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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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JAN 18 2013

State of North Dakota

Plaintiff-Appellee,

vs

Kawo Flah

Defendant-Appellant

STATE OF NORTH DAKOTA

) Supreme Ct. No. 20120357

) District Ct. No. 08-2012-OR-00767

) SA File No. M568-12-04

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM THE CRIMINAL JUDGMENT

Burleigh County District Court
South Central Judicial District
The Honorable Bruce Romanick, Presiding

Dawn M. Deitz
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STATEMENT OF THE ISSUE

Whether the State’s closing argument gave rise to obvious error?

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STATEMENT OF FACTS

The Complaint charged Kawo Otis Flah (Flah) with Possession of Drug Paraphernalia with use with Marijuana. Appellant Appendix 4-6. The Complaint alleged the violation occurred on or about April 2, 2012. Id. The matter proceeded to trial on September 4, 2012. The State called two witnesses, Officer Amanda Hocker (Hocker) and Detective Loren Grensteiner (Grensteiner). See, Trial Transcript (Transcript). Hocker testified to having been employed with the Bismarck Police Department for three years. Transcript at p. 21, lines 7-8. Hocker further testified that on April 2, 2012 she responded to Flah's residence for a domestic and the parties were separated. Id. at p. 22. Hocker spoke with the female inside of the residence and it was at that time she observed a marijuana pipe. Id. at p. 23. Eventually, Flah was questioned concerning the marijuana pipe to which Flah stated the pipe belonged to him. Id. at p. 25.

Grensteiner testified to his training and experience as a narcotics investigator for the Bismarck Police Department to include his experience concerning the use of drug paraphernalia by more than one individual. Id. at p. 31-38. Grensteiner testified that he responded to Flah's residence on April 2, 2012. Id. at p. 32. He was directed to the marijuana pipe by Hocker. Id. Flah was arrested because of his admissions to law enforcement and he was subsequently arrested. Id. at p. 34. Grensteiner searched Flah incident to arrest and found a small bag of marijuana. Id. at p. 35. Flah testified at trial

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that the marijuana pipe was not his and that officers never questioned him concerning the marijuana pipe. Id. at p. 45-46.

Given the discrepancies in the testimony from Hocker concerning Flah's statements and Flah's testimony at trial, the issue of credibility was called into question. During closing arguments, the State pointed out the discrepancies as well as reiterating jury instructions provided by the trial court. Id. at p. 53; Appellee's Appendix at 12. No objection was made by Flah at any time during closing arguments. The jurors deliberated and returned a verdict of guilty. Appellant's Appendix at 9.

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ARGUMENT

Flah did not object to any portion of the State's closing argument. Accordingly, this Court will not reverse the conviction unless the argument amounts to obvious error affecting Flah's substantial rights. State v. Rivet, 2008 ND 145, ¶ 6, 752 N.W.2d 611 (citing Hawes v. N.D. Dept. of Transp., 2007 ND 177, ¶10, 741 N.W.2d 202); N.D.R.Crim.P. 52. This Court will notice a claimed error not brought to the trial court's attention if there was an error that is plain and effects substantial rights. Id.

In deciding if there is obvious error, the probable effect of any improper comments on the jury's ability to decide the evidence fairly are considered. Id. The objective is to determine whether an error was so prejudicial in nature that substantial injury occurred and a different result would have occurred but for the error. State v. Schimmel, 409 N.W.2d 335, 339 (N.D. 1987) (citing State v. Micko, 393 N.W.2d 741, 746 (N.D. 1986). If no such prejudice resulted the error is considered harmless. Id.

The control of closing arguments is largely within the trial court's discretion, although counsel's arguments must be confined to facts in evidence and reasonable inferences that flow from them. Rivet, at ¶ 3 (citing City of Williston v. Hegstad, 1997 ND 56, ¶ 8, 562 N.W.2d 91). A prosecutor's closing argument may properly draw reasonable conclusions and inferences therefrom, but a prosecutor may

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not create evidence by argument or by injecting their own personal beliefs. Id. at ¶ 5 (citing State v. Clark, 2004 ND 85, ¶ 9, 678 N.W.2d 765). An attorney has a right to argue the credibility of witnesses to the jury as long as the argument is confined to the evidence and fair inferences arising therefrom. Hegstad, at ¶ 12.

Here, a majority of the evidence came from testimony. Accordingly, the credibility of the witnesses was an important factor for the jury. Flah’s version of events was materially different than the officers’ versions. In order for the jury to accept Flah’s version of events, they would have to accept that the officers’ testimony lacked credibility.

The State’s closing argument did not inject personal beliefs or create evidence about the officers’ credibility. The argument was premised upon: 1) the lack of evidence that Hocker and Grensteiner, experienced officers, lied about what happened and 2) the inconsistency between Flah’s statements from the night of the incident in comparison to his testimony provided at trial. This record provided the State with a reasonable evidentiary basis upon which to make a fair argument as to the officers’ credibility versus that of Flah. That is what the State’s closing argument properly did.

The propriety of the State’s argument is also supported by the trial court’s instruction to the jury on weight and credibility. Appellee’s Appendix at p. 12. Specifically, the instruction provided

1 that the jury could consider the age, intelligence and experience of a
2 witness, and the reasonableness or unreasonableness of their
3 testimony, among other factors. Id. at p. 13, lines 1-18. Hocker and
4 Grensteiner were both experienced officers, who gave consistent
5 testimony. Specifically, Hocker testified that on April 2, 2012, Flah
6 claimed ownership over the marijuana pipe. Transcript at p. 25, lines
7 11-13. Flah on the other hand provided testimony that he never
8 claimed ownership of the marijuana pipe to law enforcement. Id. at p.
9 45, lines 9-20. The State's argument was a proper response thereto,
10 premised on the experience of the officers, the consistency of their
11 testimony, and the credibility of the parties involved. All of these
12 components to the State's argument were appropriate factors under the
13 trial court's instructions.

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16 Even if this Court were to find that the argument was improper,
17 any error does not rise to the level of being obvious error. The State
18 asserts two supporting reasons.

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20 First, the challenged comment was made once. It was but one
21 argument of several made during the course of the State's closing
22 argument.

23
24 Second, the trial court's instructions to the jury also made it
25 clear that the arguments of counsel were not evidence. Appellee's
26 Appendix at p. 12, lines 1-18. The instructions provided that if
27 counsel made statements or offered opinions not supported by the

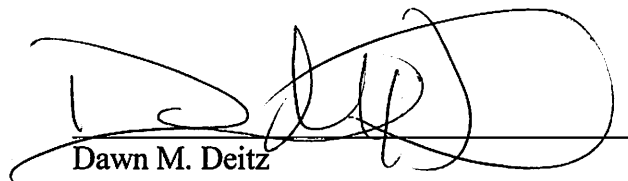
1 evidence, they were to be disregarded. Id. This Court has previously
2 held that such an instruction minimized any prejudice created by an
3 alleged improper closing argument, precluding a finding of obvious
4 error. Rivet, at ¶¶5-7; Clark, at ¶ 11.

6 Given the importance of witness credibility in the case, the
7 State's commentary in closing arguments about the evidentiary basis
8 supporting the officers' testimony as compared to that of the
9 contradictory testimony from Flah was an appropriate argument.
10 However, even if it was deemed to be error, this single statement was
11 not so prejudicial in nature that a substantial injury occurred and a
12 different result would have resulted but for the error. Flah's arguments
13 should be rejected.
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16 CONCLUSION

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18 Based upon the foregoing, the State respectfully requests that the
19 Criminal Judgment be affirmed in its entirety.

20 Dated this 18 day of January, 2013.

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2 IN THE SUPREME COURT
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4 State of North Dakota,)
5 Plaintiff-Appellee,)
6 -vs-)
7 Kawo Flah,) Supreme Ct. No. 20120357
8 Defendant-Appellant,) District Ct. No. 08-2012-CR-00767
9) SA File No. M568-12-04
10 STATE OF NORTH DAKOTA)
11) ss
12 COUNTY OF BURLEIGH)

13 Katie A. Wangler, being first duly sworn, depose and say that I am a
14 United States citizen over 21 years old, and on the 18th day of January, 2013,
15 I deposited in a sealed envelope a true copy of the attached:

- 16 1. Brief of Plaintiff-Appellee
17 2. Appendix of Plaintiff-Appellee
18 3. Affidavit of Mailing

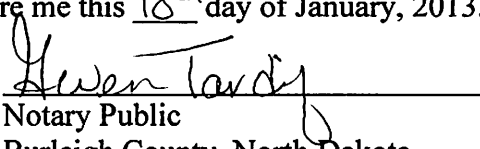
19 in the United States mail at Bismarck, North Dakota, postage prepaid,
20 addressed to:

21 BENJAMIN PULKRABEK
22 402 1ST ST NW
23 MANDAN, ND 58554

24 which address is the last known address of the addressee.

25 
Katie A. Wangler

26 Subscribed and sworn to before me this 18th day of January, 2013.

27 
Notary Public
Burleigh County, North Dakota

GWEN TARDIF
Notary Public
State of North Dakota
My Commission Expires June 11, 2015