20170400
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 4, 2018
STATE OF NORTH DAKOTA

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

State of North Dakota,)
)
Plaintiff-Appellee,) **Sup. Crt. No.: 20170400**
)
vs.) **Dist. Crt. No.: 53-2015-CR-01956**
)
Jesseaca Finneman, a.k.a.)
)
Jesseaca Heather Finneman,)
)
Defendant-Appellant.)

APPEAL FROM THE SEPTEMBER 13, 2017 VERDICT OF GUILTY AND THE NOVEMBER 13, 2017 SENTENCING, THE HONORABLE PAUL JACOBSON PRESIDING

Brief of the Appellee, State of North Dakota

Nathan Kirke Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577
53sa@co.williams.nd.us

Table of Contents

Table of Authorities

Statement of the Issues

[¶1] I. The District Court properly denied Finneman's motion for a mistrial.

Statement of the Facts

[¶2] On October 1, 2015, law enforcement found a five gallon bucket containing marijuana inside of the bedroom that Finneman shared with Beth Churchill. The bucket contained approximately 1,107 grams, or more than 2.2 pounds, of marijuana. (R.O.A. Doc. No. 64). Additional baggies of marijuana were found inside of a glass jar and a black cardboard vaporizer box inside of the shared bedroom. The jury was able to see photographs of where these items were located along with the actual marijuana itself. The quantity of marijuana found exceeded the 500 gram enhancement threshold as found at N.D.C.C. §19-03.1-23.1(1)(b)(11), which brought the possession with intent charge to a class-A felony.

[¶3] Finneman's explanation for the five gallon bucket with marijuana was that she supposedly was saving it to treat hip dysplasia in her dogs. (A.T. day 2 page 143, 146-147). Finneman claimed that it was basically "junk" and consisted of seeds/stems/clippings. Detective Dery testified that there were buds inside of the large bags of marijuana. (A.T. day 2 page 119).

[¶4] She claimed that the packaged marijuana was for her personal use, and that she would label the packages of marijuana as either sativa or indica based on their properties. (A.T. day 2 page 147). None of the baggies of marijuana found and later presented to the jury had sativa or indica written on them; apart from North Dakota State Crime Laboratory information, the only visible label on a bag was "Party Mix." (R.O.A. Doc. No.: 73). There were multiple baggies that were found in both the bedroom and the

car that contained various quantities of marijuana above the "dirty" baggies that were referenced by Finneman. (R.O.A. Doc. No. 64).

[¶5] Finneman's purse was found to contain baggies of marijuana packaged in a style consistent with sales (R.O.A. Doc. No. 97), a digital scale with marijuana residue (R.O.A. Doc. No. 77), and approximately $980.00 in cash. (R.O.A. Doc Nos. 64, 97-100). Finneman's explanation for the cash was that they had supposedly collected the cash to pay for the location they were living at, and was going to obtain money orders with it. Finneman did not have employment, and Churchill worked as a security guard. Finneman stated that she provided transportation for Churchill, and stayed home, smoked marijuana, and took care of the kids. (A.T. day 2 pages 173-174).

[¶6] The defense introduced a copy of a page from the September to October of 2015 monthly statement for the account shared by Finneman and Churchill. This document showed that the account reached negative values during that timeframe, and showed their financial difficulties during that timeframe. (R.O.A. 115). This same documentation included an invoice for $3,625.00 related to housing, that was purportedly due by October 1, 2015.

Law and Argument

[¶7] The essence of Finneman's position is that since she testified that she did not do certain things, that the cash came from other sources, that the jury had a question about the verdict form, and missed a check box on the form, that the jury was obviously confused and mislead by the verdict form when it convicted her of all charges. Finneman does not explain how, if the instructions were hopelessly confusing, the same jury, hearing the same facts, and using the same jury instructions and verdict form, found her

co-defendant not-guilty of the possession with intent charge. At trial, Finneman claimed all of the drugs and the paraphernalia; she now complains that the jury convicted her of all counts against her.

[¶8] Finneman wholly omits the fact that she had no job and supposedly sat around at home "taking care" of the kids and smoking marijuana. Finneman wholly omits that Finneman and Churchill were experiencing financial issues as shown by the defense's own exhibits, and that their bank account appeared to have had less money in it for the period of time from September 16, 2015 through October 1, 2015 than was required to be paid by the invoice presented as evidence. Essentially, the defense's own exhibit showed that Finneman and Churchill could not cover their bills with the money coming in from Churchill.

[¶9] While mentioning that drugs were found in the car, Finneman also wholly omits that individually packaged baggies of marijuana and the digital marijuana scale were found in her purse along with the cash. The prepackaged baggies of marijuana were at the top of the purse. (R.O.A. Doc.. No.: 97). The cash was right below the baggies of marijuana. (R.O.A. Doc. No.: 98). The digital marijuana scale was under the cash. (R.O.A. Doc. No.: 98). Finneman attempts to paint these as having been found in various places inside of the vehicle, as opposed to the fact that they were all found contained inside of her purse that she had left in the vehicle.

[¶10] Digital scales with controlled substances, cash, individually packaged controlled substances matching the scale, and packaging materials are some of the hallmarks of possession of controlled substance(s) with intent to deliver. See. Eaton v. State, 2011 ND 35, 793 N.W.2d 790.

The jury is not required to believe the self-serving statements of a criminal defendant

[¶11] In support of her position, Finneman provided a portion of the transcript in which she claims she never sold any marijuana. North Dakota does not require juries to believe a defendant who takes the stand and said that he/she "didn't do it." Indeed, a jury is not required to believe anything said by a criminal defendant on the stand. State v. Dahl, 2009 ND 204, 776 N.W.2d 37.

[¶12] Here, Finneman presents this Court with her testimony that she "kept the empty baggies and had marked them to designate the 'different type of flavors' and assorted varieties she would obtain." (Appellant's Brief at ¶21). The only baggy with any writing on it found by law enforcement, and presented at trial was a baggy labeled "Party Mix." (R.O.A. Doc. No. 73). There was no writing on the individually packaged baggies of marijuana that were found in Finneman's purse along with the scale and cash. The claims of personal use by Finneman did not explain the presence of a digital scale in the purse. The jury could, quite easily, see that Finneman was simply making statements to try to avoid the consequences of her actions as the claims did not match the physical evidence.

[¶13] At trial, Finneman claimed that she received the more than 2.2 pounds of marijuana for "free" out of Las Vegas, because it was just stems/seeds/cuttings, and therefore worthless. (Appellant's Brief at ¶22). Detective Dery testified that he could observe "buds" inside of the large bags of marijuana. The State submits that it would be irrational for the jury to believe that a dealer would simply give over 2.2 pounds of marijuana to a person, and that it would be irrational for the jury to believe that the large bags were simply "junk" product.

[¶14] When asked about the use of seeds/stems/clippings for making hash oil, Finneman admitted to knowing that these materials can be used to make hash oil. This destroys her claim that such material is "worthless," as it is material that can be made into another controlled substance, namely hashish oil.

[¶15] The State submits that the jury's apparent disregard for Finneman's claim that she received over 2.2 pounds of marijuana for "free" does not indicate confusion on the part of the jury. Common sense dictates that a dealer would not give away such a quantity for free to someone.

[¶16] Further, Finneman claimed to not work, but to smoke marijuana. She claimed that she did not sell drugs. However, there was no other explanation provided as to how she could finance her habit. This is especially true given the financial materials supplied to the jury by the defense, which showed the shared bank account hitting a negative balance.

[¶17] This is even more telling when, at trial, defense counsel attempted to portray the multiple baggies of marijuana as being from "somebody" buying small baggies of marijuana. Not only does this not match Finneman's claims that the marijuana came up from Las Vegas in 2014, it further emphasizes the question of how does a person with financial difficulties afford her daily marijuana habit. The jury's rejection of these claims does not support the conclusion that they were hopelessly confused.

North Dakota's "medical marijuana" provisions are not applicable to this case.

[¶18] Even Finneman admits that they have no applicability to this case. It is unknown why these were included, as they were not argued at trial and do not apply where a person has over 2.2 pounds of marijuana in their residence. The State submits

that these claims are newly raised on appeal, and that any arguments regarding them should be rejected. E.g. Murchison v. State, 1998 ND 96, 578 N.W.2d 514.

[¶19] If this Court elects to review the argument, Finneman and Churchill had over 2.2 pounds of marijuana in the residence; or more than 32 ounces of marijuana. It appears that Finneman is claiming that, somehow, the 2.5 ounces of "medical marijuana" per month provision of the new "medical marijuana" law somehow shows that Finneman's collection was for personal use. If one divides 32 by 2.5, one finds that this would be over a year's supply if used at 2.5 ounces/month. The rest of this argument is pure speculation about how much a self-professed "pot head," who is trying to avoid a conviction, would use.

[¶20] In any event, the claim fails to explain how Finneman could support her habit. If the 2.2 plus pounds of marijuana is worthless "junk" that she got for free, how did she obtain the marijuana for smoking? At trial she claimed that the large quantity of "junk," apparently not really usable according to the defense, was obtained free of charge from Las Vegas. If one couples the "pot head" consumption rate hypothesized in Finneman's brief with the 2.2 plus pounds of supposed "junk" for her dogs and the single-family income that could not maintain a positive account balance, one has a significant issue. How does Finneman support her "pot head" habit? The State submits that the answer to that question was found in the baggies of marijuana, the digital scale, and the loose cash found in Finneman's purse.

[¶21] Also, if Finneman consumed marijuana at such a rate as newly hypothesized in her brief, the claim that her supply of marijuana was from sometime in 2014 (A.T. day 2 148) does not fit with what is alleged now before this Court.

The jury instructions were an accurate depiction of North Dakota law and how a lesser included offense operates.

[¶22] The jury was instructed as to how lesser included offenses function. As the Court noted, if the jury finds a defendant not guilty of the greater offense, they are to consider whether the defendant is guilty of the lesser included offense. If the jury finds that the defendant was guilty of the lesser included, they are to then find the defendant guilty of the lesser included offense. If the jury finds the defendant not guilty of the lesser included offense, they are to return a not guilty verdict for the lesser offense and nothing for the greater one. (R.O.A. Doc. No. 118 at pages 17, 25-26).

[¶23] The parties agreed to the elements of offense portions of the jury instructions. These are where the elements of the offenses were laid out. (R.O.A. Doc. No. 118). The essential elements of the offense instructions listed out the offense and all of the elements needed to prove each of the offenses, whether greater or lesser. (R.O.A. Doc. No. 118 at pages 15 and 16). Despite Finneman's claims to this Court, the jury fully had the opportunity to explore the questions of whether Finneman possessed more than 500 grams of marijuana with the intent to deliver it to another person.

[¶24] The State submits that it is self-serving speculation to allege that: "the jury was hopelessly confused about the verdict form, that the jury was not able to make an appropriate determination of whether she was guilty of possession, possession with intent to deliver, or of quantity in terms of an enhancement factor in the determination of the level of crime" as alleged by Finneman.

[¶25] Interestingly, the jury found the co-defendant, Beth Churchill, not guilty of Possession of Marijuana With Intent to Deliver, using the same verdict form in the same

trial. (A.T. day 3 page 87). Finneman does not explain how a "hopelessly confused" jury could have found Churchill not-guilty of the Possession of Marijuana With Intent to Deliver charge with the same fact pattern presented at the same time and with the same jury instructions if the verdict form were the reason Finneman was found guilty.

[¶26] The evidence was undisputed as to the quantity of marijuana present. It would be irrational for a jury to find that there was not more than 500 grams of marijuana present, when one gallon sized zip-lock bag from the bucket in the bedroom of Finneman and Churchill contained more than 500 grams of marijuana. (R.O.A. Doc, No. 64)(laboratory item number 9-1). The other two bags from that bucket contained approximately 476 and 127 grams, totaling approximately 603 grams. Id. (laboratory items number 9-2 and 9-3). Absolutely no evidence to the contrary was presented as to whether this material was marijuana, or whether it weighed in at over 500 grams. The State submits that where there is only evidence of Finneman having more than 500 grams of marijuana, a corresponding finding by the jury is not evidence of "hopeless confusion."

[¶27] The evidence was also undisputed as to Finneman possessing the marijuana and related materials. The materials were found in their shared bedroom. (R.O.A. Doc. Nos. 86, 87, 112). Defense counsel for Churchill, Atty. Green, even went so far as to reference lingerie sizes in the various drawers as a means of identifying whose stuff was whose. Finneman even claimed the items in an attempt to avoid liability for Churchill. Simply stated, the jury heard nothing whatsoever that would indicate that the marijuana and other materials were not Finneman's. As such, the State submits that the jury's

determination that Finneman possessed the marijuana is not evidence of "hopeless confusion" on the part of the jury.

[¶28] The only portion the trial where there was dispute by Finneman was on the topic of distribution. Here, Finneman cites to two law review articles in support of the claim that over 2.2 pounds of marijuana is "personal use" for a self-professed "pot-head." This runs contrary to the claims presented by Finneman to the jury that the more than 2.2 pounds of marijuana was for her dogs' health, and that it was worthless. Neither the jury nor the court heard the claims about the new "medical marijuana" law somehow showing that 2.2 pounds of marijuana is "personal use."

[¶29] Similarly, the question of THC content or concentration was not before the District Court and was not before the jury. As with the "medical marijuana" argument, the State requests that this extraneous material be treated in accordance with this Court's procedures for newly raised arguments. At best, these arguments appear to be after-the-fact contentions to somehow show that the jury was confused.

[¶30] In an attempt to bypass the money issue, Finneman claimed that if she was selling drugs, she would be putting the money in the bank account. However, Finneman failed to address the fact that if money began pouring into an account without any legitimate source, that in-and-of-itself signals potentially improper sources. It was undisputed that Finneman did not have a job, and, instead, smoked marijuana and supposedly took care of the children. The purchase of controlled substances, like any consumable product, requires money. Finneman's explanation did not address how she could, in a lower single income family with children, and with a bank account going into the red, afford to buy marijuana. The State submits that the jury correctly determined

that Finneman and Churchill's financial situation would not support this based on the income information provided by the defense.

[¶31] Based on the information presented by the defense, it appeared that rent was paid using money orders that were purchased with cash. As this Court is aware, narcotics dealing is a cash and carry operation. E.g. State v. Guthmiller, 2002 ND 116, 646 N.W.2d 724 (cash found among other materials).

[¶32] Critically, Finneman has presented nothing showing that the instructions themselves were contrary to the law. After reviewing the last version of the final instructions, the defense agreed with the language of the elements of the offense instruction for the Possession With Intent to Deliver charges. Finneman now claims that the instructions apparently did not properly set for the elements of the offenses.

[¶33] It is unknown why Finneman cites to Apprendi v. New Jersey, 530 U.S. 366 (2000) in support of these claims, as the jury had the opportunity to decide whether or not Finneman possessed more than 500 grams of marijuana with the intent to deliver it to another person. There was absolutely no doubt, and no contention to the contrary, that more than 500 grams of marijuana was involved.

[¶34] The jury received the instruction containing the elements of the offense, which also included the 500 gram enhancement language. See. State v. Bauer, 2010 ND 109, 783 N.W.2d 21 (including the enhancement provision of weapon in elements of offense instruction). As noted below, the jury was able to decide whether the large quantity of marijuana was possessed for sale or not, and did so with the co-defendant. The jury had the opportunity to make this decision.

[¶35] Perhaps the most fatal flaw in Finneman's claim that the jury was "hopelessly confused" about the language in the instructions is that her co-defendant, Churchill, was found not-guilty of possessing marijuana with intent to deliver. As a co-defendant in a consolidated trial, the verdict form for Churchill was identical to that for Finneman.

[¶36] The jury successfully navigated the forms, and came to the conclusion that Finneman committed the offense of Possession of Marijuana With Intent to Deliver and that Churchill did not. This likely relates to the fact that the individually bagged marijuana, the cash, and the digital scale with marijuana residue were found inside of Finneman's purse. The decision also tracks Finneman's attempts to claim everything at trial.

[¶37] The State submits that, if the instructions were as confusing as Finneman claims, Churchill's results would have been the same as Finneman's because the jury would not have understood what to do with the verdict form.

Conclusion

[¶38] Finneman pursued a strategy of claiming all of the drugs and the paraphernalia in an apparent attempt to save her partner from the convictions. The jury heard Finneman's explanations for the baggies of marijuana, and could clearly see that there were no varieties written on them. The jury could see the quantity of marijuana involved, the individual packaging for resale in Finneman's purse, the loose cash in her purse, and the digital marijuana scale in her purse. The jury could see part of Finneman and Churchill's bank records, and could see that the financials listed did not meet their obligations with the account going into the negative. The jury heard that there was more

than double the 500 gram threshold of marijuana present at the residence. Finneman now complains that the jury was "hopelessly confused" when it found her guilty of possessing more than 500 grams of marijuana with the intent to deliver marijuana to another person.

[¶39] Finneman's complaint is undercut by the fact that the same jury, in the same trial, hearing the same facts, and with the same instruction set, found her co-defendant not guilty of Possession of Marijuana With Intent to Deliver. If the verdict form and the instructions were to blame for Finneman's conviction, then Churchill should also have been convicted by Finneman's logic. That did not occur. As such, the State respectfully requests that this Court affirm the convictions and the denial of the motion for mistrial below.

Dated this 11th day of May, 2018.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577
53sa@co.williams.nd.us

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

State of North Dakota,	)	**CERTIFICATE OF SERVICE**
	)	
Plaintiff-Appellee,	)	**Sup. Crt. No.: 20170400**
	)	
vs.	)	**Dist. Crt. No.: 53-2015-CR-01956**
	)	
Jesseaca Finneman, a.k.a.	)	
	)	
Jesseaca Heather Finneman,	)	
	)	
Defendant-Appellant.	)	

[¶1] I, Nathan Kirke Madden, hereby certify that on May 4, 2018, a true and accurate copy of the State's Brief was served on Atty. Myhre by email.

Dated this 11th day of May, 2018.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577
53sa@co.williams.nd.us