ORIGINAL

IN THE SUPREME COURT 20050368

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20050368

State of North Dakota,

Plaintiff-Appellee,

- vs -

Daniel J. Myers,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CRIMINAL NO. 03-K-1839
THE HONORABLE BRUCE B. HASKELL, PRESIDING

APPELLANT'S BRIEF

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NATURE OF THE CASE

The Defendant, Daniel J. Myers was charged in an Amended Criminal Information with three counts:

1. Count I, Possession With Intent to Deliver Marijuana;
2. Count II, Possession of Drug Paraphernalia (snort tube and tin foil); and
3. Count III, Possession of Drug Paraphernalia (scale and baggies).

To these charges, the Defendant plead not guilty.

A jury trial was held on June 24, 2005. After the state rested, the Defendant made a Rule 29 Motion for acquittal based on insufficient evidence. That motion was denied.

At the conclusion of the trial, the Defendant was found guilty.

The Defendant was sentenced on September 27, 2005 to the following:

1. On Count I, seven years in the custody of the Department of Corrections.
2. On Count II, five years in the custody of the Department of Corrections.
3. On Count III, one year in the custody of the Department of Corrections.

The above sentences were to run concurrent to the sentences the Defendant was already serving and the above sentences all commenced on September 27, 2005.

From the Judgment and sentence, the Defendant timely appealed.

STATEMENT OF THE FACTS

Defendant-Appellant, Daniel J. Myers ("Mr. Myers") was charged in an Amended Criminal Information with three counts:

1. Count I, Possession With Intent to Deliver Marijuana;
2. Count II, Possession of Drug Paraphernalia (snort tube and tin foil); and
3. Count III, Possession of Drug Paraphernalia (scale and baggies).

During the trial of the above charges:

1. Voir Dire was waived by the State and the Defendant. Tr. P. 5, L. 24 - 25, P. 6, L. 1 - 2.

2. Opening statements given by the State and the Defendant were recorded. Tr. of Opening Statements and Closing Arguments, P. 1, L. 3 to P. 7, L. 20.

3. Closing arguments given by the State and the Defendant were recorded. Tr. of Opening Statements and Closing Arguments, P. 7, L. 22 to P. 20, L. 11.

In the Prosecutor's closing arguments, she made the following comment:

"Do we have any statements at this point where Mr. Myers said oh no, I have nothing to do with this room, I'm only a mere visitor?" Tr. of Opening Statements and Closing Arguments, P. 13, L. 1 - 3.

No admonition by the judge to the jury was ever given when a recess was taken. Tr. P. 70, L. 17 - 19.

At the trial of this case, the State called only two witnesses, Kennen Kaiser and Troy Schaner. Tr. P. 12 - 68.

On March 24, 2003, the Bismarck Police were doing a criminal investigation of a

drug transaction that involved methamphetamine. This investigation was based on information the Bismarck Police had received from a confidential informant about a shipment of methamphetamine from Minot, North Dakota to a motel in Bismarck, North Dakota. Officer Kaiser had information on whom two of the recipients of the methamphetamine were, and they were apprehended at a Bismarck motel. The third recipient got away. Officer Kaiser believed the third recipient was Mr. Myers. Tr. P. 12, L. 22, P. 14, L. 25 and P. 15. L. 1 - 9.

The Bismarck Police then received a phone call from the manager of the Comfort Inn in Bismarck, North Dakota informing them that Mr. Myers was staying at that motel. Tr. P. 16. L. 17 - 25.

Officer Kaiser, based on a prior search warrant and the information that Mr. Myers was staying at the Comfort Inn, got a search warrant for room 336. Tr. P. 17, L. 2 - 11.

Officer Kaiser and other law officers then went to the Comfort Inn to execute the search warrant. Tr. P. 17, L. 2 - 11. Officer Kaiser began walking toward room 336 with a maintenance man from the Comfort Inn. Between the second floor hallway and the third, an individual walked by, and the maintenance man said, "that is Danny". Officer Kaiser stopped the individual and asked, "are you Danny Myers"? The individual said he was. Officer Kaiser then handcuffed Mr. Myers and escorted him toward room 336. Tr. P. 18, L. 10 - 25, P. 19, L. 1 - 24.

As Officer Kaiser and Mr. Myers moved toward room 336, Mr. Myers told Officer Kaiser that he wanted to cooperate because he had things hanging over his head.

Officer Kaiser then informed Mr. Myers that they will have to talk at the Bismarck Police Department after room 336 is searched. Tr. P. 19, L. 25 and P. 20, L. 1 - 6.

Bismarck Police Officer, Troy Schaner was the first law officer to enter room 336. Tr. P. 62, L. 23 - 25. The only person he and the other law officers found in room 336 was Tina Myers, Mr. Myers' wife. Tr. P. 20, L. 9 - 17.

The law enforcement officers then began to search room 336. Officer Kaiser was the evidence custodian. Tr. P. 20, L. 22 - 25, P. 21, L. 1 - 8.

Items found during the search are:

1. $866.00 on Tina Myers. Tr. P. 23, L. 18 - 22.
2. Bag of marijuana. Tr. P. 24, L. 22 - 23.
3. Tin foil with burn marks. Tr. P. 26, L. 9 - 10.
4. Blue case with postal scale. Tr. P. 28, L. 4 - 7.
5. Two packages of small baggies. Tr. P. 29, L. 19 - 25, P. 30, L. 1.
6. Box of Our Family sandwich bags. Tr. P. 31, L. 15 - 20.
7. Roll of reynolds wrap. Tr. P. 32, L. 24 - 25.
8. Two pen tubes. Tr. P. 33, L. 21 - 25.

The following items were taken to the state lab for testing:

1. Baggie of marijuana.
2. The scale.
3. Tin foil.
4. The two pen tubes. Tr. P. 34, L. 24 - 25 and P. 35, L. 1 - 15.

Exhibit 10, which was a certified copy of the lab report on the tests performed on

the items taken to the lab, was admitted into evidence at trial without an objection. Tr. P. 36, L. 3 - 16.

During the search, law officers saw suit cases that indicated both Mr. Myers and Mrs. Myers were staying in room 336. Tr. 41, L. 6 - 15.

Mr. Myers and Mrs. Myers were then taken to the Bismarck Police Department and placed in separate rooms. Mr. Myers was interviewed by Officers Benson, Schaner and Kaiser. Tr. P. 42, L. 5 - 12. During that interview Mr. Myers again said he wanted to cooperate with the Police. Tr. P. 43, L. 14 - 18. Before anything else was said, Officer Kaiser read Mr. Myers his Miranda Rights and Mr. Myers signed a right form. Tr. P. 43, L. 19 - 25. P. 44, L. 1 - 13.

Mr. Myers then informed Officer Kaiser about two drug deals. One deal involved an individual named Jason Counts. Tr. P. 44, L. 14 - 25 and P. 45, L. 1 - 22. The other deal involved a woman named Terri Ann Gourneau. Tr. P. 46, L. 15 - 19.

Mr. Myers wanted to be a confidential informant. Tr. P. 45, L. 23 - 24.

Mr. Myers even made a phone call to Terri Ann Gourneau. Tr. P. 48, L. 17 - 19.

During the interview Mr. Myers cooperated with the police and gave them information. As a result, instead of arresting and jailing him, the police released him. Tr. P. 50, L. 3 - 5.

According to Officer Kaiser's testimony, there were no drug deliveries that he was aware of in the Comfort Inn. Tr. P. 52, L. 21 - 25 and P. 53. L. 1. Also, the bag of marijuana that was found during the search of room 336 could have been purchased as well as sold. Tr. P. 54, L. 23 - 25 and P. 55, L. 1 - 3.

ARGUMENT

ISSUE I.

SHOULD THIS CASE BE REMANDED FOR A NEW TRIAL BECAUSE THE PROSECUTOR IN HER CLOSING ARGUMENT REFERRED TO THE DEFENDANT MYERS POST ARREST SILENCE?

The individuals rights that Mr. Myers relies on against self incrimination are set out below in the 5th Amendment to the United States Constitution, Article 1 § 12, the North Dakota Constitution, and in North Dakota Statute, N.D.C.C. 29-21-11.

Amendment 5 to the United States Constitution:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (emphasis added)

Article 1, § 12, of the North Dakota Constitution:

"In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or

property without due process of law." (emphasis added)

N.D.C.C. 29-21-11:

"In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at the defendant's own request and not otherwise, must be deemed a competent witness, but the defendant's neglect or refusal to testify does not create or raise any presumption of guilt against the defendant. Nor may such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place." (emphasis added)

In North Dakota, prosecutors have commented on Defendants not testifying in voir dire and opening statements and such comments were not reversible error.

In the case *State v. Flohr*, 310 N.W.2d 735 (N.D. 1981), the prosecutor made a comment to a prospective jury abut a Defendant testifying. *Flohr's* ruling on that comment was:

"It is a fundamental principle of constitutional law that the prosecutor may not comment on defendant's failure to testify in a criminal case. Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). In this case, the statement could not have been made for the purpose of drawing the jury's attention to the fact that the defendant had not taken the stand, because the trial had not yet started. The statement did not pre-empt Flohr's right not to testify nor did it imply any criticism of Flohr, should he not testify. Although remarks of this kind by prosecutors are not to be praised, under the circumstances in this case, it was not reversible error in view of the corrective action

taken by the trial court."

In both *State v. Morman*, 154 N.W.2d 55 (N.D. 1967) and *State v. His Chase*, 531 N.W.2d 271 (N.D. 1995), the prosecutors made comments about defendants testifying in their opening statements. In these cases, it was decided that such a comment is not a comment on a defendant's failure to testify, because the prosecutors opening statement is made before the defendant has had an opportunity to testify. Therefore, at the time of the prosecutor's opening statement, because it isn't known whether or not a defendant will testify, any comment made by a prosecutor at that time can't be a comment on the defendant's failure to testify.

The statement made by the prosecutor in the case now before the Court, was made during the prosecutor's closing argument. At that point of the trial, the prosecutor knew the time for Mr. Myers to testify had past, and Mr. Myers had not testified. The prosecutor also knew from the testimony of Officer Kaiser that Mr. Myers had been given his Miranda Rights.

The statement that the prosecutor made was:

"Do we have any statements at this point where Mr. Myers said oh no, I have nothing to do with this room, I'm only a mere visitor?"

Comments on a Defendant's failure to tell his version of events before trial are discussed in the following from *City of Williston v. Hegstad*, 1997 ND 56, 562 N.W.2d 091:

". . . the prosecutor's reference to Hegstad's silence <u>after</u> he had received his <u>Miranda</u> warnings, "or more generally to [Hegstad's] failure to come forward with his

version of events at any time before trial . . . crossed the Doyle line." Brecht v. Abrahamson, 507 U.S. 619, 629 - 30, 113 S.Ct. 1710, 1717, 123 L.Ed.2d 353, 367-68 (1993). When the prosecutor argued to the jury Hegstad "didn't tell anybody – not the hospital person, not the other police officer, nobody – until today," the prosecuting attorney clearly used Hegstad's post-arrest silence after receiving Miranda warnings to impeach his exculpatory story, in violation of Doyle v. Ohio. The City bears the burden of proving that a Doyle error was harmless beyond a reasonable doubt. Brecht, 113 S.Ct. At 1717."

Mr. Myers believes the above statement made by the prosecutor during closing argument is reversible error, because it was made after he elected not to testify, and it implied criticism because he didn't testify.

ISSUE II.

WAS IT REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO GIVE THE ADMONISHMENT REQUIRED BY N.D.C.C. 29-21-28?

A recess was taken after the State rested. According to the Tr. at P. 70, L. 17 - 19, the following occurred:

MR. GLASS: Could I have a five minute recess, Your Honor?

THE COURT: Sure. Why don't we make it ten.

(2:10 p.m. - reconvened in open court with all parties present).

From the above, it appears that when the recess was taken, no admonishment was given to the jury. The admonishing that is required to be given at the start of the recess is

set out in N.D.C.C. 29-21-28:

"Court must admonish jury. The jurors also, at each adjournment of the court, whether permitted to separate or required to be kept in charge of officers, must be admonished by the court that it is their duty not to converse among themselves nor with anyone else on any subject connected with the trial, nor to form or express any opinion thereon, until the case is finally submitted to them."

State v. Julson, 202 N.W.2d 145 (N.D. 1972) allows a trial judge to make the entire admonition at the start of a trial and at other appropriate times only say to the jury, "Members of the jury, bear in mind the Court's usual admonition."

In the case now before the Court, the transcript shows no admonition of any kind was given before the recess that ended at 2:10 p.m.

ISSUE III.

WAS THERE EVIDENCE SUFFICIENT TO CONVICT DANIEL J. MYERS OF THE OFFENSES CHARGED?

In this case, the trial court, at the conclusion of the state's case, denied Mr. Myers Rule 29 Motion for acquittal based on insufficiency of the evidence. Mr. Myers is now asking the Supreme Court to grant him an acquittal based on insufficiency of the evidence.

In order to successfully challenge the sufficiency of the evidence on appeal, the defendant must show that the evidence view in the light most favorable to the verdict and permits no reasonable inference of guilty. *State v. Fashing*, 461 N.W.2d 102 (N.D. 1990).

Mr. Myers believes this case to be a circumstantial evidence case. According to the witnesses testifying during the trial, Mr. Myers was never seen in room 336 at the Comfort Inn in Bismarck, North Dakota. Even if a jury could find that Mr. Myers was in room 336, there was no evidence produced to indicate that he ever possessed the $866.00. In fact, the only testimony about the $866.00 was that it was in the possession of Tina Myers. Also, there was no evidence produced that established he was ever in possession of the bag of marijuana, the tin foil with burns, the blue case with postal scale, the two packages of small baggies, the roll of reynolds wrap or the two pen tubes.

The standard of review for insufficiency of the evidence is a strict standard of review that only allows a motion for judgment of acquittal to be granted if the evidence is insufficient to sustain a conviction of the offenses charged. *State v. Ohnstad*, 359 N.W.2d 827 (N.D. 1987)

CONCLUSION

It was reversible error for the prosecutor to comment in her closing argument about Mr. Myers post arrest silence.

It was reversible error for the Court to fail to admonish the jury before the recess that ended at 2:10 p.m.

There is insufficient evidence to sustain Mr. Myers' conviction on count three.

DATED at Mandan, North Dakota, this 17 day of May, 2006.

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CERTIFICATE OF SERVICE BY MAIL

State of North Dakota, Plaintiff - Appellee, vs. Daniel J. Myers, Defendant - Appellant.	)	Supreme Court No.: 20050368

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on May 17th, 2006, she served, by hand delivering, a copy of the following:

APPELLANT'S BRIEF

by leaving a copy with the person(s) hereinafter named or with their office, at their last known address as follows:

Cynthia M. Feland
Assistant State's Attorney
514 E. Thayer Avenue
Bismarck, ND 58501

The undersigned further certifies that on May 17th, 2006, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and a 3½" computer diskette containing the full text of the Brief.

Jacqueline Haag

Jacqueline Haag, Legal Assistant to
Benjamin C. Pulkrabek