ORIGINAL

20050368

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, -vs- Daniel J. Myers, Defendant-Appellant.	Supreme Ct. No. 20050368 District Ct. No. 08-03-K-1839 SA No. F 282-287-03-04

BRIEF OF PLAINTIFF-APPELLEE

Appeal from the District Court Judgment
Dated September 29, 2005
South Central Judicial District
The Honorable Bruce B. Haskell, Presiding

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STATEMENT OF THE ISSUES

I. Whether a reference to a proposition presented in the defendant's opening statement by the State in its closing argument constitutes harmless error.

II. Whether the District Court's failure to admonish the jury prior to a ten-minute recess constitutes reversible error.

III. Whether there was sufficient evidence presented at trial to sustain the jury verdict of guilty.

STATEMENT OF THE CASE

In April of 2003, the defendant, Daniel J. Myers (hereinafter Myers) was charged with Possession a Controlled Substance (Marijuana) with Intent to Deliver, (Class B Felony), Possession of Drug Paraphernalia (methamphetamine), (Class C Felony), and Possession of Drug Paraphernalia (marijuana), (Class A Misdemeanor) by complaint and pled not guilty to the offenses.

On June 24, 2005, a jury trial was conducted with Myers being found guilty of the offenses.

Myers' version of the facts of the case is for the most part correct and additional facts as they relate to each issue shall be brought out in the brief.

LAW & ARGUMENT

I. The Comment in the State's Closing Argument Was Not a Statement Regarding Myers' Failure to Testify at Trial.

"The control and scope of closing arguments are left to the discretion of the trial court." State v. Ebach, 1999 ND 5, ¶ 5, 589 N.W.2d 566; State v. Evans, 1999 ND 70, ¶ 11, 593 N.W.2d 336; and State v. Ash, 526 N.W.2d 335 (N.D. 1995). A guilty verdict will not be reversed on the ground the prosecutor exceeded the permissible scope of closing argument unless a clear abuse of the trial court's discretion is shown. State v. Ebach, 1999 ND 5, ¶ 5, 589 N.W.2d 566; State v. Evans, 1999 ND 70, ¶ 11, 593 N.W.2d 336; and State v. Ash, 526 N.W.2d 335 (N.D. 1995). "To establish an abuse of discretion, absent a fundamental error, the defendant must demonstrate the prosecutor's comments in closing argument were improper and unfairly prejudicial." State v. Ebach, 1999 ND 5, ¶ 5, 589 N.W.2d 566, citing, State v. Marks, 525 N.W.2d 298, 302 (N.D. 1990). An error is unfairly prejudicial only if a different decision would have resulted, absent the error. State v. Ebach, 1999 ND 5, ¶ 5, 589 N.W.2d 566; and State v. Azure, 525 N.W.2d 654, 656 (N.D. 1994).

Myers contends that the State improperly commented on his election not to testify at trial during closing argument when the prosecutor stated, "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?" Appellant's Brief, Pp. 7-10. The comment complained of by Myers was not in reference to his failure to testify at trial, but to his failure during his voluntary statement to law enforcement to divest himself of ownership to the motel room where the drugs and drug paraphernalia were recovered. Trans. of Opening Statements and Closing Arguments, Pp. 15-16. Myers

did not remain silent after his arrest and Miranda warnings; rather, he proceeded to tell law enforcement about his drug activities. See, Trial Trans., Pp. 43-51.

Further, the allegedly improper comment was "invited" by defense counsel's opening statement wherein he stated, "In fact he wasn't even staying at that particular hotel on that particular day. There was a Myers in that room but it was not Danny, it was a Tina Myers." Trans. of Opening Statement and Closing Argument, Pp. 6-7. "In determining is a prosecutor's 'invited response', taken in context, unfairly prejudiced the defendant, a reviewing court must "weigh the impact of the prosecutor's remarks and take into account defense counsel's opening salvo". State v. Evans, 1999 ND 70, 593 N.W.2d 336, citing, United States v.Young, 470 U.S. 1, 12 (1985). If the prosecutors comments were "invited" and merely responded so as to "right the scale", said comments would not warrant reversal of a guilty verdict. State v. Evans, 1999 ND 70, 593 N.W.2d 336, citing, United States v.Young, 470 U.S. 1, 12-13 (1985).

In determining whether a prosecutor's allegedly improper remarks were so prejudicial as to deprive the defendant of his right to a fair trial, the reviewing court considers: "(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the [defendant's] guilt; and (3) the curative actions taken by the trial court." State v. Evans, 1999 ND 70, 593 N.W.2d 336, citing, United States v. Eldridge, 984 F.2d 943, 946-47 (8th Cir. 1996).

The alleged improper comment was made in the midst of the following argument:

> "Well there is a definition in the instructions that you were given of possession and possession is in two forms. Actual

> possession meaning we found this on his person, which is not the case in this particular instance, or constructive possession, meaning he has access and ability to utilize this particular piece of paraphernalia. Did he? Absolutely. How do we know that? It was found in the motel room, not found on Tina Myers, but found in the motel room. The same motel room that is connected with Mr. Myers. How do we know it's connected with Mr. Myers – because when the maintenance man pointed out yep, that's the guy from that room – we had that testimony through the officer. We have that. What else do we have? We have male clothing in the room, so is there any question that Mr. Myers is associated with that. 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? No. In addition we have him making all kinds of comments about drug activities, do we not? Absolutely. So is there really any reasonable doubt that he had the ability to utilize that? No."

Trans. of Opening Statements and Closing Arguments, Pp. 12-13. The prosecutor made but a single reference to Myers' failure to tell law enforcement he was not connected to the room. And when taken in context, clearly shows that the prosecutor is referring to statements made by Myers to law enforcement, not to his election not to testify at trial.

Further, there was a great deal of other evidence indicative of Myers' guilt. The testimony of the police officers as to the presence of men's clothing in the room, the proximity of Myers to the hotel room and the voluntary statements made by Myers post Miranda warning, established that Myers occupied the room. Trial Tr. Pp. 16-40. There was also more than a sufficient amount of evidence linking Myers' to drug trafficking. Trial Tr., Pp. 23-48.

Finally, the trial court took curative action to remedy any alleged improper argument made by the prosecutor by admonishing the jury, upon Myers' objection and prior to their deliberation, to disregard the State's reference, if any, to the term "testified. Trans. of Opening Statements and

Closing Arguments, p. 16, Lines 14-16. The trial court further instructed the jury that "the defendant does have no burden of proof in this case, has an absolute right not to testify and you are not to draw any inferences or conclusions from that, so if Ms. Feland did say that, you are to ignore that." Trans. of Opening Statements and Closing Arguments, p. 16, lines 17-20. Myers did not object to the curative instruction and did not move for a mistrial. Trans. of Opening Statements and Closing Arguments, Pp. 16-20, and Trial Trans, Pp. 73-88.

In addition, the trial court's instructions on proof beyond a reasonable doubt and on arguments by counsel are not evidence minimized any prejudice suffered by Myers. See, State v. Clark, 2004 ND 85, 678 N.W.2d 765; State v. Skorick, 2002 ND 190, 653 N.W.2d 698 (A jury is presumed to have follow the trial court's instructions).

Therefore, the State's comment, even if construed as alluding to or regarding Myers' failure to testify, constitutes harmless error and is not grounds for reversal. If the statement made by the State had been improper, the remedy was a mistrial, not dismissal. See, State v. Norquist, 309 N.W.2d 109, 119 (N.D. 1981). As previously stated, there was no mistrial requested in this case. Trans. of Opening Statements and Closing Arguments, Pp. 16-20, and Trial Trans, Pp. 73-88.

II. The Trial Court's Failure to Admonish the Jury Prior to a Ten Minute Recess Does Not Constitute Reversible Error.

Myers claims the court erred in failing to admonish the jury prior to a ten-minute recess. (Trial Trans., p. 70, lines 17-19). Myers is correct in that N.D.C.C. § 29-21-28 requires trial courts to admonish jurors at each adjournment. However, the brief recess taken by the court was not an adjournment. State v. West, 223 N.W.705 (1929) (temporary cessation of

proceedings before a jury for the purpose of hearing a motion is not an "adjournment" within the law requiring admonition). Thus, the issue turns to whether it is necessary to admonish a jury at each recess taken by the trial court.

To ensure a fair trial, civil or criminal, it is essential that a **jury** be cautioned as to permissible conduct and conversations outside the **jury** room. United States v. Williams, 635 F.2d 744, 745-46 (8th Cir.1980). It is fundamental that a **jury** be cautioned from the beginning of a trial and generally throughout the trial to keep their considerations confidential and to avoid wrongful, often subtle, suggestions offered by outsiders. United States v. Williams, 635 F.2d 744, 745-46 (8th Cir.1980). Nevertheless, this court has never held that such admonition must be repeated at every recess.

In the present case, the trial court had earlier given an **admonition** to the **jury** at the beginning of the case and had again admonished the **jury** prior to recessing for lunch. Trans. of Trial, p. 40, lines 6-10. The instance complained of by Myers involved a mid-afternoon recesses. Trans. of Trial, p. 70, lines17-21. The recess was taken at Myers' counsel's request and was for a mere 10 minutes. Trans. of Trial, p. 70, lines17-21. Following the recess, Myers made no objection to the lack of admonition. Trans. of Trial, Pp. 70-88. Further, in raising the issue, Myers has not claimed that the failure to given the admonition before the recess prejudiced him in anyway. Absent an objection by defense counsel during trial or a claim that the failure resulted in prejudice to the there was prejudice, the trial court did not commit reversible error **failing** to admonish the **jury** prior to a single recess. See, State v. His

Chase, 531 N.W.2d 271, 274 (N.D. 1995)(Trial court did not commit reversible error as no objection was made as to the sufficiency of the admonition and no prejudice was claimed).

III. There Was Sufficient Evidence Presented at Trial to Sustain the Jury Verdict of Guilty.

Rule 29(a), North Dakota Rules of Criminal Procedure, provides that the court, on its own motion, or the defendant's motion, following the close of evidence on either side, shall enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. In the case before this Court, Myers made such a motion; asserting that there the State's case was "circumstantial" and that the "circumstantial evidence was not conclusive and did not exclude every reasonable hypothesis of evidence - or of innocence." (Trial Tr. pp. 70-71). The trial court denied Myers' Rule 29 motion stating that there was no evidence presented during the trial which supported any theory other than that Myers committed the offense. (Trial Tr. p. 70, lines 4-9).

In an appeal challenging the sufficiency of the evidence, the defendant must show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819; State v. Knowels, 2003 ND 180, 671 N.W.2d 816; State v. Steen, 2000 ND 152, 615 N.W.2d 555, 561(citing City of Jamestown v. Neumiller, 2000 ND 11, ¶ 5, 604 N.W.2d 441; State v. Pollack, 462 N.W.2d 119, 121 (N.D.1990); State v. Fasching, 461 N.W.2d 102, 102-03 (N.D.1990)). In reviewing the sufficiency of the evidence, this court has previously declined to resolve conflicts in the evidence or weigh the credibility of witnesses. State v. Pollack, 462 N.W.2d 119, 121 (N.D.1990); State v. Fasching, 461 N.W.2d 102, 103

(N.D.1990). Only if the record presents no substantial evidence to support the verdict will a jury's determination be reversed. State v. Lund, 424 N.W.2d 645 (N.D.1988).

Corroborating evidence need not be incriminating in and of itself. State v. Garcia, 1997 ND 60, ¶ 38, 561 N.W.2d 599; State v. Torres, 529 N.W.2d 853, 855 (N.D.1995). Nor must the corroborating evidence directly link the accused to the crime. State v. Burgard, 458 N.W.2d 274, 277 (N.D.1990); State v. Haugen, 448 N.W.2d 191, 195 (N.D.1989).

> "The corroborating evidence need not 'establish criminal conduct,' but need only corroborate the accomplice as to some material fact and tend to connect the defendant with the crime. Furthermore, the corroborating evidence need not, in isolation, be incriminating, if the combined and cumulative evidence other than the accomplice's testimony tends to connect the defendant with the commission of the offense."

State v. Torres, 529 N.W.2d 853, 855 (N.D.1995) (quoting State v. Burgard, 458 N.W.2d 274, 277 (N.D. 1990)).

Applying these standards, there is sufficient corroborating evidence which tends to connect Myers to the delivery of marijuana. Kenan Kaiser, a narcotics investigator with the Bismarck Police Department, testified: (1) A search warrant was obtained for Myers' motel room at the Comfort Inn. (Trial Tr., p. 17, lines 6-8). (2) Myers rented the hotel room under a factitious name. (Trial Tr., pp. 15-17). (3) Myers was detained in the hallway outside his motel room. (Trial Tr., pp. 18-20). (4) During the search of Myers' motel room, officers recovered $866.00 in U.S. currency, a large bag containing 4 smaller baggies of marijuana, tin foil with burn marks, a scale with a powdery residue, 2 small packs of baggies, a box of sandwich bags, a roll of tin foil, and 2 pen tubes with white residue. (Trial Tr., pp. 23-36). (5) The baggies of marijuana were sent to the lab for

testing. (Trial Tr., p. 34, line 25). (6) Each of the four bags tested positive for cannabis or marijuana. (Trial Tr., p. 36, lines 19-22). (7) The quantities of cannabis in each bag were 3.54 grams, 3.87 grams, 6.66 grams, and 1.34 grams. (Trial Tr., p. 36, lines 24-25). (8) The quantities of marijuana recovered were consistent was the type of quantities sold on the street and inconsistent with possession for personal use. (Trial Tr., pp. 37-39). (9) The pen tubes tested positive for methamphetamine upon analysis at the North Dakota State Lab. (Trial Tr., pp. 33-40). (10) Sandwich baggies are commonly used to package drugs and those recovered from Myers hotel room were consistent with the baggies used to package the quantities of marijuana recovered. (Trial Tr., p. 32, lines 10-23). (11) After waiving his Miranda rights, Myers described two big deals going on at the same: one was running marijuana for Jason Counts, and the other involved distribution of meth from Terri Gourneau. (Trial Tr., pp. 44-48). (12) Myers made a recorded phone call to Gourneau to discuss the deal in the officers presence. (Trial Tr., pp. 48-49). (13) Myers further stated that the $866.00 in U.S. currency belonged to Jason Counts for the marijuana Myers received. (Trial Tr., pp. 50-51).

Detective Troy Schaner testified: (1) He assisted in the execution of the search warrant on Myers' motel room. (Trial Tr., p. 62, lines 10-13). (2) Myers made a recorded phone call to Gourneau in Schaner's presence. (Trial Tr., pp. 64-65). (3) Myers discussed with Gourneau how much of the methamphetamine belonged to Myers. (Trial Tr., p. 65, line 4-20). (4) The sum of U.S. Currency found in combination with the scale, baggies and individually wrapped marijuana indicated drug trafficking. (Trial Tr., pp. 66-67). (5) Myers stated that the marijuana that was seized

belonged to Jason Counts and that the money was generated as a result of the sale of some of the marijuana. (Trial Tr., p. 68, line 4-21).

Under N.D.C.C. § 19-03.1-23(1), "it is unlawful for any person to willfully, as defined in section 12.1-02-02 . . . possess with intent to . . . deliver, a controlled substance . . .." A "willful" possession of a controlled substance may be actual or constructive, exclusive or joint, and may be shown entirely by circumstantial evidence. State v. Dymowski, 458 N.W.2d 490, 500 (N.D.1990). See also, State v. Connery, 441 N.W.2d 651, 655 (N.D.1989). Constructive possession may be established by showing the defendant had the power and ability "'to exercise dominion and control over'" the controlled substance. State v. Dymowski, 458 N.W.2d 490, 500 (N.D.1990), quoting, State v. Morris, 331 N.W.2d 48, 54 (N.D.1983).

Myers did not specifically deny knowledge of the marijuana in the motel room, Myers acknowledged that the marijuana and money belonged to Jason Counts. The amounts and packaging of marijuana were consistent with possession for the sale of the same. See, State v. Rodriguez, 454 N.W.2d 726, 731 (N.D.1990) ("one ounce of cocaine is a quantity which is larger than that intended for personal use.").

Myers has failed to show, based on the evidence, that "no rational fact finder could have found the defendant guilty beyond a reasonable doubt." State v. Kringstad, 353 N.W.2d 302, 306 (N.D.1984). Therefore, Myers' argument on this issue must fail and this Court should deny his appeal and affirm the conviction.

CONCLUSION

The comment made by the State in its closing argument, even if construed as alluding to or regarding Myers' failure to testify, constitutes harmless error and is not grounds for reversal. The remedy for improper remarks by the State was a mistrial, which was not requested by the defense. Further, Myers has failed to establish that he was prejudiced when the trial court failed to admonish the jury prior to a ten-minute break. Finally, the evidence presented to the jury was sufficient to sustain the verdict. The jury obviously believed the testimony of State's witnesses.

Myers has failed to present any evidence of error. Therefore, based on the reasoning above, the State respectfully requests that the convictions, in all matters, be affirmed.

Respectfully submitted this 14th day of June, 2006.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	AFFIDAVIT OF MAILING
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	Supreme Ct. No. 20050368
	)	
Daniel J. Myers,	)	
	)	
Defendant-Appellant.	)	District Ct. No. 08-03-K-1839
. . . . .	)	SA No. F 282-287-03-04

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

Ardyth Volesky, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the date of June 14, 2006, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

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

BENJAMIN C PULKRABEK
ATTORNEY AT LAW
402 1ST STREET NW
MANDAN ND 58554

which address is the last known address of the addressee.

Ardyth Volesky

Subscribed and sworn to before me this 14th day of June, 2006.

GWEN TARDIF
Notary Public
State of North Dakota
My Commission Expires May 23, 2009

Gwen Tardif, Notary Public
Burleigh County, North Dakota
My Commission Expires: 5-23-2009