

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,)	
)	
Plaintiff - Appellee,)	Supreme Court No.
)	20210055
vs.)	
)	District Court No.
BARRY RYDER REDDOG,)	08-2020-CR-01843
)	
Defendant - Appellant.)	
)	

APPELLEE’S BRIEF

Appeal from Criminal Judgment Entered on February 19, 2021,
by Burleigh County District Court, South Central Judicial District,
State of North Dakota, the Honorable Bruce A. Romanick Presiding.

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STATEMENT OF THE ISSUE

[¶1] Whether the evidence was sufficient to support Reddog’s conviction.

STATEMENT OF THE FACTS

[¶2] Just after midnight on July 5, 2020, Rory Kreiling was robbed at gunpoint as he stepped outside his Bismarck apartment to have a cigarette. (Jury Trial Transcript, Day 1 (hereinafter “Tr. 1”) p. 186). Two people, a male and a female, approached Mr. Kreiling, and the male ordered Mr. Kreiling back into his apartment at gunpoint. Id. pp. 186–187. The male gunman ordered the female to restrain Mr. Kreiling, and as she kept watch over him, the first male and a third person stole items from Mr. Kreiling’s apartment. Id. pp. 189–193. After the robbers left, the still-bound Mr. Kreiling left his apartment, flagged down a car for help, and called 9-1-1. Id. p. 195.

[¶3] Bismarck Police arrived on scene shortly after the 9-1-1 call. Id. p. 234. One of the first officers to arrive was Zachary Kraft. Id. Detective Mark Gaddis, the lead detective, arrived shortly thereafter. Id. p. 163. Detective Gaddis interviewed Mr. Kreiling that night, and he described the gunman as 35 years old, Native American, five-foot ten-inches tall, around 170 pounds, wearing dark clothing and a black and white boonie-style cap. Id. p. 140. Mr. Kreiling said the gunman had tattoos on his arms, legs, and the left side of his face. Id. Mr. Kreiling also told Detective Gaddis he thought he heard the female accomplice say the name “Benny” or “Barry.” Id. p. 213.

[¶4] Over the next few days, Detective Gaddis’ investigation led him to focus on Barry Ryder Reddog (hereinafter “Reddog”) as the gunman, and Cheyenne Risingsun as the female accomplice. Id. p. 142. The day after the robbery, Mr. Kreiling contacted Detective Gaddis to tell him that the female at the robbery may have been Ms. Risingsun.

Id. p. 165. Mr. Kreiling had met Ms. Risingsun a couple of times prior to the robbery. Id. p. 204. Shortly thereafter, Bismarck Police detained Ms. Risingsun for questioning, at which time they discovered in her possession a knife taken from Mr. Kreiling the night of the robbery. Id. p. 142. Ms. Risingsun told Detective Gaddis that Reddog gave her the knife. Id. pp. 142–143. Detective Gaddis also investigated leads on the third person to the robbery, but he was not able to make an identification. Id. p. 168.

[¶5] Around July 8, 2020, Detective Gaddis presented a photographic line-up to Mr. Kreiling of male suspects, which included a photograph of Reddog. Id. p. 148. Mr. Kreiling affirmatively identified Reddog as the gunman. Id. pp. 148, 198. On July 10, 2020, Bismarck Police arrested Reddog at his mother’s residence and transported him to the police station for questioning. Id. p. 149. During transport, Reddog’s mother’s residence was searched. Id. p. 151. The police recovered an item taken during the robbery and firearm components. Id. pp. 151–152. Detective Gaddis questioned Reddog about the robbery for about 40 minutes following the search, and Reddog confessed he was the gunman. Index # 65 at 1:02:40.

[¶6] Reddog was charged with three counts: Robbery with a Firearm, N.D.C.C. § 12.1-22-01(1); Conspiracy to Commit Felonious Restraint, N.D.C.C. § 12.1-18-02(2); and Unlawful Possession of a Firearm by a Felon, N.D.C.C. § 62.1-02-01(1)(b). (Appellant’s Appendix (hereinafter “App.”) p. 8–9). The third count was later dismissed. Id. p. 18. Trial was held on February 18–19, 2021 at the Burleigh County Courthouse. Id. p. 6 The jury found Reddog guilty of both counts, and he filed a timely appeal. Index # 72; App. p. 22.

LAW AND ARGUMENT

[¶7] Reddog raises the issue of whether the evidence at trial was sufficient to support his conviction. He begins by arguing that the trial testimony of Mr. Kreiling is so un-credible that Mr. Kreiling should retroactively be deemed incompetent to have testified. Reddog then asks this Court to take the dramatic step of excising Mr. Kreiling's testimony from the record. From there, Reddog goes on to erroneously argue that without Mr. Kreiling's testimony, Reddog's conviction rests solely on the uncorroborated testimony of his accomplice and co-conspirator, Ms. Risingsun.

[¶8] Reddog's arguments are improper under the prevailing case law standards, and they are disputed by a fair and complete reading of the record. The State presented ample competent evidence to the jury to support the guilty verdict for these two offenses. Reddog's arguments must fail as improper, erroneous, and unconvincing.

1. Reddog's initial argument rests solely on an improper credibility attack on one of the State's witnesses.

[¶9] Reddog's initial argument of insufficiency uses an improper tactic. Specifically, he attacks the credibility of a State witness in the hopes of excising that testimony from the record. Reddog attempts to justify this improper tactic by inventing a new rule to contravene established precedent. This tactic is improper under prevailing case law, and Reddog's new rule must be rejected.

[¶10] The standard of review for claim of insufficiency is well established. Reddog has the burden to "show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt." State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988) (citations omitted). The reviewing Court then "merely

review[s] the record to determine if there is competent evidence that allowed the jury to draw an inference ‘reasonably tending to prove guilt and fairly warranting a conviction.’” Id. (citations omitted). Critically, “[t]he Court does not weigh conflicting evidence or judge the credibility of witnesses,” nor does the Court “substitute [its] judgment for that of the jury.” State v. Mohammed, 2020 ND 52, ¶ 5, 939 N.W.2d 498 (citations omitted); Jacobson, 419 N.W.2d at 901.

[¶11] Reddog requests this Court to judge the credibility of the witness, Mr. Kreiling by highlighting what he believes to be inconsistent or biased testimony. Reddog’s trial attorney cross-examined Mr. Kreiling about any perceived inconsistencies in Mr. Kreiling’s identification and interactions with police in the days following the robbery. Tr. 1 pp. 210–211, 213–214. Prior to closing arguments, the jury received an instruction entitled, “WEIGHT AND CREDIBILITY,” which informed the jury it had the right to give evidence any weight it found appropriate. Index # 69 p. 15. And in closing argument, Reddog’s trial attorney spent nearly his entire argument highlighting these and other perceived inconsistencies for the jury. Trial Transcript Day 2 (hereinafter “Tr. 2”) pp. 43–52. The record shows the jury was fully aware of any perceived inconsistencies in Mr. Kreiling’s testimony when it reached its verdict.

[¶12] Reddog does not simply attack Mr. Kreiling’s credibility; he asks this Court to take the unprecedented step of excising Mr. Kreiling’s testimony from the record entirely. Reddog claims that because he is attacking the credibility of a single witness based on that witness’s testimony, rather than attacking credibility in a comparative manner by weighing one witness against another. The standard for insufficiency claims is clear; case law forecloses any consideration of witness credibility. State v. Mohammed,

2020 ND 52, ¶ 5, 939 N.W.2d 498 (citations omitted); Jacobson, 419 N.W.2d at 901.

This naturally includes considering the credibility of a single witness.

[¶13] Reddog's argument regarding Mr. Kreiling's credibility is an attempt to have this Court determine the credibility of the witness, which this Court does not do. Therefore, the Court cannot excise a witness' testimony from the record due to a defendant claiming the witness was not credible. The jury heard any perceived inconsistencies in Mr. Kreiling's testimony at trial, and, as was its sole duty, it made a determination of how credible it found his testimony. It is well established that in a claim for evidentiary insufficiency this Court will not undermine a jury verdict with ex post facto considerations of witness credibility. Reddog's attack on Mr. Kreiling's credibility should be given no consideration by this Court.

2. Reddog does not accurately describe the state of the record, and the State's case did not rest solely on Ms. Risingsun's testimony.

[¶14] Following the argument that Mr. Kreiling's testimony should be disregarded, Reddog argues that the conviction rests "solely" on uncorroborated testimony of Reddog's co-conspirator. He further argues that no physical evidence was found in the possession of Reddog linking him to the robbery. Neither of these arguments is supported by the record.

[¶15] Under North Dakota law, a defendant may not be convicted of a crime based solely on the testimony of an accomplice to the crime. N.D.C.C. § 29-21-14. Even if a person is merely a co-conspirator, that person may still be an accomplice to crimes accompanying the conspiracy. N.D.C.C. § 12.1-06-04(5). When the testimony of an

accomplice to the crime is used at trial, that testimony must be corroborated by other evidence in the record. Id.

[¶16] Okl, Regarding Reddog’s first allegation, the record shows the State’s case did not rest “solely” on the testimony of Ms. Risingsun. The State presented four witnesses at trial: Sergeant Mark Gaddis, the lead detective; Rory Kreiling, the victim; Cheyenne Risingsun, the co-conspirator; and Officer Zackary Kraft, a first responder. See generally Tr. 1. The bulk of the State’s evidence came in through Detective Gaddis and Mr. Kreiling. Ms. Risingsun provided testimony primarily on the conspiracy charge. While it is true she made numerous contradictory statements about other aspects of the robbery on cross examination, Ms. Risingsun also admitted her memory of the night was impaired because she was “pretty drunk” and “pretty high” on methamphetamine the night of the robbery. Tr. 1 p. 226. Critically, though, the key parts of her testimony—those surrounding the conspiracy to commit felonious restraint and discovery of the knife taken during the robbery—were corroborated by Detective Gaddis and Mr. Kreiling to a high degree. Id. pp. 219–222.

[¶17] Regarding the allegation no physical evidence linked Reddog to the robbery, Reddog misstates the record. As an initial matter, nearly none of the stolen items in this matter were recovered. Mr. Kreiling testified the robbers took from him two televisions, two cell phones, six rings, over \$500 in cash, a knife, a pair of blue jeans, a small jewelry box, some pictures, and a pair of Nike tennis shoes. Id. p. 200–201. Of all those items, only two were recovered: the knife and the tennis shoes. Id. pp. 154–155; Index ## 61, 63. The knife was found in the possession of Ms. Risingsun, but she testified Reddog gave it to her after the robbery. Id. pp. 154, 221. The shoes were found in the

possession of Reddog at the time of his arrest. *Id.* p. 155. Further, Reddog was wearing a black and white boonie-style hat at the time of his arrest, which the victim later identified as the same hat Reddog wore the night of the robbery. *Id.* p. 202; Index # 60. Therefore, there was physical evidence linking Reddog to this crime.

[¶18] Reddog also misstates the record in asserting that no firearm accessories were found in his possession. Reddog asserts that law enforcement was “unequivocal” that the “magazine with rounds” presented at trial was found in the possession of Ms. Risingsun. *Id.* ¶ 32. The record, however, disputes this assertion. At trial, Detective Gaddis testified the magazine was recovered from the Bismarck Motor Hotel, Reddog’s mother’s residence, and the location where Reddog was arrested on July 10, 2020. Tr. 1 pp. 155–156. The magazine and rounds were the only physical evidence of a firearm presented at trial, and no part of the record indicates these were found in the possession of Ms. Risingsun.

3. The evidence was sufficient to allow the jury to reasonably draw an inference of guilt for both charges.

[¶19] Reddog fails to properly raise an argument for evidentiary insufficiency. Reddog has not met his burden to “show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt.” *Jacobson*, 419 N.W.2d at 901. Reddog does not identify even a single essential element for which he claims the State failed to meet its burden of proof. A fair reading of the record in the light most favorable to the verdict shows the evidence was sufficient to allow the jury to reasonably draw an inference of guilt.

a. **Count One: Robbery with a Firearm**

[¶20] For this charge, ample evidence exists to uphold the conviction. The State established through testimony that the events in question took place on July 5, 2020, at an address in Bismarck, Burleigh County, North Dakota. See Tr. 1 pp. 139, 185. Mr. Kreiling testified that Reddog was the gunman at the robbery, and during police interrogation Reddog confessed to such a fact. Id. pp. 199–200; Index # 65 at 42:08. Regarding the theft, Mr. Kreiling testified to a list of items that were stolen from his apartment, and the State introduced evidence that two of those items were later recovered from Reddog and Ms. Risingsun. Id. pp. 200–201, 155–156.

[¶21] The State presented both direct and circumstantial evidence Reddog possessed and pointed a firearm at Mr. Kreiling the night of the robbery. For direct evidence, Mr. Kreiling testified that he got a good look at the gunman the night of the robbery, and he indicated on the stand that person was Reddog. Id. pp. 186, 199, 210. Detective Gaddis testified to the description Mr. Kreiling gave him the night of the robbery, and that description is an accurate description of Reddog. Id. p. 140. Mr. Kreiling also testified he immediately recognized the gunman as Reddog during a contemporaneous photographic lineup. Id. pp. 210, 198–199.

[¶22] As circumstantial evidence of a firearm, Mr. Kreiling testified on redirect examination that the handgun pointed at him was “either a 9 mm or a .380 auto with an extended ammo clip.” Id. p. 216. During a search of the area where Reddog was arrested on July 10, 2020, police recovered a 9 mm handgun magazine with an extended grip and two rounds. Id. p. 155–156. Though Ms. Risingsun testified she did not see Reddog with a gun the night of the robbery, she did testify she heard the signature “click” of a gun

being cocked somewhere in her vicinity. Tr. 1 pp. 220–221. That testimony was corroborated by Mr. Kreiling. *Id.* pp. 186–187. It is irrelevant that the actual gun used in the robbery was never found, as the jury heard ample direct and circumstantial evidence to support a finding that Reddog possessed a firearm during this robbery.

[¶23] Finally, regarding pointing the firearm in a threatening or menacing manner, Mr. Kreiling testified Reddog pointed the gun at him numerous times throughout the robbery. *Id.* pp. 187–188. Mr. Kreiling testified that prior to being bound, while seated on his couch, Reddog threatened to shoot him in the knee if he didn't tell Reddog where he kept his money. *Id.* p. 189. Shortly thereafter, as Mr. Kreiling was forced to lie face-down on his bed with hands bound, Reddog forcefully pushed the barrel of the gun into the back of Mr. Kreiling's head and said "Don't move." *Id.* p. 190. Officer Kraft later testified Mr. Kreiling "was very upset" when police arrived on the scene, and that "[i]t took [the officers] a while to get him to calm down so he could tell us what happened." *Id.* p. 234. There was sufficient evidence Reddog both used a firearm and pointed it at Mr. Kreiling in a threatening or menacing manner.

[¶24] The record shows the State presented ample competent evidence to reasonably allow the jury to convict Reddog of Robbery with a Firearm.

b. Count Two: Conspiracy to Commit Felonious Restraint

[¶25] For this charge, there is also sufficient evidence in the record to support the conviction. Mr. Kreiling testified Reddog removed a phone charging cord from the wall, handed it to Ms. Risingsun, told her to tie up Mr. Kreiling, and then she did. *Id.* Mr. Kreiling's story at trial matched what he told police the night of the robbery. *Id.* p. 235. The jury was free to infer from this testimony the presence of an agreement between

Reddog and the co-conspirator. Mr. Kreiling testified he was restrained at the wrists by Ms. Risingsun, and Ms. Risingsun confirmed this was true. Tr. 1 pp. 189, 219.

Therefore, there was a conspiracy and an overt act. Finally, regarding the terrorizing aspect of Felonious Restraint, the jury could easily draw that conclusion by the fact the restraint took place during the course of an armed robbery.

[¶26] Reddog's co-conspirator, Ms. Risingsun, testified substantially the same as Mr. Kreiling regarding the conspiracy, but she differed slightly as to the sequence of events. Ms. Risingsun testified as follows: Mr. Kreiling pulled the charging cable out of the wall plug; then he gave the charging cable to Reddog; Reddog then gave the cable to Ms. Risingsun and told her to tie up Mr. Kreiling; and then she tied up Mr. Kreiling. Tr. 1 pp. 219–220. Despite a slight difference in the sequence of events, Ms. Risingsun's testimony still supports an inference there was a common plan between Reddog and Ms. Risingsun to bind the hands of the victim.

[¶27] The record shows the State presented sufficient evidence to reasonably allow the jury to convict Reddog of Conspiracy to Commit Felonious Restraint.

CONCLUSION

[¶28] Based upon the foregoing, the State respectfully requests the convictions be affirmed.

Dated this 12th day of July, 2021.

/s Julie Lawyer

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APPELLEE’S CERTIFICATE OF COMPLIANCE
N.D.R. App. P. 32(e)

[¶ 1] COMES NOW Julie Lawyer, Burleigh County State’s Attorney, on behalf of the State of North Dakota, Appellee, and certifies the following:

[¶ 2] The Appellee’s Brief as electronically filed is **13 pages** in length. This fully complies with the requirements for Principal Briefs in N.D.R. App. P. 32(a)(8).

[¶ 3] This Certificate of Compliance is submitted pursuant to N.D.R. App. P. 32(e) and the undersigned attests it is correct and true as of the date below.

Dated this 12th day of July, 2021.

/s/ Julie Lawyer
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