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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court Nos. 20080181,
Plaintiff and Appellee,	)	20080182
	)	
vs.	)	District Court Nos. 18-07-K-02434,
	)	18-07-K-01889
Judy Ann Demarais,	)	
	)	
Defendant and Appellant.	)	

ON APPEAL FROM CRIMINAL JUDGMENTS
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE SONJA CLAPP, PRESIDING.

BRIEF OF APPELLEE

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II. Whether sufficient evidence was presented at trial to support the jury's guilty verdict on the charge of bail jumping.

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STATEMENT OF THE CASE

[¶1] Judy Ann Demarais (Demarais herein), appeals from a judgment of criminal conviction in the District Court of Grand Forks County in District Court No's. 18-07-K-1889 and 18-07-K-2434. On August 14, 2008, Demarais was charged with Possession of Drug Paraphernalia (Methamphetamine), a Class C Felony and Possession of Marijuana, a Class B Misdemeanor arising from an incident on the 13th day of August, 2007. Appellant's App. at 13. The Information on Count I alleged that Demarais did use or possess with the intent to use a glass smoking device, a digital scale, and baggies for the purpose of ingesting, preparing or storing methamphetamine. The Information on Count II alleged that Demarais willfully possessed a small amount of marijuana. Id.

[¶2] On October 12, 2007, Demarais was charged with Failure to Appear - Bail Jumping arising from an incident on the 5th day of October, 2007. Appellant's App. at 14. The Information alleged that Demarais failed to appear before a Court or a Judicial Officer in Case No. 18-07-K-1889 on October 5, 2007, after having been released upon condition or undertaking that she will subsequently appear as required. Id. On November 16, 2007, the State filed an Amended Information to reflect the correct offense level as being a Class C Felony. Appellee's App. at 1.

[¶3] The two files were consolidated and a trial was held May 6 -9, 2007. Demarais was subsequently convicted of all of the above mentioned charges on May 9, 2007. Trial Tr., vol. II, pp. 468-470. Demarais was convicted of two Class C Felonies and a Class B Misdemeanor. Notice of Appeal was entered on July 24, 2008. Appellant's App. at 5 & 12.

STATEMENT OF THE FACTS

[¶4] On August 13, 2007, a probation search was conducted at 140 Cleveland Avenue, Grand Forks, North Dakota. Trial Tr., vol. I, p. 77. It was the residence of Demarais and Marty Erickson. Id. at 77 & 118. Marty Erickson was on probation at the time. Id. Wade Price with the North Dakota Department of Corrections supervises offenders on probation and parole to ensure that they are abiding by the conditions and rules. Trial Tr., vol. I, p.72. Mr. Price testified that he investigates possible probation violations by conducting probation searches and doing drug screens to monitor their compliance. Id. at 73. A standard condition of supervised probation is that they are subject to search of their residence, person, property; any property they have under their control. Id. Mr. Price further testified that it is typical protocol to conduct a probation search when they have received information that the individual may not be in compliance. Id.

[¶5] Mr. Price and three officers conducted the search. Trial Tr., vol. I, p.78. When officers arrived they observed Mr. Erickson standing in the picture window looking out. Id. at 79. Officers entered the residence and asked Mr. Erickson to have a seat in the living room area of the trailer home. Id. Demarais was located in the back bedroom. Id. at 80. Special Agent Steve Gilpin with the North Dakota BCI started the search while Mr. Price interviewed Mr. Erickson. Trial Tr., vol. I, pp. 78, 80, 104.

[¶6] Special Agent Gilpin's role was to secure the residence and then assist with the search of the residence. Trial Tr., vol. I, p. 113. Securing the residence involves maintaining who is in the residence and bringing those individuals back to a common area so that they are all in one place. Id. The common area for this search was the living

room. Id. Agent Gilpin testified that the first thing he did was enter the residence and look down the hallway to the right. Id. at 114. He observed and made contact with a female sitting on the floor just inside of a bedroom that was identified as Demarais. Id. at 114-17. Agent Gilpin identified himself and advised her that a probation search was going to be conducted. Trial Tr., vol. I., p.117. He then requested that Demarais come out to the living room area. Id., at 117-18. Demarais went to the living room area and a search was then commenced. Id. at 118. Agent Gilpin spoke with Demarais regarding who resided at the trailer. Id. Just a brief time later, another Agent located drugs or drug paraphernalia. Id. at 119-20.

[¶7] Agent Gilpin asked Demarais about the meth pipe that was found and Demarais responded that would be the only thing agents would find. Trial Tr., vol. I, pp. 120-21. When asked follow-up questions, Demarais then stated that the items in the residence were not hers. Id. at 121 &137. Mr. Price testified that there was no ownership claimed of the items found in the residence. Id. at 84. Officer Price requested that Marty Erickson provide a drug screen. Id. at 81. On direct examination, Agent Gilpin testified that he requested Demarais provide a drug screen. Id. at 121-22. On cross examination, Agent Gilpin was asked if Demarais was sitting on the sofa when she was asked to take a drug test. Trial Tr., vol. I, p.136. Specific questions regarding Demarais being requested to take a drug screen were further elicited from Agent Gilpin during cross examination to include how many times it was requested; how many times the words were said; if the agent wanted to test Demarais; that at the time of arrest the agent did not have a test to find out whether she had been using; whether the agent had a drug test after Demarais

was arrested; and whether the agent told Demarais that if she took the test the charges would be dropped. Id. at 136,138-140.

[¶8] On re-direct by the State, Agent Gilpin was asked if he had any evidence to indicate whether or not Demarais did or did not possess the drugs or drug paraphernalia. Trial Tr., vol. I, p. 148. It was during the answer to this question that defense requested a mistrial alleging a Rule 404(b) violation alleging that Demarais was detained in custody without her Miranda Rights provided to her. Id. at 148-160. It appeared the defense thought Agent Gilpin was going to testify about Demarais' prior marijuana conviction in 2001. Id. The defense requested suppression of all statements Demarais made after she was handcuffed. Id.

[¶9] The Court heard arguments regarding the suppression of any statements based upon a Miranda violation. Trial Tr., vol. I, pp. 150-160. Two reports were received as part of this motion. Appellees's App. at 2-8. The Court denied Demarais' request finding that there was no questioning of the witness as to the Miranda Rights and it appeared from the reports that the Miranda Rights were read. Id. at 160. Additionally, the Court further found that the defense had at least three opportunities for pretrial motions. Id.

[¶10] On direct examination, Agent Gilpin testified as to what information he had indicating whether or not Demarais possessed with intent to use the drugs or drug paraphernalia. Trial Tr., vol. I, p. 168. The testimony indicated they had a pipe with residue of methamphetamine that tested positive from the North Dakota Crime Lab; the pipe was found in a drawer located in Demarais' bedroom; inside this drawer was women's clothing; and the pipe was found in a women's zipper type purse. Id. at 168-69.

The marijuana was sitting in proximity to where Demarais was located. Id. at 169. Additional drug paraphernalia was located in Demarais' bedroom to include Q-tips, scales and baggies. Id. at 170-71.

[¶11] The jury further heard testimony from Agent Clifford Graham with the North Dakota Bureau of Criminal Investigation (BCI). Trial Tr., vol. I, pp. 185-270. Agent Graham is currently assigned to the Grand Forks Narcotics Task Force. Id. at 186. Agent Graham assisted with the search and was assigned to log evidence. Id. at 190.

[¶12] Agent Graham testified that a black and white purse had been seized from the second drawer of a dresser in Demarais' bedroom. Id. at 194-95. In this dresser drawer was a pair of red women's under garment next to the purse, like a panty. Id. at 195-96. Inside the purse was a glass pipe which tested positive for methamphetamine. Trial Tr., vol. I, p. 197. The Agent then testified as to how this pipe is used to ingest methamphetamine, that it is a used pipe and explained how one would clean it with Q-tips. Id. at 197-98. The Agent then testified as to Exhibit 7, the Q-tips that were found with said pipe and that based upon his experience and training one of them had been used to clean a pipe and had residue on it. Id. at 199-200. The Agent further testified as to State's Exhibit 4, a black digital scale which was in a purple and pink bag inside of the purse. Id. at 200-01. These types of scales are used to bag and weigh narcotics such as cocaine, methamphetamine and sometimes marijuana. Id. at 201-03. Baggies with methamphetamine residue were also located with the methamphetamine pipe. Id. at 207.

[¶13] With respect to the marijuana, Agent Graham testified that a nylon blue case containing marijuana was located on the main bedroom floor right by the door as

you walk into the main bedroom. Id. at 210-11. This marijuana was found on the floor next to Demarais. Id.

[¶14] With respect to the Bail Jumping conviction, Kelly Organ with the Clerk's office, Criminal Division, testified. Trial Tr., vol. II, pp. 273-285. Demarais appeared on August 14, 2007, and September 17, 2007, in case # 07-K-1889. Id. at 274-75. Bond was set and Demarais was released on a promise to appear at future court dates. Id. at 276. A continued hearing was set for October 5, 2007. Id. at 275. Demarais did not appear and a bench warrant was issued at 5 PM on that day. Id. at 276. Neither Demarais, nor anyone on her behalf, called the clerks office between October 5 and October 16, the day she was arrested and appeared in court. Id. at 276-79. Demarais was required to appear on October 5, 2007, before Magistrate Dyrud as a condition of her bond release. Trial Tr., vol. II, pp. 279-80.

[¶15] The State disagrees with some of the statements in Appellant's statement of the case and statement of the facts. Paragraph 6 states Demarais was convicted of three felony charges; however, she was convicted of two felony offenses and one misdemeanor offense. Paragraph 7 states that there were three separate informations; however, Demarais was charged on two informations. Paragraph 14 states that Demarais surrendered on October 14, 2007; however, it was on October 16, 2007. Paragraph 33 states that Gilpin testified he twice asked Ms. Demarais to undergo a saliva drug test; however, the record reflects that she was asked once and then Gilpin explained to her why he was asking for one. Paragraph 40 states that SA Graham said that the lead agent, Gilpin, decided what to testify to about the "purse" and Graham simply followed Gilpin's lead (with a cite to T.220); however, looking at the trial transcript the State would

disagree that this is an accurate statement of the evidence. The State further disagrees with paragraph 41 as being an accurate representation of the evidence as cited to by Appellant.

ARGUMENT

I. Sufficient Evidence was Presented at Trial to Support the Jury's Guilty Verdict For Possession of Drug Paraphernalia.

[¶16] In the case at hand, Demarais argues (1) the State failed to show sufficient evidence, and (2) the unanticipated discussion of Demarais' drug test refusal before the jury denied Demarais her right to a "dispassionate (jury as) arbiters of the facts." Appellant's Brief at 76 and 86, respectively.

[¶17] In reviewing the sufficiency of the evidence to convict, the Supreme Court of North Dakota looks only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. State of North Dakota v. Kunkel, 548 N.W.2d 773 (N.D. 1996). A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. Id. To overturn a conviction, the defendant must show that the evidence, when viewed in a light most favorable to the verdict, permits no reasonable inference of guilt. State v. Fasching, 461 N.W.2d 102-03 (N.D.1990) (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)).

[¶18] Demarais argues that the State failed to prove that Demarais possessed with intent to use, a glass smoking device, a digital scale, and baggies for the purposes of ingesting, preparing, or storing methamphetamine, a controlled substance other than marijuana. Appellant's Brief at 77-78.

[¶19] In Raywalt, the defendant was convicted of possession of drug paraphernalia. State v Raywalt, 436 N.W.2d 234, 235 (N.D.1989). The defendant

possessed a "recipe" for manufacturing methamphetamine and a list of chemicals in his jacket pocket. Id. at 236. Raywalt appealed arguing insufficient evidence and that the trial court erred in admitting a prior conviction, statements to police and testimony regarding other drug-related items found. Id.

[¶20] Raywalt first argued "there was no evidence to show that he intended to use the drug recipe to manufacture a controlled substance." Raywalt 436 N.W.2d at 236.

[¶21] In forming its opinion, this Court outlined North Dakota's drug paraphernalia law. Id. at 236-38.

[¶22] "Any object is paraphernalia if it is used, intended for use, or designed for use in connection with a controlled substance." State v Raywalt, 436 N.W.2d 234, 236-37 (N.D.1989).

[¶23] "The Comments of the Model Drug Paraphernalia Act make it clear that a showing of intent to use the object illegally is required before the object may be found to be paraphernalia:

> "To ensure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" nor "bad", neither "lawful" nor "unlawful". Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution. Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia."

Raywalt, at 236-37 (citing Comments to Model Drug Paraphernalia Act (quoted in Minutes of House Social Services and Veterans Affairs Committee on House Bill 1510, Feb. 5, 1981)).

[¶24] "The crucial decision under the Act, and what makes an item "drug paraphernalia" for purposes of the Act, is whether the defendant intended that it be used with illegal drugs." Raywalt at 237.

[¶25] In the present case, there was sufficient evidence to show that Demarais possessed paraphernalia with the intent to use it to ingest, prepare or store methamphetamine. N.D.C.C. § 19-03.4-03.

[¶26] To convict, the State must prove (1) the accused had possession of the paraphernalia, and (2) the accused possessed the paraphernalia with the intent to use it to ingest, prepare or store methamphetamine. Id.

[¶27] In the present case, there is not a culpability requirement pursuant to N.D.C.C. § 19-03.4-03 and should be considered a strict liability offense. In Rippley, the defendant was convicted of delivery of a controlled substance pursuant to N.D.C.C. 19-03.1-23, wherein this Court held that it is a strict liability offense. State v. Rippley, 319 N.W.2d 129, 130-33 (N.D.1982). "It is widely understood that the legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer." Rippley, at 132. "It is generally within the power of the legislature to declare an act criminal irrespective of criminal intent, and that due process is not violated by excluding criminal intent as an element of the crime. This is especially true as to public welfare offenses, and food and drug offenses. Id. (citing State v. Nagel, 279 N.W.2d 911, 915 (S.D.1979)). "In the area of drug regulation, guilty intent is not necessarily a prerequisite to the imposition of criminal sanctions. State v. Rippley, 319 N.W.2d at 132.

[¶28] In the case at hand, Demarais was charged with possession of drug paraphernalia. Possession may be actual or constructive, exclusive or joint, and may be shown entirely by circumstantial evidence. State v. Morris, 331 N.W.2d 48, 53 (N.D.1983) (citing State v. Larson, 274 N.W.2d 884, 886 (N.D.1979); State v. Olson, 290 N.W.2d 664, 670 (N.D.1980); Commonwealth v. Bentley, 276 Pa.Super. 41, 419 A.2d 85 (1980)).

[¶29] "Constructive possession, or the ability to exercise dominion and control over a controlled substance, can be inferred from the totality of circumstances associated with a particular case." Morris, supra, 331 N.W.2d at 54 (citations omitted). "Some of the additional circumstances which may support an inference of constructive possession are an accused's presence in the place where a controlled substance is found; his proximity to the place where it is found; and the fact that the controlled substance is found in plain view." Id. (citations omitted).

[¶30] In the present case, the trial record provides sufficient evidence to convict. The drug paraphernalia was located in Demarais' trailer. Trial. Tr., vol. I, p. 118. The drug paraphernalia was located in Demarais' bedroom. Id. at 120. When Demarais was asked about the methamphetamine pipe, she responded that that would be the only thing the agents would find. Id. at 120-21. The glass pipe was located inside a black and white purse and tested positive for methamphetamine. Id. at 197. The purse was in a dresser drawer located in Demarais' bedroom. Id. at 194-195. In this same dresser drawer, next to the purse, agents found a red woman's undergarment to include a red panty. Id. The glass pipe had been used to smoke methamphetamine. Trial Tr., vol. I, p. 198. Used and unused Q-tips were found in the purse. Id. at 199-200. Agent Graham testified that Q-

tips are used to clean pipes and one of the seized Q-tips looked like it had been used to clean a pipe - it had residue typical of what is seen when they are used to clean their pipes. Id. at 200. A black digital scale was located in a purple and pink bag inside of the black and white purse. Id. at 201. Scales are typically found with narcotics and are used to bag and weigh narcotics. Id. Baggies with methamphetamine residue were located inside the purse. Trial. Tr., vol. I, pp. 207-08. Demarais was in close proximity to the drug paraphernalia - she was located in the bedroom on the floor within arms reach of the purse. Id. at 211. There was also a bag of marijuana found next to Demarais in a blue nylon case. Id. at 210-11. Neither Demarais nor her boyfriend, Erickson, claimed ownership of the drug paraphernalia found in the residence at the time of the search. Id. at 84.

[¶31] Demarais further argued that the "unanticipated discussion in the direct examination of Special Agent Gilpin" regarding the drug test refusal was placed improperly before the jury and denied her right to a "dispassionate (jury as) arbiters of the facts." Appellant's Brief at 86. The State addresses this argument fully under Issue III. Furthermore, Demarais has failed to support this argument with the legal analysis or facts to support it. Specifically, Demarais failed to show why it was improper to place the drug test refusal before the jury. As discussed under Issue III, this testimony was not unanticipated and had not been suppressed or excluded.

[¶32] Issues that have not been fully briefed and argued should not be heard on appeal. Ernst v. State, 2004 ND 152 ¶ 15, 683 N.W.2d 891 (citing State v. Backlund, 2003 ND 184, ¶38, 672 N.W.2d 431). Additionally where a party has failed to provide

supporting argument for an issue stated in his brief, he is deemed to have waived that issue. State v. Obrigewitch, 365 N.W.2d 105, 109 (N.D. 1984).

II. Sufficient Evidence was Presented at Trial to Support the Jury's Guilty Verdict For Bail Jumping.

[¶33] Demarais was convicted of failure to appear - bail jumping pursuant to N.D.C.C. §12.1-08-05.

> "A person is guilty of an offense if, after having been released upon condition or undertaking that she will subsequently appear before a court or judicial officer as required, she willfully fails to appear."

N.D.C.C. §12.1-08-05(1).

[¶34] Kelly Organ, Deputy Clerk, with the Criminal Division in Grand Forks County testified that Demarais was to appear on October 5, 2007, at 10:00 A.M. Trial Tr., vol. II, p. 275. Demarais originally appeared on August 14, 2007, with respect to the possession of drug paraphernalia charge in case #07-K-1889. Id. at 275-76. At this hearing, bond was set and Demarais was released on a promise to appear at future court dates. Id. Demarais was to appear on October 5, 2007, at 10:00 A.M. and failed to appear. Id. A bench warrant was issued at 5:00 PM that day. Id. at 276. Ms. Organ further testified that neither the defendant, nor any family or friends, called the Clerk's Office after the warrant was issued. Trial Tr., vol. II, pp. 277-78. Demarais was arrested on October 16, 2007. Id. at 278. Demarais was required to appear on October 5 before Magistrate Dyrud in district court and failed to appear. Id. at 279-80.

[¶35] Demarais asserts that she did not willfully fail to appear as she was "having a medical crisis involving her diabetic condition that was out of control and caused her to sleep for almost an entire day." Appellant's Brief at 92. The jury heard this testimony

and one can infer that they did not find this testimony to be credible as they found Demarais guilty.

[¶36] When reviewing a conviction for sufficiency of the evidence, the Court does not resolve conflicts in the evidence or weigh the credibility of witnesses. State v. Fasching, 461 N.W.2d 102, 103 (N.D. 1990) (citing City of Mandan v. Thompson, 453 N.W.2d 827 (N.D. 1990)). To overturn a conviction, the Defendant must show that the evidence, when viewed in a light most favorable to the verdict, permits no reasonable inference of guilt. Id. at 102-03 (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)).

[¶37] Demarais further argues that the prosecutor made a statement in closing argument that was not a reasonable inference of the evidence. Appellant's App. at 94-96.

[¶38] The North Dakota Supreme Court has recently discussed the proper scope of closing arguments. State v. Rivet, 2008 ND 145, ¶¶4-5, 752 N.W.2d 611. The Court stated that control of closing argument is within the discretion of the trial court. Id. at ¶4. However, "arguments by counsel must be confined to facts in evidence and the proper inferences that flow therefrom." Id. (citing City of Williston v. Hegstad, 1997 ND 56, ¶8, 562 N.W.2d 91). It is permissible for an Assistant State's Attorney to refer to testimony properly in evidence and the fair inferences that arise therefrom. Rivet, 2008 ND 145, ¶7, 752 N.W.2d 611.

[¶39] The State's first witness was Wade Price, a parole and probation officer with the North Dakota Department of Corrections. Trial Tr., vol. I, pp. 71-72. During the direct examination, the State did not elicit any testimony regarding people who use meth

being up for days at a time. It was not until cross examination, that this testimony was first elicited. Id. at 95. The following question was posed on cross examination,

> "Chronic meth users can go down to a hundred pounds in a very short time. They are up continuously. I have heard of them being buzzed for ten days, would that be uncommon?"

Trial Tr., vol. I, pp. 95-96.

[¶40] Officer Price's response was: "This is a characteristic, yes." Id. at 96.

[¶41] In the State's re-direct, Officer Price answered the question of what happens after they stay up for days. Id. at 99. Price testified that they are eventually going to crash and sleep for a couple days. Id. at 99-100.

[¶42] Specifically, Demarais objects to the following closing statement made by the State:

> "Demarais was never planning on attending on October 5th of 2007. She wasn't sleeping."

Appellant's Brief at 94.

[¶43] It is the above statement that Demarais argues that the State was implying to the jury that the missed date was based on crashing after a meth binge. Appellant's Brief at 95.

[¶44] However, the State asserts that Demarais' argument fails in several respects. First, the State's closing remark did not even mention drug use. In fact, the State's entire closing remarks on the bail jumping charge is devoid of any reference to drug use, drugs or "crashing". Trial Tr., vol. II, pp. 438-442. The State asserted that Demarais was not sleeping which directly contradicts Demarais' argument that the State was implying that she was crashing.

[¶45] Secondly, the State's remark was proper and a fair inference to be made based upon the facts and evidence. Demarais testified that she missed the court appearance because she was sleeping. Trial Tr., vol. II, p. 398. Kelly Organ, Deputy Clerk, testified that Demarais did not call the Clerk's Office before she was arrested on October 16. Trial Tr., vol. II, pp. 277-78. This was eleven days after the missed court date.

[¶46] It is reasonable to infer that if Demarais had missed the court date because of a medical condition she would have called the Court the day after. Therefore, one could infer that the missed date was willful and Demarais was not sleeping.

[¶47] Furthermore, Demarais did not object.

III. The Defendant Was Provided a Fair Trial.

[¶48] The trial court properly denied Demarais' mid-trial motion to suppress.

[¶49] "A district court has broad discretion in evidentiary matters, and a court's decision whether to admit evidence will not be overturned on appeal absent an abuse of discretion." State v. Tibor, 2007 ND 146, ¶ 27, 738 N.W.2d 492 (citing State v. Wiest, 2001 ND 150, ¶ 9, 632 N.W.2d 812). It is the State's position that the Supreme Court should review the District Court's evidentiary ruling on an abuse-of-discretion standard. State v. Streeper, 2007 ND 25, ¶ 11, 727 N.W.2d 759 (citing Ramsey, 2005 ND 42, ¶ 8, 692 N.W.2d 498).

[¶50] It appears that Demarais is arguing that the district court erred by failing to suppress Demarais' statements on a motion made mid-trial. Demarais argues that the State engaged in prejudicial misconduct by eliciting the irretrievable damaging evidence of the drug test refusal and the trial court failed to recognize the gravity of the issue or

missed the issue completely relying on Rule 12, N.D.R.Crim.P. Appellant's Brief at 101. The State asserts that Demarais makes several other conclusary remarks, all of which have not been fully briefed with supporting legal argument as to the grounds of which Demarais' statements should have been suppressed.

[¶51] Issues that have not been fully briefed and argued should not be heard on appeal. Ernst v. State, 2004 ND 152 ¶ 15, 683 N.W.2d 891 (citing State v. Backlund, 2003 ND 184, ¶38, 672 N.W.2d 431). Additionally, where a party has failed to provide supporting argument for an issue stated in his brief, he is deemed to have waived that issue. State v. Obrigewitch, 365 N.W.2d 105, 109 (N.D. 1984).

[¶52] Should this Court address defenses third argument, the State asserts that Demarais was not denied her constitutional rights and was afforded a fair trial.

[¶53] It is difficult to discern the issue and legal basis as set forth in section III of Demarais' Brief. The State will assume Demarais' issue is that it was error for the trial court to suppress statements mid-trial based upon a Miranda violation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Demarais concludes that based on errors her Fifth and Sixth Amendment rights were violated. Appellant's Brief at 102.

[¶54] Demarais' argument fails in three respects. First, Demarais waived her right to suppress pursuant to N.D.R.Crim.P. Rule 12(b)(3)(C); second, Demarais was advised of her Miranda warning prior to the objected to statements; and thirdly, a Miranda violation is not a violation of the Fifth Amendment and Demarais was afforded due process pursuant to the Sixth Amendment.

A. Defendant waived her right to suppress evidence

[¶55] Rule 12(b)(3)(C) of the N.D.R.Crim.P. sets forth the procedure on pretrial motions. A motion to suppress evidence must be made before trial or it is waived. N.D.R.Crim.P. Rule 12(b)(3)(C) and 12(e).

[¶56] In the present case, the first time defense raised a Miranda violation was midway through trial. Trial Tr., vol. I, pp. 150-160. "Rule 12(b), N.D.R.Crim.P., requires certain motions be made before trial, or they are waived." State v. Skarsgard, 2008 ND 31, ¶9, 745 N.W.2d 358. (citing State v. Frankfurth, 2005 ND 167, ¶12, 704 N.W.2d 564). "However, the Supreme Court may grant relief from the waiver if the movant establishes just cause." Id. (citing State v. Schroeder, 524 N.W.2d 837, 839 (N.D.1994); State v. Neset, 462 N.W.2d 175 (N.D.1987); State v. Raywalt, 436 N.W.2d 234 (N.D.1989); State v. Valgren, 411 N.W.2d 390 (N.D.1987)).

[¶57] The defense asserts that just cause exists. In support of this argument, defense asserts in its brief that "*without any notice* to the defense that the State intended to elicit testimony from police witnesses concerning Demarais' refusal to take a drug screening test, the prosecutor engaged in serious misconduct." Appellant's Brief at ¶99 (*emphasis added).* The defense further asserts in its brief that "it was made clear *for the first time to the defense during Special Agent Gilpin's testimony* the precise sequence of events involving Demarais' handcuffing, arrest, and the statements that Demarais allegedly made to Gilpin while handcuffed, *including her refusal to take a drug test.*" Appellant's Brief at ¶100 (*emphasis added).* The defense argues "the situation presented in the instant case established just cause for a mid-trial suppression hearing." Id.

[¶58] The above statements by defense are not supported by the facts and the procedure of the case. Agent Gilpin's report was provided to defense in discovery and was received by the Court as Demarais' motion exhibit 1. Trial. Tr., vol. I, pp. 155-57. The pertinent portion of the report contains the following:

> "Special Agent Gilpin met with agents and was advised that a glass smoking device along with two (2) scales, one (1) of those scales being a digital scale, had been found in a dresser drawer just as you walk into that bedroom. Special Agent Gilpin met with Officer Price and requested that handcuffs be placed on Erickson and Demarais. Special Agent Gilpin placed hand restraints on Demarais in the front. Officer Price placed hand restraints also in front of Erickson. Officer Price began speaking with Erickson in relation to the suspected methamphetamine pipe which had been found in the bedroom. Erickson told Officer Price that he did not know the pipe was present in the bedroom. Special Agent Gilpin then again identified himself as an agent of the Grand Forks Narcotics Task Force and advised both subjects of their Miranda Warning. Special Agent Gilpin asked both subjects if they understood their rights and both subjects stated that they did. Special Agent Gilpin began speaking with Demarais about the items found in the bedroom to include the methamphetamine pipe. Demarais then stated that would be the only thing agents would find in the residence. Special Agent Gilpin then asked Demarais if Demarais knew those items were in the residence and Demarais stated that she did not. Special Agent Gilpin spoke again with Demarais and asked Demarais if she had ever been arrested for any drug charges in the past. Demarais advised Special Agent Gilpin that in 2001 Demarais was caught with marijuana. Special Agent Gilpin then asked Demarais when the last time Demarais had used any methamphetamine and Demarais advised Special Agent Gilpin that approximately the same time that she was charged with marijuana back in 2001. Special Agent Gilpin requested that Demarais voluntarily provide a saliva sample to test for controlled substances and Demarais refused by saying that it was her right not to have the test done. Special Agent Gilpin advised Demarais that she did not have to provide the sample, however Special Agent Gilpin was just merely looking for consent to prove that Demarais was not on methamphetamine. Again, Demarais refused to provide a sample to be tested."

Appellee's App. at 2-4.

[¶59] Special Agent Graham's report was provided to defense in discovery and received by the Court with respect to the suppression of Demarais' statements. Trial Tr.,

vol. I, pp. 157-58. Special Agent Graham's report contains the following: "Special Agent Graham also observed Marty Erickson and Judy Ann Demarais read their Miranda Warning." Appellee's App. at 7.

[¶60] The last thing Special Agent Gilpin states he did was arrest, at 2:55 p.m., "Erickson and Demarais for the possession of drug paraphernalia, methamphetamine related, and possession of marijuana." Appellee's App. at 5. The search commenced at 2:00 p.m. Trial Tr., vol. I, p. 113 and Appellee's App. at 2.

[¶61] The defense states in his brief that "the precise sequence of events involving Ms. Demarais' detention and arrest were first disclosed during Gilpin's testimony." Appellant's Brief at ¶34. This assertion directly contradicts the motion exhibits, as set forth above, that were provided to defense in discovery. The defense further asserts in his brief that "at no time did Gilpin **testify** that he warned Ms. Demarais of her Miranda-rights." Id. at 35. However, at not time did the defense or the state ask this question of Agent Gilpin during trial.

[¶62] Just cause does not exist as Demarais had sufficient time to file any pretrial motions and failed to do so. The defense was provided a copy of Agent Gilpin's report and had at least three opportunities to file any pretrial motions with respect to a Miranda violation based upon information in Agent Gilpin's report. Trial Tr., vol. I, pp. 155-156. The pretrial notices were "back in November of 2007, an amended one on November 30, 2007, and then yet another one January 29th of 2007." Id. at 155. Several pretrial hearings were held in this case. Appellant's App. at 2-3. Pretrial hearings were held on February 7, March 19 and April 30, 2008. Id. The trial was held May 5-9, 2008. Id.

[¶63] Because Demarais failed to file a pretrial motion under N.D.R.Crim.P. 12(b)(3)(C), she has waived her suppression argument and this issue is not properly preserved for appeal. See State v. Frankfurth, 2005 ND 167, ¶ 12, 704 N.W.2d 564, stating that Rule 12(b), N.D.R.Crim.P. requires certain motions be made before trial, or they are waived. Additionally, "just cause" does not exist as the defense was provided with Agent Gilpin's and Agent Graham's reports prior to the pretrial hearings and had an opportunity to file any pretrial motions.

[¶64] Should this Court find that just cause exists, the State further argues that the defendant was advised of her Miranda warning prior to making any statements now complained of.

B. Demarais was advised of her Miranda warning prior to the objected to statements

[¶65] "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct., at 1612.

[¶66] As set forth above, Agent Gilpin's report supports that he read Demarais' Miranda warning prior to any of Demarais' statements that defense now argues should be suppressed. Right after the drug paraphernalia was found Gilpin's report states that "Gilpin met with Officer Price and requested that handcuffs be placed on Erickson and Demarais. Gilpin placed hand restraints on Demarais in the front." Appellee's App. p.3, ¶5. "Gilpin then again identified himself as an agent of the Grand Forks Narcotics Task Force and advised both subjects of their Miranda Warning." Appellee's App. p.3 ¶6. "Agent Gilpin asked both subjects if they understood their rights and both subjects stated

that they did." Id. "Gilpin began speaking with Demarais about the items found in the bedroom to include the methamphetamine pipe" Id. Further in the report, it indicates that Demarais was asked to provide a drug test, when she last used any methamphetamine and prior drug charges. Id. at ¶8.

[¶67] At trial, defense advised the trial Court of the following in support of his objection to suppress Demarais' statements:

> That Demarais "was being detained in custody without her Constitutional Miranda Rights provided to her." Trial Tr., vol. I, p. 150. "Nowhere in there does it say that she was placed in handcuffs and then asked questions. Nowhere does it state in there" Id. at 155. "Your Honor, it's clear once those handcuffs go on her, she's in custody. At that point, she has to be read her Miranda warning. And she wasn't and it wasn't; still she was arrested." Id. at 159.

[¶68] The above arguments contradict the BCI reports of Agent Gilpin and Agent Graham as set forth above, and therefore the State argues are without merit.

C. A Miranda violation is not a violation of the 5th Amendment and defendant was afforded due process pursuant to the 6th Amendment.

[¶69] Demarais further argues that she was deprived "of her right to a fair trial and to due process of law under the Fifth and Sixth Amendments." Appellant's Brief at 102. In support of this argument, Demarais asserts that "the testimony of Gilpin concerning Demarais' refusal to take a drug screening test while he questioned her in handcuffs created a fundamentally unfair situation." Id. at 103.

[¶70] "The Fifth Amendment guarantees that no person ...shall be compelled in any criminal case to be a witness against himself." New York v. Quarles, 467 U.S. 649, 654, 104 S.Ct. 2626, 2632, 81 L.Ed.2d 550 (1984). "The Fifth Amendment itself does not prohibit all incriminating admissions; absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." Id.

(citing United States v. Washington, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818, 52 L.Ed.2d 238 (1977)). Should the Court find a Miranda violation, the States third argument is that Demarais was afforded due process and received a fair trial. The North Dakota Supreme Court has opined that a violation of Miranda is not a violation of the Fifth Amendment itself. See State v. Connery, 441 N.W.2d 651, 654 (N.D.1989) (citing New York v. Quarles, 467 U.S. 649, 656, 104 S.Ct. 2626, 2632, 81 L.Ed.2d 550 (1984)).

[¶71] Demarais is not arguing that her statements were coerced and therefore would be admissible. The State argues that Demarais has not set forth a legal basis, other than Miranda, as to why her statements should have been suppressed.

[¶72] In support of her due process argument, Demarais asserts that the State engaged in prejudicial misconduct by eliciting the irretrievably damaging evidence of the drug test refusal before the jury. Appellant's Brief at 101. As set forth above, Demarais statements were not suppressed prior to trial and the defense was aware of the statements prior to trial. In addition, Demarais cannot now claim error when defense posed more questions about drug testing before making any objections. "A person legally should not be permitted to benefit from an error resulting from or through the action that he promoted or instigated. State v. Klose, 334 N.W.2d 647, 651 (N.D.1983) (citing State v. Sheldon, 301 N.W.2d 604 (N.D.1980)).

[¶73] In the State's direct examination, two questions regarding Demarais taking a drug test were asked of Agent Gilpin and were not objected to. Trial Tr., vol. I, pp. 121-22. Right after this, defense cross examined Agent Gilpin. Defense elicited further testimony from Agent Gilpin which included seven (7) additional questions regarding any drug test or refusal. Id. at 136, 138-139. It was not until the State was conducting

its re-direct of Agent Gilpin, when Demarais felt that Agent Gilpin was *going* to testify to Demarais' 2001 marijuana conviction, that Demarais raised objections requesting suppression of Demarais' statements on the ground of Miranda and N.D.R.Crim.P. Rule 404(b). Id. at 150-160. Therefore, the State asserts they did not engage in prejudicial misconduct and Demarais should not be allowed to benefit from a claimed error in which she participated in. Demarais was afforded due process pursuant to the Sixth Amendment.

[¶74] Additionally, the State asserts that Demarais did not fully brief her constitutional argument and this should not be considered.

CONCLUSION

[¶75] In the case at hand, a twelve person jury properly found the Demarais guilty of all charges because substantial evidence was presented to warrant such a conclusion. Based on the foregoing law and conclusion, the State respectfully request that this Court affirm the District Court's rulings and the criminal judgments in this case.

Respectfully submitted this 27 day of January, 2009.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	Supreme Court Nos. 20080181,
Plaintiff and Appellee,	)	20080182
	)	
vs.	)	District Court Nos. 18-07-K-02434,
	)	18-07-K-01889
Judy Ann Demarais,	)	
	)	
Defendant and Appellant.	)	

ON APPEAL FROM CRIMINAL JUDGMENTS
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE SONJA CLAPP, PRESIDING.

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 27th day of January, 2009, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE
APPELLEE'S APPENDIX

and that said email was served on the address of:
Jeff A. Bredahl and said e-mail address is: jeffb@ndjustice.com

Susie Unseth
States Attorney's Office

Subscribed and sworn to before me this 27th day of January, 2009.

Cheryl Vergal
Notary Public

sv

CHERYL VERGAL
Notary Public
State of North Dakota
My Commission Expires June 19, 2014