and offered to give him a ride because he was on crutches. Blake said the lady had driven around while they both were drinking and "cheersing" in her vehicle until she dropped him off at the YMCA. Tr. 82:9-25. Blake told him that he had recently been kicked out of his aunt's place and that he uses Lyft or Uber to get around, but on the day in question he was waiting for his brother in Lincoln to get him because he was unemployed and could not afford Lyft or Uber. Tr. 83. Sergeant Berger testified when he took Blake to his squad car, Blake did not seem to have any trouble walking and did not use his crutches. Tr. 83:18-22, 84:1-11. Blake told him the female driver of the van that picked him up waved at him outside of the Super Pumper convenience store and "whipped a shitty" to come back to him. Tr. 85:6-15. Blake described the route to Sergeant Berger as they drove on the approximate route. Tr. 85-86.

[¶20] On cross-examination, Sergeant Berger testified Blake admitted to drinking in the van, but told him since he was an adult passenger, he did not have an open container violation. Tr. 87:5-13. Sergeant Berger admitted he did not note the presence of marijuana on Blake in his report, only paraphernalia. He also testified he only smelled alcohol on Blake, not marijuana. Tr. 88.

[¶21] On redirect examination, Sergeant Berger testified that while he forgot to put in his report that he found marijuana on Blake, he placed the marijuana, approximately enough to roll three (3) joints, into evidence. Tr. 90:6-18.

[¶22] On recross-examination, Sergeant Berger testified that in his submission report of what was submitted into evidence, he wrote a description of the pill bottle and only noted that it contained green marijuana residue. He was questioned whether his use of residue was the equivalent of enough quantity for three (3) joints. Tr. 91:18-25, 92:1-6.

[¶23] Bismarck Patrol Officer Zachery Hayden testified he met with Bradford at her residence at approximately 6:30 p.m. on the day in question. Tr. 94. Officer Hayden testified Bradford was “hysterical, crying, shaking.” Tr. 95:17, 21-23. He testified Bradford stated she was at the Super Pumper at North 19th and Century in Bismarck, went inside the store to buy cigarettes, left and got in her vehicle, and went to the intersection of 19th and Utah, when her passenger door opened and a man dressed all in black and with crutches and a foot boot got in her vehicle. Tr. 96. Bradford stated she did not know the man. She told Officer Hayden the man told her, “You’re going to take me” and placed his hands in his pocket. Bradford told him the man seemed to be pointing something with his hand that could have been a gun or a knife. She then told the man to “get the fuck out,” when the man began screaming in a nonsensical manner. She

described the route that she drove. She said the man accused her of taking his golf clubs, among other nonsensical things he said to her. Tr. 99:6-10. Sergeant Berger obtained surveillance video from the YMCA and described how he recorded it onto his cell phone. Tr. 98-101. The video was played for the jury.

[¶24] On cross-examination, Officer Hayden testified Bradford did not mention buying a beer as well as cigarettes, did not mention anyone drinking alcohol in her car, and did not mention that the man said “I know who you are.” Tr. 105:4-12.

[¶25] The State then rested.

[¶26] The defense made a motion pursuant to Rule 29, North Dakota Rules of Criminal Procedure, which was denied. Tr. 107-108.

[¶27] Blake testified on his own behalf. He said on February 21, 2019, he had just gotten kicked out of his aunt’s house. He had been given a ride to the Super Pumper so he could pick up a beer because he had run out of his painkillers and did not have any cannabis, which since he is from Oregon he uses “a lot of weed.” He testified he purchased a beer, which he said was seen on the video. Tr. 112. Blake demonstrated on a map the route he had taken. Once he crossed Utah street, Bradford signaled to him and did a U-turn for him to pick him up. As he got into her vehicle, she told him she could see he had a cast on his foot and did not want him to get frostbite, so she was giving him a ride. Tr. 114-115. Blake testified the weather on the day in question was somewhat nice, but was not warm, possibly reaching 19 degrees, but with a low temperature of -6 degrees. He testified there was snow and ice, and he had to be careful. He testified he was wearing his black Dickies work pants, a black tee, a new black sweater, new backpack, and new headphones and new cell phone. Tr. 116-117. Blake testified

Bradford flagged him down, turned around, rolled down her window, and offered to help him so he did not get frostbite on his foot. Bradford unlocked the door, he got into the vehicle, putting his crutches and backpack in first. He took off his headphones and told Bradford he needed to go to Hampton by Hilton by the Olive Garden. Tr. 118. Blake testified Bradford drove a Chrysler van, which required him to step into it. He testified he had both hands on his crutches, put both crutches together, opened the van, put the crutches inside the van, took off his backpack, and put the backpack on the floor of the van. He testified he expressed his appreciation to Bradford. Tr. 119. Bradford said it was no problem, and he told her where he wanted to go because the Hampton by Hilton was close to where Blake's brother worked. Blake testified when he told her to turn left, she kept on driving. Tr. 120. When they were near his aunt's place, Bradford asked if he wanted to get dropped off there, but Blake told her he had just gotten kicked out of there. Blake asked if it was okay for him to open his beer, and Bradford agreed, since she already had an open beer. He asked if he could smoke in her car, and again she agreed. Tr. 121. While Bradford was driving him around, she was drinking a beer, was on her phone texting, and did not seem like she was paying attention. Blake received a text from his brother, who indicated he would give Blake a ride. Blake testified Bradford had to be warned to stay in her lane. Tr. 122:16-24. When they got to the gas station Bradford had testified about, Blake said Bradford told him to get out, but after Blake complained that he was taken out of his way, he did not know where he was, and only had drank half of his beer, she told Blake, "I'm not going to let you walk." Blake then told her he wanted to go to the YMCA. Tr. 123. Blake testified that Bradford was talking about the universe, that although she had the same first name as a famous singer, she could not sing

but that she could dance. Bradford told him she was very bad at dancing and said, “Actually, I’m a very bad girl.” It was at this point they were pulling into the YMCA Tr. 124. As they were pulling in, a Rob Zombie song came on the radio, so she told Blake to turn up the radio while they sang along. As Blake got out of the van, he asked for a lighter, and Bradford gave hers to him. He thanked her for the ride, and he got out. Tr. 125. 1-20. When he got into the YMCA, the staff allowed him to charge his phone in the lobby. Blake said he was in the lobby for about an hour before Officer Berger showed up. Tr. 126.

[¶28] On cross-examination, Blake testified he did not have a car or a license, which was suspended. He said he got around by getting rides. Tr. 127. Blake testified he could walk without his crutches, but only for a short distance. Tr. 130. Blake testified he was kicked out of his aunt’s house because of the noise he made with his crutches and his medical foot boot. He said he was currently staying with his brother in Lincoln. Tr. 133. He testified that because Bradford would not let him out of her vehicle when they stopped at a gas station, he tried to file a kidnapping report on her. Tr. 135. Blake testified that the reason he tried to file a kidnapping report on Bradford is because he was in jail for something he did not do. He testified he admitted to being in Bradford’s vehicle, but nothing happened like she had testified to. Blake said Bradford picked him up but did not take him where he wanted to go, passed all of the turns he instructed her to take, and would not let him out of the vehicle at the gas station. He said he was the victim in this situation. Tr. 136-138.

[¶29] The defense rested.

[¶30] Blake was found guilty upon the offenses of Terrorizing and Unlawful Entry into a Vehicle. Blake now appeals from his conviction.

[¶31] **JURISDICTION**

[¶32] 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.

[¶33] **STANDARD OF REVIEW**

[¶34] “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.

[¶35] **ARGUMENT**

[¶36] The evidence presented at trial was insufficient to sustain the guilty verdict for Terrorizing and/or Unlawful Entry Into Motor Vehicle.

[¶37] Terrorizing is defined by statute:

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...[t]hreatens to commit any crime of violence or act dangerous to human life....

N.D.C.C. § 12.-17-04(1).

[¶38] Unlawful Entry Into Motor Vehicle is defined by statute:

1. A person is guilty of an offense if, knowing that the person is not licensed or privileged to do so, the person:
 - a. Forcibly enters a vehicle, vessel, or aircraft;
 - b. Enters a vehicle, vessel, or aircraft, without the use of force, with intent to commit a crime; or
 - c. Enters a vehicle, vessel, or aircraft lawfully, and with the intent to commit a crime, conceals oneself in the vehicle, vessel, or aircraft.
2. The offense is a class B felony if the actor is armed with a firearm, destructive device, or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury. Otherwise the offense is a class C felony.

N.D.C.C. § 12.1-22-04.

[¶39] This case involves no fundamental dispute of the facts, only the perception of these facts. Blake admitted that he entered Bradford's Chrysler van; that he rode through the streets of northern Bismarck with her; that he drank beer in her vehicle; and that he got out of Bradford's vehicle when she brought him to the YMCA. Tr. Tr. 136-138. The question then devolves into a discussion of what elements of the criminal acts, under the applicable statutes, occurred. There is no doubt that Bradford apparently interpreted this incident involving Blake in a certain way, at least based the testimony of her physical manifestations after the occurrence, as set forth in the testimony of Bradford herself; of her significant other, Bruce Shaw; and of Officer Hayden, who interviewed her after she called 911 when she arrived home. However, while this incident occurred, it does not appear that Bradford effectively conveyed any discomfort she felt to Blake. Bradford herself testified that Blake never pointed a weapon at her and never said that he would kill her or hurt her. She did not take measures to protect herself. She said she did not think of reaching for the baseball bat she kept in the van Tr. 57:1-15; 57:16-20. She did not try to call police from her cell phone. Tr. 54:16-21. She did not attempt to drive to the police station, park the van, or attempt to exit the van. Tr. 55:2-7. She did not try

to escape from her van while it was parked at the gas station where she parked before they arrived at the YMCA. She testified she did not know why she did not get out of the van when she was parked at the gas station. Tr. 35. Instead, even from Bradford's testimony, she appeared to be engaging, introducing herself to Blake when he got in her van, finding out where his aunt lived, and apparently talking with Blake. While she did, later in her testimony, indicate that she did tell Blake to "get the fuck out," at the beginning and the end of their automotive sojourn, it appears that any alarm she may have had by the situation was not successfully conveyed to Blake.

[¶40] Blake himself presents himself in a somewhat off beat and eccentric way. On the day in question, he was dressed entirely in black, even down to a black foot cast. He was on crutches. He was very forthright with Officer Berger when he was interviewed at the YMCA. He readily admitted he went to the Super Pumper so he could pick up a beer because he had run out of his painkillers and did not have any cannabis. He admitted he was from Oregon and he uses "a lot of weed." He admitted he did have a container with a small quantity of what appeared to be marijuana "shake". The container was a prescription bottle for a prescription pain killer. He admitted he had been kicked out of his aunt's house that day and was unemployed because of his broken foot. While Officer Berger detected the odor of alcohol on Blake, it is notable that he did not testify about smelling any grape on Blake. Blake's own testimony is indicative of a scatter-shot speech pattern and perhaps a disjointed thought pattern. If someone could be convicted because of his appearance and free-wheeling behavior, Blake would be a likely candidate.

[¶41] Blake's own account of what occurred on February 21, 2019, indicates that Bradford was being a Good Samaritan. It was a cold day, and Blake was on

crutches. He claimed Bradford hailed him, made a U-turn to pick him up, drank beers with him while they drove aimlessly around northern Bismarck just long enough for each of them to consume the alcoholic beverages, discussed several things with Blake, and dropped him off at the YMCA, where he remained while he charged his cell phone and waited for a ride from his brother in Lincoln.

[¶42] In order for a person to be guilty of Terrorizing, the person must not only have the necessary intent to place another human being in fear for that human being's safety, or must act in reckless disregard of the risk of causing terror, disruption, or inconvenience to that person, but must also threaten to commit any crime of violence or act dangerous to human life. *See* § 12.1-22-04, N.D.C.C. Here, Bradford testified that Blake never pointed a weapon at her and never said that he would kill her or hurt her. She did not take other reasonable measures to protect herself. She did not even think of reaching for the baseball bat she kept in the van. She did not try to call police from her cell phone. She did not attempt to drive to the police station, park the van, or attempt to exit the van, even when it was parked at the gas station before they arrived at the YMCA.

[¶43] Just as there is no clear indication that Blake either had any necessary intent or was acting in reckless disregard of the same during this incident by his overt actions or words, much was made of the fact that Blake placed one or both of his hands in his hoodie pocket. It would be natural for a person to have one or both of his or her hands in one's pockets on a February day when the temperature was 19 degrees. This would be consistent with someone who had been standing outside with crutches in his hands. It would also be consistent for someone who is holding a beverage in one hand to hold the other hand in his or her pocket to warm it. It is also somewhat puzzling why this

supposed one-handedness was not further pursued when the testimony of both Bradford and Blake indicated that he smoked a cigarette in Bradford's van, since from Bradford's testimony he presumably reached for a pack of cigarettes in his clothing, took the cigarette out of its packaging, fumbled with a lighter that was not functioning, received a lighter from Bradford, and lit the cigarette while simultaneously holding an alcoholic beverage in the other hand.

[¶44] While it is conceded that a person could convey a threat to commit any crime of violence or act dangerous to human life without expressly stating this in so many words or by making a threatening gesture—drawing a finger across one's throat would certainly qualify as a threat, for example—the question here is whether Blake made such a threat by either his words or his actions with the necessary intent to do so. Even the words Blake allegedly spoke to Bradford, while somewhat obscure and unusual, were not direct threats, as Bradford conceded. And having one's cold hand in one's pocket on a cold February day in North Dakota is not a necessarily a direct threat, nor does it rise to the level of reckless disregard that this could be construed as a risk to any person. Therefore, the question becomes whether Blake intended to make a threat to commit any crime of violence or act dangerous to human life directed to Bradford. According to Bradford, he did not point a weapon at her. He never verbally said that he would kill her or even hurt her. While Bradford said Blake was rambling and his speech was “nonsensical”, the only thing she testified was the least bit threatening to her was that Blake had his hand in his pocket and from time to time appeared to point with his pocketed hand while the two took a circuitous route through northern Bismarck while he drank one or possibly two alcoholic beverages. This brings into question Blake's intent

behind his actions. If Blake's intent was terrorize Bradford into giving him a ride, his words and actions do not convey that intent. While it could be argued that Blake was forward and possibly intrusive into Bradford's personal space, Bradford's own contemporaneous responses to Blake would not have indicated to him that he was threatening her. According to Blake's testimony, Bradford engaged in conversation with him, offered to drop him off someplace, and drove him around while they both consumed alcoholic beverages and smoked a cigarette. According to Bradford's testimony, she introduced herself to Blake, engaged in conversation with him, and did not put up any resistance to his request for a ride. Even if she did tell him to get out of the vehicle, using an obscenity, the overall tenor of the encounter represented, at best, a misunderstanding of the situation that was not conveyed to the other party. There was no feedback from Bradford indicating intent.

[¶45] Here, the testimony does not sustain the verdict of guilty of the offense of Terrorizing.

[¶46] The next question is whether the facts would sustain the offense of Unlawful Entry into a Vehicle. Upon this question, there is a greater discrepancy between the testimony of Blake and Bradford. Blake testified that Bradford flagged him, made a U-turn, and picked him up. Bradford testified that Blake entered her car without any invitation while she was stopped at an intersection. This creates a legitimate question of whether Blake was licensed or privileged to enter Bradford's vehicle. However, he did not use force to enter her vehicle. He did not conceal himself within the vehicle. Since he was not charged under Subsection 2 of Section 12.1-22-04, N.D.C.C., it is apparent Blake was not armed with a firearm, destructive device, or other weapon. The

only testimony regarding whether Blake had possession of a weapon in his hoodie pocket was in regard to Bradford's testimony about her perception of Blake's actions.

Therefore, the activity complained of creates the issue of whether Blake entered Bradford's vehicle with the intent to commit a crime.

[¶47] Blake's testimony was straight forward. He testified Bradford apparently took pity on him because he was on crutches. She went out of her way by making a U-turn to pick him up. They drove around northern Bismarck. Even if Bradford had told Blake to get out of her van, this indicates only that the parties were not effectively communicating with each other.

[¶48] Assuming *arguendo* that Blake was not licensed or privileged to enter Bradford's vehicle, then the question becomes whether Blake intended to commit a crime within the vehicle. As indicated above, this incident appears to be a discrepancy of communicated intentions, at best, and a difference in perceptions of the same incident, at worst. While not taking away from Bradford's reaction after this incident, during this incident she would not have appeared to have been intimidated by Blake because she did not convey any perception of a threat.

[¶49] Here, the testimony does not sustain the verdict of guilty of the offense of Unlawful Entry Into Motor Vehicle.

[¶50] 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.

[¶51] 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.

[¶52] 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. Blake 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. The trial court denied the Rule 29 motion.

[¶53] Blake did not refute the acts with which he was alleged to have committed. He did, however, present a different picture of what occurred. It is certainly possible that Bradford's post-incident reactions were real, while at the same time she did not convey to Blake any uneasiness which she may have had while this incident occurred.

[¶54] The jury found Blake guilty of Terrorizing and Unlawful Entry Into Motor Vehicle. However, Blake contends that the evidence does not support or sustain either of the guilty verdicts. Blake contends even when giving all reasonable inferences to the

[¶55] **CONCLUSION**

[¶56] The guilty verdict was not supported by sufficient evidence for Terrorizing and Unlawful Entry Into Motor Vehicle. Blake 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 30th day of March, 2020.

Respectfully submitted,

/s/ Russell J. Myhre

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CERTIFICATE OF COMPLIANCE

[¶1] COMES NOW Russell J. Myhre of Enderlin, North Dakota, and hereby certifies that the attached Brief of Appellant is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶2] The number of pages in the principal Brief, excluding any addenda, is twenty-three (23) pages, according to the page count of the filed electronic document. This page count includes this Certificate of Compliance and excludes the Certificate of Service.

Dated this 30th day of March, 2020.

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

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|-------------------------------|---|-------------------------------------|
| State of North Dakota, |) | |
| |) | |
| Plaintiff/Appellee, |) | Supreme Court No. |
| |) | 20190394 |
| |) | |
| vs. |) | |
| |) | |
| Michael T. Blake, |) | Burleigh County District No. |
| |) | 08-2019-CR-00555 |
| |) | |
| Defendant/Appellant. |) | |

I, Russell J. Myhre, do hereby certify that on March 30, 2020, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant
3. Motion for Extension of Time

On:

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

Dated this 30th day of March, 2020.

/s/ Russell J. Myhre

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CC Affidavit: Supreme Court, supclerkofcourt@ndcourts.gov;
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| |) | |
| Defendant/Appellant. |) | |

I, Russell J. Myhre, do hereby certify that on April 10, 2020, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

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

Dated this 10th day of April, 2020.

/s/ Russell J. Myhre

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