

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	Supreme Court No. 20200118
vs.)	
)	District Court No. 09-2018-CR-02703
Ginny Rose Lubitz,)	
)	
Defendant-Appellant.)	

ON APPEAL FROM VERDICT OF GUILTY AND SENTENCE
 FROM THE DISTRICT COURT
 FOR THE EAST CENTRAL JUDICIAL DISTRICT
 CASS COUNTY, NORTH DAKOTA
 THE HONORABLE JOHN C. IRBY, PRESIDING

APPELLEE'S BRIEF

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[¶2] TABLE OF AUTHORITIES

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<u>State v. Brandner</u> , 551 N.W.2d 284, 286 (N.D. 1996)	¶22
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Other Authorities:

N.D.C.C. § 12.1-16-01	¶7, 24
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[¶3] STATEMENT OF THE ISSUES

[¶4] 1. Whether the District Court erred in denying the Defendant's request for a continuance.

[¶5] 2. Whether there was competent evidence presented during the trial which could have allowed the jury to draw an inference reasonably tending to prove guilt.

[¶6] STATEMENT OF CASE

[¶7] The Defendant appeals from her conviction for murder under N.D.C.C. § 12.1-16-01. The Defendant contends that the District Court erred in denying her request for a continuance and that there was insufficient evidence to support her conviction.

[¶8] The State asserts that there was competent evidence presented during the trial that allowed the jury to draw an inference reasonably tending to prove the Defendant's guilt, and that the District Court did not err in denying the Defendant's continuance request. The State requests that this Court affirm the Defendant's conviction.

[¶9] STATEMENT OF FACTS

[¶10] The Defendant has presented a lengthy Statement of Facts and the State incorporates it herein by reference.

[¶11] LAW AND ARGUMENT

I. [¶12] The District Court did not err in denying the Defendant's request for a continuance.

[¶13] The District Court did not err in denying the Defendant's request for a continuance. Motions for continuances are governed by Rule 6.1(b), N.D.R.Ct.

The pertinent language of the Rule is as follows:

“Other Continuances. Motions for continuance shall be promptly filed as soon as the grounds therefor are known and will be granted only for good cause shown, either by affidavit or otherwise. Stipulations for continuance will not be recognized except for good cause shown. Every continuance granted upon motion must be to a future date consistent with the docket currency standards for district courts, except for good cause shown.”

[¶14] The district court is responsible for the “decision to grant or deny a motion for a continuance.” Everett v. State, 2008 ND 199, ¶ 25, 757 N.W.2d 530 (citing State v. Kunkel, 452 N.W.2d 337, 339 (N.D. 1990)). “We review a district court’s decision to grant a continuance under an abuse of discretion standard.” Id. “A district court abuses its discretion by acting unreasonably, arbitrarily, or unconscionably.” Id. “When reviewing a trial court’s decision on a motion for continuance, an appellate court must look to the particular facts and circumstances of each case as there is no mechanical test for determining whether or not a trial court abused its discretion.” Kunkel, at 339.

[¶15] The trial court held a status conference on January 6, 2020 and the continuance request was discussed on the record. The Defendant argues that the trial court abused its discretion in denying the motion for continuance because

additional time was needed to gather information about whether the infant was born alive or stillborn. Specifically, she argues that the later disclosure of an email from the Cass County Chief Deputy Coroner to a county medical examiner in Los Angeles, California gave good cause for a continuance.

[¶16] The State indicated that the email at issue was immediately disclosed once its existence was discovered while meeting with chief deputy coroner Kriste Ross in the days prior to trial, and that ultimately, its conclusion replicated the same information as in the autopsy report that was previously discovered to the defense. The State proffered that this was the same conclusion, except from a different source and that it didn't add anything new or any kind of information that wasn't previously made known to the defense in order to prepare for trial. (Tr. p. 9, lns. 1-22; Jan. 6, 2020.)

[¶17] The trial court reviewed the autopsy report (exhibit 1 as referenced in the transcript and index #99 in case docket) and coroner email (exhibit 2 and index #100) during the status conference, and then concluded there was no prejudice in denying a continuance to the defendant as to this email:

“All right. I have had the opportunity to review Exhibit 1, at least the pertinent conclusion part and compare that with Exhibit 2 here. And to me, Exhibit 2 represents possible theory. It's not hard evidence of any kind. It represents a possible theory that was out there. I don't know that the State has an obligation to inform the defense of every possible theory that may be out there that would explain or otherwise explain what happened here. So I'm not seeing any prejudice to the defendant by not producing this earlier.”

(Tr. p. 13, lns. 12-21; Jan. 6, 2020.)

[¶18] The defendant also requested a continuance so that they could explore the cell phone information further. The State indicated that all of the pertinent information had been previously provided in an earlier cell phone dump. (Tr. p. 9-10, lns. 23-25, 1-23; Jan. 6, 2020.)

[¶19] The trial court agreed that this issue also did not warrant a continuance, as stated as follows:

“Now, as far as the phone goes. Again, the defense has had that for a considerable amount of time. I understand that there may be some complications in getting another download, but the possibility of anything else being found on that phone that would be exculpatory seems to be remote. And again, I don't think that that is a good reason to grant a motion to continue.”

(Tr. p. 14, lns. 3-9; Jan. 6, 2020.)

[¶20] As this Court stated in Kunkel, there is no specific mechanism to determine whether a trial court abuses its discretion in denying a continuance request. However, the record from the January 6, 2020 status conference is clear as to the information the trial court balanced in determining whether to grant a continuance. The trial court gave reasonable explanations as to how it had come to its decision. Thus, considering all that information, the trial court did not err in denying the Defendant's request for a continuance.

II. [¶21] **There was competent evidence presented during the trial which allowed the jury to draw an inference reasonably tending to prove guilt.**

[¶22] The Defendant argues that the evidence presented at trial was insufficient to sustain the guilty verdict of murder. A defendant challenging the sufficiency of the evidence “must show that the evidence, when viewed in the light

most favorable to the verdict, reveals no reasonable inference of guilt.” State v. Mohammed, 2020 ND 52, ¶ 5, 939 N.W.2d 498 (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)). The Court’s role is to “merely review 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. (quoting State v. Matuska, 379 N.W.2d 273, 275 (N.D. 1985)). The evidence should be viewed in the light most favorable to the prosecution, and the prosecution must be given the benefit of all inferences reasonably to be drawn in its favor. State v. O’Toole, 2009 ND 174, ¶ 8, 773 N.W.2d 201. It is important to note that the Court “does not weigh conflicting evidence or judge the credibility of witnesses.” Mohammed, at ¶ 5, (citing State v. Brandner, 551 N.W.2d 284, 286 (N.D. 1996)).

[¶23] A guilty verdict may be based entirely on circumstantial evidence, but the “evidence must be probative enough to establish guilt beyond a reasonable doubt.” Id. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts, and the Court “will not disturb it on appeal unless it is unwarranted.” Id. The Court “will reverse the decision of the trier of fact only if the record presents no substantial evidence to support the verdict.” Matuska, 379 N.W.2d at 275.

[¶24] At trial, the Defendant was found guilty of murder as set forth under N.D.C.C. § 12.1-16-01. The statute requires the State to prove that the Defendant intentionally or knowingly caused the death of another human being; or, caused the death of another human being under circumstances manifesting extreme

indifference to the value of human life. Id. The Defendant sets forth argument as to various aspects of the trial testimony in its brief to try to argue that there was not competent evidence presented during the trial to sustain the murder conviction. However, there was competent evidence presented at trial to support the Defendant's conviction for murder, and a review of the lengthy record from the trial reveals the same.

[¶25] The State called numerous witnesses during the trial. This included former friends of the Defendant, Tina Vondal and Kelly McIntire, who interacted with her on the days leading up to and on the day of the murder. Both testified about various issues, such as the bathroom where the murder occurred and the Defendant's demeanor on the day of the murder, among other things. More specifically, Ms. Vondal testified as to the day of the murder, where she observed that the Defendant had enclosed herself in the bathroom and would not come out. (Tr. p. 32; Jan. 8, 2020.) Eventually, she and McIntire had to push their way into the bathroom. (Tr. p. 42-43; lns. 21-25, 1-3; Jan. 8, 2020.) Vondal testified that the Defendant was able to communicate with her at this time. (Tr. p. 43; lns. 2-14, 1-3; Jan. 8, 2020.) She also was able to describe the Defendant's demeanor and her not wanting medical attention. (Tr. p. 47-48; lns. 6-25, 1-8; Jan. 8, 2020.) Finally, she also testified that Defendant had not disclosed her pregnancy. (Tr. p. 65-66; lns. 21-25, 1-2; Jan. 8, 2020.)

[¶26] Kelly McIntire also testified at the trial about the day of the murder. This included testimony about the Defendant denying that she was pregnant when

asked. (Tr. p. 78; Ins. 5-8; Jan. 8, 2020.) Ms. McIntire described the scene in the bathroom when she entered upon getting the door open. (Tr. p. 80; Ins. 15-18; Jan. 8, 2020.) This included the Defendant's ability to communicate and answer questions with her. (Tr. p. 81; Ins. 1-14; Jan. 8, 2020.) Ms. McIntire also found the baby face down in the tub in water. (Tr. p. 87; Ins. 8-22, Jan. 8, 2020.) There was then testimony regarding removing the baby from the bathtub. Ms. McIntire described a conversation with the Defendant where the Defendant indicated that she did not want 911 called and mentioning that there was no record of her being pregnant. (Tr. p. 94; Ins. 13-21; Jan. 8, 2020.) Moreover, the Defendant indicated to Ms. McIntire she did not want an ambulance "because of what I did." (Tr. p. 97; Ins. 10-17; Jan. 8, 2020.) The Defendant's cell phone was also found on the floor of the bathroom, which was later investigated as to its search history about pregnancy related items. (Tr. p. 95-96; Ins. 20-25, 1-4; Jan. 8, 2020.)

[¶27] The State's trial testimony also included Fargo Police Department Officer Heidi Witzel, who responded to the scene and had an interaction with the Defendant in the bathroom. (Tr. p. 177; Ins. 4-22; Jan. 9, 2020.) Officer Witzel held the infant to look for signs of life. (Tr. p. 175; Ins. 6-24; Jan. 9, 2020.) Additionally, there was testimony from Detective Chris Mathson, who was the State's case agent. He conducted further investigation this matter, which included an examination of the Defendant's cell phone records and searches, which revealed items related to pregnancy and labor. (Tr. p. 281; Ins. 11-25; Jan. 10, 2020.) The video interview conducted by Detective Mathson with the Defendant

was played for the jury during the State's case, which was lengthy and discussed numerous matters leading up to, during the laboring process, and following the birth and murder of the infant. This included discussion as to the Defendant being aware of her pregnancy and taking no action to prepare for it. Detective Mathson also confronted the Defendant on inconsistencies in her story. Moreover, during this interview, the Defendant indicated she had been conducting the searches on her phone for a younger pregnant family member. This was investigated and a younger pregnant family member was not found to have recently given birth. (Tr. p. 292; Ins. 13-25; Jan. 10, 2020). The jury was able to observe the Defendant's demeanor and draw their own conclusions as to credibility during this interview.

[¶28] The Cass County Chief Deputy Coroner, Kriste Ross testified as to her death investigation in this matter, which included her description of why her office got involved, her observation of the scene and a recorded audio interview with the Defendant while she was in the hospital. The audio interview was played for the jury during the State's case, and the jury would have been able to compare her statements in this interview to Detective Mathson's later interview. Finally, the State's witnesses also included the medical examiner who conducted the autopsy on the infant, Dr. Mary Ann Sens. Dr. Sens testified as to her education and experience and about the autopsy she performed on the infant in this case. This included her overall findings during the autopsy and observations that this was a term baby with no congenital defects with a stomach full of water. Thus, she concluded the cause of death was drowning. (Tr. p. 209; Jan. 9, 2020.)

[¶29] The jury heard all the testimony and was in the best position to evaluate the witnesses' credibility. There was competent evidence presented during the trial which could have allowed the jury to draw an inference reasonably tending to prove the Defendant was guilty of murder. The Defendant has failed to meet the standard for challenging the sufficiency of the evidence. When viewed in light most favorable to the verdict, the evidence at trial supported a reasonable inference of guilt. The Defendant has not established any reason to reverse the jury's decision.

[¶30] **CONCLUSION**

[¶31] The State requests that this Court affirm the Defendant's conviction of murder.

Dated this 13th day of August, 2020.

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[¶32] CERTIFICATE OF COMPLIANCE

[¶33] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8).

The page count is fourteen pages.

Dated this 13th day of August, 2020.

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[¶34] CERTIFICATE OF SERVICE

[¶35] A true and correct copy of the foregoing document was sent by e-mail
on the 13th day of August, 2020, to: Russell J. Myhre at efile@myhrelaw.com

Tracy E. Hines