

SUPREME COURT OF THE STATE OF NORTH DAKOTA

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AUG 09 2005  
  
STATE OF NORTH DAKOTA

State of North Dakota, )  
)  
Plaintiff and )  
Appellee, )  
)  
vs. )  
)  
Ryan C. Tulp, )  
)  
Defendant and )  
Appellant. )  
\_\_\_\_\_ )

Sup. Ct. No.: 20050178

Stutsman Co. No.: 47-04-K-10

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**APPELLANT'S BRIEF**  
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APPEAL FROM THE CRIMINAL JUDGMENT ENTERED ON APRIL 11, 2005

CASE NO.: 47-04-K-10  
COUNTY OF STUTSMAN  
SOUTHEAST JUDICIAL DISTRICT  
HONORABLE MIKAL SIMONSON

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### STATEMENT OF THE ISSUES

- I. Whether the trial court erred in denying Defendant's rule 29 motion because, as a matter of law, there was insufficient evidence on which to find Defendant guilty beyond a reasonable doubt.
- II. Whether the judgment should be reversed because the evidence does not support the verdict.

### STATEMENT OF THE CASE

This is an appeal from a judgment and commitment upon a jury verdict finding the Defendant, Ryan Tulp, guilty of delivery of a controlled substance, marijuana, a class B felony. Defendant was charged by criminal information dated February 24, 2004. (Docket #8; Appendix [App.] at 5). Trial was held on February 3, 2005. (Docket entries 23-30). At trial, Defendant made a motion for judgment of acquittal under rule 29 of the North Dakota Rules of Criminal Procedure, and the motion was denied. (TR. at 124-127). Defendant was found guilty "of the crime of delivery of a controlled substance, marijuana, as charged in the criminal information." (Docket # 30; TRANSCRIPT OF PROCEEDINGS, February 3, 2005, [hereinafter TR.], at 188). "JUDGMENT" was entered April 11, 2005. (Docket # 37; App. at 6). "NOTICE OF APPEAL" was mailed May 9, 2005. (Docket # 42; App. at 12). "NOTICE OF

APPEAL" was entered May 12, 2005. (Docket # 39; App. at 13). A motion was filed for an extension of time to file the appeal. (Docket # 46; App. at 14). The district court granted the motion. (Docket # 49; App. at 15).

#### STATEMENT OF DISPUTED FACTS

Note: The facts are delineated from the trial evidence with the standard of review in mind, and understanding that the jury chooses among conflicting pieces of evidence. This "STATEMENT OF DISPUTED FACTS" is in no way intended to admit to any of the testimony at trial or to concede to the accuracy of any of the jury's findings as to fact or credibility.

On or about October 22, 2002, the Stutsman County Drug Task Force received a report of drugs in a dorm room at Jamestown College. (TR. at 29-30, 31). On arriving at the dorm room, officers met with Claudia Chenard and two other people in the room. (TR. at 30). Consent was obtained for a search of the room. (TR. at 30). The officers found a small amount, "a gram or two", of marijuana in Ms. Chenard's purse. (TR. at 30, line 12). There are twenty-eight grams to an ounce of marijuana. (TR. at 30).

Ms. Chenard was brought to the Task force office, facing, according to Officer Scott Edinger, a "very minor - or a very small amount of drugs, it was a minor situation." (TR. at 30, lines 19-21). Ms. Chenard was "offered" a chance to get

herself out of the trouble in which she found herself. (TR. at 30). She signed a cooperation agreement with the task force. (TR. at 31, 94). She was asked to provide information or to do controlled buys for the task force. (TR. at 32). She was told controlled buys are the "quickest and easiest way to work off charges like that." (TR. at 32, lines 5-7). She was told to arrange two buys from two different people. (TR. at 32).

At the time of trial in February 2005, Claudia Chenard was twenty years old, a student at Minnesota State University, Moorhead. (TR. at 60). In the fall of 2002, she was a freshman at Jamestown State College, living in a dorm room at Kroeze Hall. (TR. at 61-62). She was from Eden Prairie, Minnesota. (TR. at 84). According to her testimony, at the time she was confronted about the small amount of marijuana found in her purse at the dorm room in October 2002, police officers indicated to her that she could go to court and deal with the consequences or she could "exchange and buy from somebody else in a bigger quantity in return" for her leave. (TR. at 63, lines 19-21). She understood that if she did as they asked, she would not be charged with her crime. (TR. at 63). She did not know what might happen to her if she faced her charges. (TR. at 64). She "took what sounded like a better deal . . . ." (TR. at 64, line 17). She was being

pressured by the school to cooperate with the officers. (TR. at 65, 87). She was afraid of where she might live if she were kicked out of the dorm. (TR. at 87-88). By April 2003, officers were pressuring her to "get with it already" and complete her agreement with them. (TR. at 66, line 4). Ms. Chenard was afraid to come before a judge and did not want a marijuana conviction on her record. (TR. at 90-91). She worried how it would affect her employability. (TR. at 91-92). She testified that at the time she would have done anything to avoid the marijuana conviction. (TR. at 96). She was told by law enforcement personnel that if she cooperated "this would be a lot easier." (TR. at 97). Later, when she found out that the consequences would not have been so severe, Ms. Chenard "really did regret the decision" she had made. (TR. at 64, lines 22-23).

At the time she signed the agreement Ms. Chenard did not know where she could buy marijuana in order to satisfy the agreement. (TR. at 63). She did not know people on campus who smoked marijuana. (TR. at 63). She testified that she "just knew people that had smoked once in a while, but I didn't know them very well enough to know if I could buy from them or not." (TR. at 63). In October 2002, Claudia Chenard

had never met Ryan Tulp. (TR. at 63). In April 2003, she had met Ryan Tulp, had "run across him very randomly", (TR. at 67, lines 6-7), had never smoked marijuana with Ryan Tulp, (TR. at 68, 88-89), and had never seen Ryan Tulp smoke marijuana, (TR. at 68). She had never seen Ryan Tulp sell marijuana to anyone. (TR. at 89).

At trial, Officer Scott Edinger of the Task Force described a controlled buy:

That is a situation where we'll have an informant who has information about someone who is selling drugs. That informant may know the person or they may get to know the person. They'll get to know them well enough that they can actually purchase drugs from that person. They'll contact us and then we'll generally, in this case and as in most, we'll meet with that person shortly before the buy. They'll be searched to make sure that they're not actually bringing drugs with them, not bringing any money with them. We provide them with money. We usually place a wire transmitter, it's a small radio that we can listen to what's going on inside when a controlled buy is going on. And then they'll go in and meet with that person and purchase whatever has been prearranged or whatever



they usually purchase.”

(TR. at 28, line 22, through TR. at 29, line 11).

The task force had no particular target but left it up to Ms. Chenard to find targets. (TR. at 33). On April 11, 2003, six months after Ms. Chenard signed the cooperation agreement, she called the Task Force office and told them that she could buy some marijuana from a “Ryan Tulp.” (TR. at 33, lines 10-12). At the office she made a telephone call, saying that she was calling “Ryan to set up the buy . . . .” (TR. at 33, lines 24-25). Ms. Chenard testified that she called a number she had listed for Ryan Tulp and her call was answered. (TR. at 68). The person who answered did not identify himself as Ryan Tulp. (TR. at 69). During that time Ms. Chenard was searched and wired. (TR. at 33-34). The search was merely a frisk search and not a full strip search. (TR. at 71). Ms. Chenard was provided \$100 with which to buy marijuana. (TR. at 40). She was driven to 1210 2<sup>nd</sup> Avenue Southwest in Jamestown. (Tr. at 35). Agents were placed in the area “to protect” Ms. Chenard in case of “some trouble.” (TR. at 36, lines 11-15). Her wire was set to a radio frequency on the officers’ car radios and was recorded on a cassette tape in Officer Edinger’s vehicle. (TR. at 35).

Ms. Chenard was seen by officers entering the apartment building, but was not observed by officers inside the

building. (TR. at 38, 107). Almost immediately after Ms. Chenard entered the building, Officer Edinger heard voices coming over the radio. (TR. at 39). He identified that the heard a male voice, Ms. Chenard's voice, and two other females in the background. (TR. at 39). He heard Claudia ask the male what his last name was, and he heard the word "Tulp". (TR. at 39). Officer Edinger heard mention of a "half ounce" and "\$100", as well as discussion about another "quarter ounce" for "\$20", which was declined by Ms. Chenard. (TR. at 40, lines 1-5, 11-12). Ms. Chenard was in the building a "very short" time, just a couple of minutes. (TR. at 39, lines 20-21). Officer Edinger indicated it was one of the shortest buys the Task Force had ever done. (TR. at 39). Officer Edinger saw Ms. Chenard leave the building, but he did not see her walk to the car in which another agent waited for her. (TR. at 40).

Agent Mark Hendrickson transported Ms. Chenard to the scene of the buy. (TR. at 106). Ms. Chenard got out of the vehicle at 3:13 p.m. according to Agent Hendrickson. (TR. at 110). Ms. Chenard's walk from the vehicle to the apartment took like "five - maybe a few minutes." (TR. at 73). Officer Hendrickson saw her enter the building. (TR. at 107). He monitored the transmission from the wire, which was placed in Ms. Chenard's purse. (TR. at 107-108). Approximately one

minute after Agent Hendrickson dropped off Ms. Chenard, he heard conversation from the wire. (TR. at 108). He heard Ms. Chenard say "Hey you" and ask for a last name, with a male answering "Tulp". (TR. at 112). He heard conversation relating to "bigger ones" and "red hair". (TR. at 113). Agent Hendrickson testified to hearing talk of another "quarter" for twenty bucks. (TR. at 115). He heard Ms. Chenard leaving and, a few seconds later, saw her leave the building. (TR. at 115). She came back to his car and handed him a bag of marijuana. (TR. at 116-17). The marijuana was later measured to be 10.36 grams. (TR. at 122). No fingerprints were found on the marijuana. (TR. at 57). There was no evidence at trial as to whether the money was ever recovered. Although the buy occurred in April 2003, charges were not brought until January 2004. (TR. at 43-44).

Claudia Chenard testified that she went to an apartment about 15-20 feet from the door of the building. (TR. at 73). She stated that "Ryan" answered the door. (TR. at 73, line 24). She testified that she only knew his first name so she asked him his last name and he stated that it was Tulp. (TR. at 74). She stated that she accompanied the person to his bedroom where he opened up a shelf where there were a couple of baggies. (TR. at 74). She testified that he handed her some marijuana and she handed him the money. (TR. at 75).

She testified that he did not offer to sell her any more. (TR. at 75). As she was leaving, two girls whom she did not know came into the building. (TR. at 75).

Nobody besides Claudia Chenard witnessed the deal. (TR. at 89). Law enforcement officers were not in a position to observe the transaction. (TR. at 89). Contrary to her signed agreement with law enforcement, Claudia Chenard smoked marijuana between October 22, 2002, and April 11, 2003. (TR. at 90). By her own admission, she continued to break the law after signing the agreement and she breached the signed agreement. (TR. at 90, lines 14-17).

At trial, Ms. Chenard was asked, "And did Mr. Tulp, sitting hear at the table, have you ever seen him before?" (TR. at 62, lines 4-5). Ms. Chenard answered, "I saw him freshman year a lot, yeah." (TR. at 62). She did not specifically identify the Defendant in the courtroom as the person from whom she purchased marijuana on April 11, 2003. Ms. Chenard's telephone records were never checked to see who she actually called on April 11, 2003, to set up the buy. (TR. at 95). A voice analyses was never done on the tape of the buy. (TR. at 56).

Jodi Myers testified to knowing Claudia Chenard at Jamestown College in 2002. (TR. at 151-152). Claudia Chenard was one of the first persons Ms. Myers met when she came to

Jamestown. (TR. at 152). They had several friends and acquaintances in common. (TR. at 152). She testified that Claudia Chenard "was dishonest and not someone you would trust with your life." (TR. at 153).

At the time of trial, Ryan Tulp had no criminal record. (TR. at 128). He was employed in Valley City taking care of a mentally disabled child. (TR. at 128). Prior to moving to Valley City, he lived in Jamestown at 117 1<sup>st</sup> Street West, Apartment 3. (TR. at 128). Although he did not reside at 1210 2<sup>nd</sup> Avenue Southwest, No. 2, in Jamestown, he stayed there "quite a bit." (TR. at 129, line 4). Mr. Tulp would have stayed there part of the time around April 11, 2003. (TR. at 130). In Jamestown, Mr. Tulp worked at the Anne Carlson School as a life skills trainer and a certified medical assistant. (TR. at 129).

Mr. Tulp testified that he never sold marijuana to Claudia Chenard and that he never saw her at any of the apartments he was at. (TR. at 131-132). According to Mr. Tulp, he left Jamestown to go to Valley City around noon on April 11, 2003. (TR. at 132). Mr. Tulp testified that he was still in Valley City around 3:00 to 3:15 p.m. (TR. at 132). Mr. Tulp remembers his activities of that day because it was the Friday following the first concert he had attended in Grand Forks. (TR. at 135).

Mark Stockert testified that Ryan Tulp came to his house in Valley City at around 4:00 on April 11, 2003. (TR. at 142). He remembered Mr. Tulp talking of an argument he had with his girlfriend which made it apparent that Mr. Tulp had been in Valley City for a time prior to coming to his house. (TR. at 143-144). He remembers the day because Mr. Tulp had left his car with him to go to the concert two days prior. (TR. at 145).

#### ARGUMENT

I. Whether the trial court erred in denying Defendant's rule 29 motion because, as a matter of law, there was insufficient evidence on which to find Defendant guilty beyond a reasonable doubt.

When ruling on a motion for judgment of acquittal pursuant to rule 29, N.D.R.Crim.P., "the trial court must[,] first, assume the truth of the evidence which supports the State's case, and then, second, decide whether or not a reasonable person would be justified in concluding from this evidence that all the elements of the crime have been established beyond a reasonable doubt." *State v. Dymowski*, 458 N.W.2d 490, 499 (N.D. 1990). Circumstantial evidence alone may convict a defendant only "if it is of such probative force as to enable the trier of fact to say that the defendant is guilty beyond a reasonable doubt." *State v. McMorrow*, 286

N.W.2d 284, 286-87 (N.D. 1979). The evidence must "connect the defendant with the crime", be more than an invitation for "mere speculation that the defendant may have been in the general vicinity of the crime", and must be sufficient to establish proof beyond a reasonable doubt. *Id.* at 287.

At the close of the state's case, the Defendant had not been identified as the Ryan Tulp referred to by the testimony of the witnesses. Ms. Chenard was the only person who was present at the time she allegedly purchased the marijuana. Although officers had a tape of the alleged transaction, there was no voice analysis done to identify the voice on the tape as that of the Defendant's. The police officers had no independent knowledge of Ryan Tulp's residence or whereabouts at the time of the buy. The money used for the buy was not found in Defendant's possession. No fingerprints were found on the bag of marijuana that would connect it to Defendant. The rule 29 motion should have been granted. *See, e.g., State v. Olson*, 244 N.W.2d 718, 721 (N.D. 1976) (indicating that in cases when there is insufficient corroborating facts or circumstances to establish the defendant's identity, in-court identification becomes critical).

The evidence from the confidential informant in this case is very similar to the uncorroborated evidence before the Nebraska Supreme Court in *State v. Jimenez*, 533 N.W.2d 913

(Neb. 1995). In that case, the court ruled the evidence insufficient , stating:

Here, everything which ties Jimenez to the events recorded on the tape depends on Hubbard's [cooperating witness's] testimony; Hubbard identified Jimenez as the person from whom drugs could be purchased, Hubbard identified the building [the detective] saw Hubbard approach as containing Jimenez'[s] residence, and only Hubbard identified Jimenez'[s] voice on the recording. Indeed, although Overman testified that he talked with Jimenez sometime in October, there is no testimony that the voice Overman heard on that occasion matched the taped voice identified by Hubbard as belonging to Jimenez. Neither was any attempt made to otherwise identify the seller's voice or to obtain fingerprints from the bag containing the drugs Hubbard surrendered to the police.

The fact that an officer had seen Jimenez in the area of the apartment at other times does not establish that Jimenez was in the apartment with Hubbard at the time the drug purchase took place. And while the references in the tape to "Fernando" may suggest that someone named Fernando was at



least being sought, they neither alone nor combined with the fact that Jimenez had been seen in the area at other times establish that the Fernando referred to is the Fernando Jimenez in question.

*Id.* at 259-260. The Nebraska court was aided by a statute requiring corroboration of the testimony of cooperating witnesses in drug cases, *id.* at 258, and North Dakota apparently has no such requirement. However, the weaknesses in the state's case in this action are very similar to those in the Nebraska case. No one identified the voice on the tape as belonging to Defendant. Those weaknesses, coupled with the lack of an in-court identification of Defendant as the person who purchased the marijuana from Ms. Chenard, make it impossible for a reasonable factfinder to find Mr. Tulp guilty beyond a reasonable doubt.

The in-court identification was critical in this case, and there was insufficient evidence to compensate. The trial court erred by not granting the motion for acquittal under rule 29.

II. Whether the judgment should be reversed because the evidence did not support the verdict.

"It is a well-settled rule of statutory construction that criminal statutes are strictly construed in favor of the defendant and against the government." *State v. Plentychief*,

464 N.W.2d 373, 375 (N.D. 1990). The state must prove each element of the offense beyond a reasonable doubt. *Id.* at 376. On review, this court will not weigh conflicting evidence or judge the credibility of the testimony, but will "look for competent and substantial evidence from which the jury could reasonably conclude" the defendant was guilty. *Id.* If, when viewing the evidence in the light most favorable to the verdict, this court is unable to find evidence that supports proof of the elements of the crime beyond a reasonable doubt, it will reverse the conviction. *Id.*

Circumstantial evidence alone may justify a conviction only if "it is of such probative force as to enable the trier of fact to say that the defendant is guilty beyond a reasonable doubt." *State v. Lawenstein*, 346 N.W.2d 292, 293 (N.D. 1984). At trial the "circumstantial evidence must be conclusive and must exclude every reasonable hypothesis of innocence[.]" *Id.* On appeal, this court reviews "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.* The evidence must fairly warrant a conviction. *State v. Kaloustian*, 212 N.W.2d 843, 845 (N.D. 1973).

Many of the weaknesses in the state's case are

identified earlier in this brief. In addition, Ms. Chenard's testimony was inherently unreliable. By her own admissions, she would have done anything to have gotten out of her predicament without having a conviction on her record. She felt pressured by the school and by the police. Her interest in the outcome of this matter was clear. She admitted to violating the agreement she had with law enforcement by continuing to use illegal drugs. Apparently, refraining from criminal activity was not one of the things she was willing to do in order to keep a clean criminal record. In any case, her own admissions indicate that she lacked truthfulness and trustworthiness. This lack of trustworthiness and truthfulness was confirmed by the testimony of Jodi Meyers.

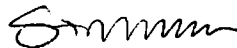
Without the testimony of Claudia Chenard, there is no evidence to support the state's case. The lack of evidence coupled with Ms. Chenard's untrustworthiness make it clear that there was insufficient evidence for a rational factfinder to find Defendant guilty beyond a reasonable doubt.

#### **CONCLUSION**

In conclusion, the judgment and verdict of the trial court should be reversed. The court should remand the matter to the district court with instructions to dismiss with prejudice.

Respectfully submitted this 9th day of August, 2005.

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SUPREME COURT OF THE STATE OF NORTH DAKOTA

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**AFFIDAVIT OF SERVICE BY MAIL**

Sup. Ct. No.: 20050178  
Burleigh Co. No.: 47-04-K-10

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STATE OF NORTH DAKOTA )  
 ) ss.  
 COUNTY OF CASS )

Pamela J. Johnson, being first duly sworn, deposes and says that she is over the age of 18 years and is not a party to nor interested in the above-entitled matter.

That on the 9<sup>th</sup> day of August, 2005, she served the following:

**APPELLANT'S BRIEF and APPELLANT'S APPENDIX**

upon  
Jay Schmitz, Assistant State's Attorney

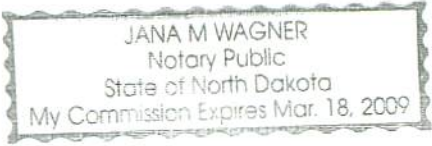
by placing a true and correct copy thereof in an envelope addressed as follows:

Jay Schmitz  
Assistant State's Attorney  
Stutsman County Courthouse  
511 2<sup>nd</sup> Ave. SE  
Jamestown, ND 58401

and depositing the same, with postage prepaid, in the United States mail at Fargo, North Dakota. To the best of affiant's knowledge, the address above-given was the actual post office address of the person intended to be so served.

*Pamela J. Johnson*  
\_\_\_\_\_  
Pamela J. Johnson

Subscribed and sworn to before me this 9<sup>th</sup> day of August, 2005.



*Jana M. Wagner*  
\_\_\_\_\_  
Notary Public