

ORIGINAL

RECEIVED BY CLERK
SUPREME COURT
DEC 7 2006

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20050363

SUPREME COURT NO.: 20050368

State of North Dakota,

Plaintiff-Appellee,

- vs -

Daniel J. Myers,

Defendant-Appellant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Dec 07 2006

STATE OF NORTH DAKOTA

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

PETITION FOR REHEARING

BENJAMIN C. PULKRABEK
Attorney for Appellant

CYNTHIA M. FELAND
Attorney for Appellee

402 First Street NW
Mandan, North Dakota 58554
(701)663-1929
N.D. Bar Board ID No. 02908

514 Thayer Avenue E
Bismarck, North Dakota 58501
(701)222-6672
N.D. Bar Board ID No. 04804

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	ii
STATEMENT OF THE ISSUES	1
NATURE OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	3
ISSUES PRESENTED:	
THE ISSUES TO BE REVIEWED RELATE TO THE FOLLOWING STATEMENT MADE BY THE PROSECUTOR IN HER CLOSING ARGUMENT:	
“DO WE HAVE ANY STATEMENT AT THIS POINT WHERE MR. MEYERS SAID OH NO, I HAVE NOTHING TO DO WITH THIS ROOM, I AM ONLY A VISITOR? NO.”	
I. THE ABOVE STATEMENT MADE BY THE PROSECUTOR WAS REVERSIBLE ERROR BECAUSE IT WAS MADE AFTER MR. MYERS ELECTED NOT TO TESTIFY AND IMPLIED CRITICISM BECAUSE HE DIDN’T TESTIFY.	3, 4
II. WHETHER OR NOT THE ABOVE STATEMENT MADE BY THE PROSECUTOR WAS AN IMPROPER REFERENCE TO MR. MYERS SILENCE.	3, 4
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

City of Williston v. Hegstad
1197 ND 56, 562 N.W.2d 91 3

State v. Keyes
2000 ND 83, ¶ 9, 609 N.W. 2d 428 3

STATEMENT OF THE ISSUES

The issues to be reviewed relate to the following statement made by the prosecutor in her closing argument:

“Do we have any statement at this point where Mr. Meyers said oh no. I have nothing to do with this room, I am only a visitor? No.”

- I. The above statement made by the prosecutor was reversible error because it was made after Mr. Myers elected not to testify and implied criticism because he didn't testify.
- II. Whether or not the above statement made by the prosecutor was an improper reference to Mr. Myers silence.

NATURE OF THE CASE

This is a petition to rehear the opinion filed in the above entitled matter on
11/28/06.

STATEMENT OF FACTS

This Petition for Rehearing is based on the North Dakota Supreme Court's interpretation of the prosecutor's following statement in her closing argument:

"Do we have any statement at this point where Mr. Meyers said oh no, I have nothing to do with this room, I am only a visitor? No."

It is Defendant-Appellant, Daniel Myers belief that the North Dakota Supreme Court only by misapprehending the above statement could conclude that:

1. The above statement wasn't reversible error even though it was made after Mr. Myers elected not to testify and implied criticism because he didn't testify; and
2. The above statement was about evidence and not an improper reference to Mr. Myers silence.

ARGUMENT

The above issues are constitutional rights violations and as such a reviewed de novo. *State v. Keyes*, 2000 ND 83, ¶ 9, 609 N.W. 2d 428.

According to *City of Williston v. Hegstad*, 1197 ND 56, 562 NW2d 91, . . . the prosecutor's reference to Hegstad's silence after he had received the Miranda 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."

Therefore, Hegstad makes it clear that prosecutors can't comment on a Defendant's silence after a Miranda warning is given and Defendants don't have to come forward with their version of the events at anytime before trial.

In Mr. Myers case, he made no comment after his Miranda warning, however, he did make some statements before he was given his Miranda warning. None of these statements related to the ownership of the room and no questions were asked of him by law officer as to who owned the room. Therefore, the prosecutor should have not been allowed to comment on his silence.

It is fundamental principle of constitutional law that a prosecutor may not comment on a defendant's failure to testify in a criminal case. State v. His Chase, 531 N.W.2d 271, 273 (N.D. 1995); State v. Flohr, 310 N.W.2d 735, 736 (N.D. 1981). "A comment on the silence of a defendant is an improper comment on the right to remain silent in violation of the Fifth and Fourteenth Amendments of the [United States] Constitution." State v. Ebach, 1999 ND 5, ¶ 15, 589 N.W.2d 566. See also N.D. Const. art. I, § 12; N.D.C.C. § 29-21-11.

Mr. Myers made no statement regarding ownership of the room. Therefore, a fundamental principle of constitutional law prevents a prosecutor from commenting on this silence. A fundamental principle of constitutional law should not be destroyed by a prosecutor's comment on what she believes the evidence shows.

If the current opinion in State v. Myers is allowed to stand, defendants who have made any statements prior to their being given Miranda warnings will have to decide whether to:

1. Allow the prosecutor to make statements on any subject they remained silent on before their Miranda warning was given; or
2. Take the stand and testify on any subject that could relate to their silence

before their Miranda warning was given.

CONCLUSION

It is reversible error for a prosecutor to comment in its closing argument about a Defendant's silence.

Mr. Myers' Petition for Rehearing should be granted.

Dated this 7 day of December, 2006.

Respectfully submitted:

Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID# 02908
Attorney for Appellant
402 First Street NW
Mandan, ND 58554
(701)663-1929

CERTIFICATE OF SERVICE BY MAIL

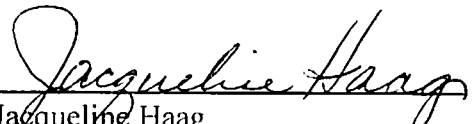
The undersigned hereby certifies that I am an employee in the office of Pulkrabek Law Firm and I am a person of such age and discretion as to be competent to serve papers. On December 7, 2006. I hand delivered the following:

PETITION FOR REHEARING


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

I further certifies that on December 7, 2006, I dispatched to the Clerk of the North Dakota Supreme Court, an original and seven copies of the PETITION FOR REHEARING and a 3½" computer diskette containing the full text of the PETITION.


Jacqueline Haag

Subscribed and sworn to before me on this 7 day of December, 2006.


Notary Public

