20100218

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FEBRUARY 4, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	Supreme Court No. 20100218
vs.	)	
	)	District Court No. 09-09-K-03331
Salome F. Hinojosa,	)	
	)	
Defendant-Appellant.	)	

Appeal from the Judge's granting of the State's Motion to Continue on December 21, 2009, the Judges denial of the Rule 29 Motion to Acquit on April 21, 2010, and the Jury Verdict of Guilty from April 21, 2010, as reflected in the Criminal Judgment and Commitment dated June 21, 2010.
Cass County District Court
East Central Judicial District
The Honorable Wickham Corwin, Presiding

APPELLEE'S BRIEF

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[¶7] JURISDICTION

[¶8] The District Court had jurisdiction over this case pursuant to N.D. Const. Art. VI, § 8 and N.D.C.C. § 27-05-06(1). This Court has jurisdiction over this appeal under N.D. Const. Art. VI, § 6 and N.D.C.C. § 29-28-06(2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A).

[¶9] STANDARD OF REVIEW

[¶10] I. Whether the Trial Court erred in granting a continuance due to a prosecution witness being on vacation.

[¶11] Legal logic dictates sound discretion is the proper standard to be applied on the question whether or not good cause existed for extension or continuance, and that an appellate court will not reverse such decision except in instances where the trial judge abused his discretion. We have repeatedly stated that abuse of discretion is the equivalent of acting unreasonably, arbitrarily or unconscionably. State v Kania, 341 N.W.2d 361, 365 (N.D. 1983).

[¶12] II. Whether there was a basis for the Trial Court's denial of Defendant's Rule 29 Motion to Acquit.

[¶13] **III. Whether the jury had sufficient evidence from Trial Exhibit 2, Docket Entry 68, that the transaction took place within 1000' of the real property of a school.**

[¶14] The standard of review which we employ in cases challenging the sufficiency of evidence to sustain a conviction is well settled. We do not weight or resolve conflicts in the evidence, nor do we judge the credibility of witnesses; those matters are for the trier of fact. We look only to the evidence most favorable to the verdict and the reasonable interferences therefrom to determine if there is substantial evidence to warrant a conviction. State v. Voeller, 356 N.W. 2d 115, 117 (N.D. 1984).

[¶15] The standard of review is the same "[w]h[h]eter (sic) the sufficiency of the evidence is questioned on motion for judgment of acquittal … at the close of the [State's] case, at the close of all the evidence, or after the return of a guilty verdict." State v. Lambert, 539 N.W.2d 288, n.2 (N.D. 1995) (quoting United States v. Austin, 585 F.2d 1271, 1273 (5thCir. 1978)).

[¶16] **STATEMENT OF CASE**

[¶17] This matter was commenced on September 24, 2009, by an Information and an Arrest Warrant charging Salome Fierros Hinojosa (hereinafter Defendant) with delivery of methamphetamine within one thousand feet of a school, specifically North Dakota State University, and when Defendant had two prior drug convictions. (Appendix (App.), 9,16.) The Information alleged the delivery occurred on June 3, 2009, at 110 ½ 9th Street

South #6 in Fargo, Cass County, North Dakota. (Id.) The two prior convictions were for possession of heroin with intent to deliver on April 4, 1994, in Texas and felony possession of a controlled substance on March 18, 2002, in Grand Forks County, North Dakota. (Id.)

[¶18] The Inmate's Requests for Disposition of Indictments, Information, or Complaints, and Notice of Place of Imprisonment; Certificate of Inmate's Status; and Offer to Deliver Temporary Custody dated September 29, 2009, were received by the Clerk of District Court on October 2, 2009. (Id.) 17-9. An Order for Writ of Habeas Corpus ad Prosequendum, an Affidavit in support, and a Writ of Habeas Corpus ad Prosequendum were filed with the Clerk of District Court on October 19, 2009. (Id). 23. The Order for Writ of Habeas Corpus ad Prosequendum was signed by the Honorable Steven Marquart and the Writ of Habeas Corpus Ad Prosequendum was signed by the Clerk of Court on October 28, 2009. (Id. 20-1.)

[¶19] Defendant subsequently appeared before the Honorable Wickham Corwin on November 10, 2009, by interactive TV, bail was set at $10,000.00 cash, Attorney Monty Mertz was appointed to represent Defendant, and a Motion to Schedule Trial within Ninety Days was filed. (Transcript (Tr.) 11/10/09.) A Scheduling Order setting the Preliminary Hearing for December 10, 2009, and the Jury Trial for February 23, 2010, was issued November 10, 2009. (App., 26.) The Order Setting Trial Within Ninety Days was signed November 30, 2009, by Judge Wickham Corwin. (App., 28.) A Notice of

Hearing was issued December 1, 2009, setting the Jury Trial for December 29, 2009. (App., 27.)

[¶20] Defendant and Attorney Mertz appeared on December 10 for the Preliminary Hearing. (Tr. 12/10/09). A defense request for continuance of the Preliminary Hearing was requested and granted. The Preliminary Hearing was continued to December 21, 2009. (App., 31.)

[¶21] On December 15, 2009, a Notice of Endorsement of Additional Witness was filed with the Clerk and served upon attorney Mertz, identifying Alan Orv Weaver as the confidential informant. (Appellee's Appendix (A.App.), 1-2.) On December 15, 2009, a Motion to Extend Time for Trial with supporting documents was filed with the Clerk and served upon attorney Mertz. (App., 32-5.) This motion was heard on December 21, 2009, at the preliminary hearing and was granted. (Tr. 12/21/09, 12-3.) Also at this hearing, attorney Mertz informed Judge Corwin that he had a conflict of interest due to the confidential informant and requested to withdraw as attorney. (Id. 3.) That request was granted. (Id.) Attorney Rebecca Heigaard-McGurran was appointed. (See, Id. 9.) The preliminary hearing was rescheduled for January 7, 2010, and the jury trial was scheduled for February 23, 2010 (with the probability it would be on March due to calendaring issues). (Id. 13-4.) A Notice of Hearing dated December 28, 2009, set the jury trial on February 23, 2010. (A.App., 3.)

[¶22] The preliminary hearing was held January 7, 2010, and an

Amended Information was filed deleting the prior drug conviction from Texas. (App. 36.) Defendant waived the preliminary hearing and arraignment and pled not guilty. (Tr. 1/7/10, 4.)

[¶23] On February 17, 2010, a Joint Motion and Stipulation to Continue the Trial was filed and signed by the Court. (App., 37-38.) A new scheduling order dated February 19, 2010, was issued setting jury trial for March 23, 2010. (A.App., 4.)

[¶24] A pre-trial conference was held on March 22, 2010, with Defendant in court and attorney Heigaard-McGurran appearing by telephone. (Tr. 3/22/10, 3.) At this time, a Motion to Continue the Trial from defense counsel was heard. (Id. & App., 40-2.) Speedy trial was waived by Defendant through his attorney and Judge Corwin granted the motion. (Id. 10-1.) A Scheduling Order was then issued setting jury trial on April 20, 2010. (App., 39.)

[¶25] A pre-trial conference was held on April 19, 2010. Tr. 4/19/10. Trial was held on April 20 and 21, 2010. (Trial Transcript (T.Tr.) I & II.) The jury rendered a guilty verdict. (A.App., 5; T.Tr. II, 129.) A pre-sentence investigation was ordered and sentencing was held on June 14, 2010, after the PSI was completed. (Tr. 6/14/10.) Judge Corwin sentenced Defendant to fifteen years imprisonment, serving ten years and the balance of five years suspended for five years of supervised probation; the standard conditions of probation were applied, all fines and fees were waived, the sentence was to run

concurrent with sentences issued in several Grand Forks District Court files, and Defendant was credited with two hundred eighty-four (284) days of previous custody time. (Id. 13-15 & App., 46-51.)

[¶26] A Notice of Appeal signed July 2, 2010, was filed July 8, 2010. (App., 52.) This matter is now before the North Dakota Supreme Court.

[¶27] **STATEMENT OF FACTS**

[¶28] On June 3, 2009, Fargo Detective Dane Hjelden (hereinafter Hjelden) of the narcotics squad met with a confidential informant, Tanya Gange (hereinafter Gange). (T.Tr. II 53.) Gange informed Hjelden that she could purchase one gram of methamphetamine for $220.00 from Alan Weaver. (Id. 57-8.) Gange was searched and a spoon and syringe were found on her person. (Id. 65.) Neither item had any residue; and her explanation was that she was using them as props to make Weaver think she still used. (Id. 66.) Weaver was instructed regarding the dos and don'ts of the process of the purchase and was wired with a bug so the officers could hear conversations between her and Weaver. (Id.) She was given $220.00 from the Fargo Police Department buy funds. (Id. 76.)

[¶29] Hjelden then drove Gange to 110 ½ 9th Street South in Fargo and she went into the building. (Id. 68.) Hjelden had previously served a search warrant on this apartment and Weaver was living there at that time. (Id.) Gange was in the apartment approximately an hour and a half. (Id.) For about forty-five minutes Hjelden was parked right in front of the building. (Id. 69.)

He then moved to a parking lot to the north of the building across the street. (Id.)

[¶30] Eventually a van pulled up, honked the horn, and parked in front of the building. (Id. 70.) Hjelden could hear Weaver speaking over the bug that his source was there and he was going to get the drugs. (Id. 71.) Hjelden saw the driver exit the van and go to the apartment building. (Id. 72.) He was using binoculars. (Id.) Hjelden had a full face view as the driver got out of the van and went up to the apartment. (Id.) Hjelden could not see whether the driver went into the building and he never did see Weaver at the door. (Id. 73.) The driver returned to the van and left. (Id. 74.) As the van left it drove north towards Hjelden and made a u-turn in the intersection in front of him. (Id.) Hjelden could see the driver's face clearly. (Id.)

[¶31] Gange left the apartment and came to Hjelden's vehicle and gave Hjelden the methamphetamine she had purchased. (Id. 75.) They returned to the police station and she was searched again. (Id.) She had nothing on her. (Id.) She confirmed that she gave Weaver $220.00, he left the apartment, returned with the methamphetamine, and gave it to her. (Id. 76-7.)

[¶32] The driver's identity was determined by running a record check. (Id. 77.) The vehicle license was run through a registration check and came back belonging to Salome F. Hinojosa. (Id.) The driver's license picture for Salome F. Hinojosa was then accessed by computer. (Id. 78.) Hjelden confirmed that it was the same person he had seen driving the vehicle and

approaching the apartment at the time of the sale. (Id.)

[¶33] During her testimony, Gange confirmed that she contacted Alan Weaver to purchase methamphetamine and went to his apartment. (T.Tr. I, 138.) Gange gave him $220.00. (Id. 137-8.) Weaver then contacted a source by telephone who eventually arrived. (Id. 139.) Weaver left the apartment and returned shortly after with methamphetamine. (Id. 139-40.) He gave Gange the methamphetamine and she left and met up with Hjelden. (Id.)

[¶34] Weaver's testimony confirmed that Gange contacted him and came to his apartment to purchase methamphetamine. (Id. 177-8.) He contacted his source, Defendant, who later arrived at his apartment. (Id. 178-9.) Weaver met Defendant at the front door of the apartment building and obtained the methamphetamine from Defendant. (Id. 180-2.) Weaver then returned to his apartment and gave the methamphetamine to Gange. (Id.)

[¶35] Officer Rognlin testified that he has been in law enforcement for twenty-five years. (T.Tr. II, 20.) He has a Bachelors of Science in Criminal Justice, took the Post-Board Peace Officer Standards and Training at Alex Tech, and has a Masters from the University of Mary in management. (Id.) He is currently attached to the investigative unit in the intelligence unit. (Id. 21.) He works at Geographic Information System involving crime mapping, mapping, intelligence gathering, and CompStat, which is computer statistics. Id. He has also been in accident reconstruction since 1992. (Id.)

[¶36] In preparing the map identified as Exhibit 2, Rognlin utilized a

computer program called Arc Map which is an Esri product used by city planners and engineers. (Id. 23.) He is able to pull parcel maps and aerial photos into this program in order to prepare distance maps. (Id. 22-3.) He was trained in this program in 2003 along with some city planners; and as part of his training he was told that the software is very accurate. (Id. 23.) The program utilizes both the parcel map (accurate to one half foot per quarter mile) and aerial map (accurate to plus or minus three feet per mile) by laying them one over the other and puts them together based upon the accuracies and perimeters of each of the maps. (Id. 23-4.) The parcel maps provide the boundaries of the property and the aerial maps provide building, tree, etc., location. (Id. 24-5.) Aerial maps are updated every two years and parcel maps are updated every year. (Id. 25.) Exhibit 2, the map in question, was offered and received into evidence. 9Id. 26.0

[¶37] Officer Rognlin then testified directly regarding Exhibit 2. (Id.) To assist in the measuring, he highlighted the boundary of each property in red. (Id.)

He measured the distance from property line to property line at 778 feet at the nearest points. (Id. 27.) He then measured the distance between the apartment building at 110 ½ 9th Street South #6 and an NDSU building at 650 North Pacific Avenue in Fargo at 904 feet at the nearest point. (Id. 27-8.)

[¶38] Marc Larson is a forensic scientist at the State Crime Lab. (T.Tr. I, 127.) He testified the State Crime Lab received a baggie with a substance

connected to this case. (Id. 130.) He tested it; and it tested positive for methamphetamine. (Id. 131.)

[¶39] Lt. Tammy Lynk is the evidence and property manager for the Fargo Police department. (Id. 124.) She testified that the drugs relating to this case were kept in the FPD evidence room except for shipping to and from the State Crime Lab for testing. (Id. 125-6.)

[¶40] **LAW AND ARGUMENT**

[¶41] **I. The Trial Court did not err in granting a continuance due to a prosecution witness being on vacation.**

[¶42] Defendant's Request for Disposition was filed with the court on October 2, 2009. Ninety days after that is December 31, 2009. The trial was originally scheduled for December 29, 2009. The timing of certain events in this matter complicated the issue of having a trial within the ninety day period. Specifically, Defendant was not actually brought from the North Dakota State Penitentiary for an appearance before the court until November 10, 2009. At that time the Motion to Schedule Trial Within 90 Days was presented to the court and granted. The order setting the trial within ninety days was signed November 3, 2009. The original Scheduling Order issued November 10, 2009 set the preliminary hearing for December 10, 2009; the dispositional conference for February 3, 2010; and the jury trial date for February 23, 2010. This was amended by Notice of Hearing dated December 1, 2009 setting the trial date at December 29, 2009.

[¶43] On December 10, 2009, a request was made and granted to continue the preliminary hearing due to the relatively recent appointment of Attorney Mertz in relation to scheduled hearings and obtaining discovery materials. The preliminary hearing was then held on December 21, 2009. By that time the Motion to Continue had been filed and Noticed for the same date. The Motion was based upon the vacation plans of the chemist at the State Lab who was an essential witness for the State. There was also an issue of conflict of interest for Attorney Mertz requiring a new defense attorney. Judge Corwin found good cause to grant the motion based upon both issues.

> Well, I'm going to grant the State's request. And by way of addition al explanation, the 90-day window to try a serious case of this nature is extraordinarily short. Even under the best of circumstances, we seldom have perfect luck. We haven't had perfect luck in this case, obviously. But despite all of that, until recently the matter was scheduled for trial within the 90-day window. We even made arrangements to specially schedule the preliminary hearing in an attempt to keep things on the 90-day track. But there most recent developments, which are beyond the control of either part, clearly do upset the apple cart. I find at this point, based on the additional comments from counsel, that there is good cause for extending the deadline And that finding is buttressed by the admission that the defendant is not in a position to claim any resulting prejudice.

(Tr. 12/21/09, 12-3.)

[¶44] There is a four-prong test that has been established to determine whether a continuance of the trial and of the detainer action is for good cause.

> In State v. Erickson, 241 N.W.2d 854, 859 (N.D. 1976), this Court adopted the United States Supreme Court balancing test announced in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182,

> 33 L.Ed. 2d 101 (1972), which is used to evaluate the validity of a speedy trial claim under the United States Constitution, and now, the North Dakota Constitution, and the North Dakota Statute. N.D.C.C. § 29-01-06(5). The test requires balancing four factors: length of the delay, reason for the delay, proper assertion of the right, and actual prejudice to the accused. State v. Murchison, 541 N.W.2d 435, 438 (N.D. 1995) (citing Barker 407 U.S. 531-33, 92 S.Ct. 2182).

State v. Bergstrom, 2004 ND 48, ¶15, 676 N.W.2d 83.

This Court goes on to cite Barker in the Bergstrom case:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with the fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. (citations omitted).

[¶45] This Court has also stated that "[t]he 90 day period under the Detainers Act is not a strict statute of limitations, but rather a conditional right, which can be extended by stipulation or acquiescence of the parties or by the court for good cause shown. State v. Fulks, 1997 ND 143, ¶ 4, 566 N.W.2d 418.

[¶46] Under the first factor, length of delay, this matter was originally delayed 120 days with a trial date attempting to be set within thirty days of the original trial date. Also, the extension was granted before the expiration of the

ninety days. Unfortunately, due to the court calendar the trial had to be set 60 days after the original trial date. See State v. Foster, 1997 ND 8, ¶ 8, 560 N.W.2d 194.

[¶47] The second factor, reason for delay, is the unavailability of an essential witness. That witness was the chemist from the State Lab who performed the tests on the controlled substance which is the subject of this case. Proof that the substance delivered is a controlled substance is essential to proving the case. Therefore the lab chemist is an essential witness. Hinojosa's claim that vacation is not a good excuse especially since the chemist is a state employee and hired to do this kind of work is unrealistic and petty. The chemist had scheduled a vacation in Colorado so he would not even be in the state. In Bergstrom, the State had made three requests for continuance. Bergstrom, at ¶5. The first was because the prosecutor would be on vacation which was granted. Id. The second was because the main witness was at training out of state and the crime lab analyst was subpoenaed for another trial which was also granted. Id. The third request was denied. The reasons stated in Bergstrom are extremely similar to the reason in this case.

[¶48] The third factor, Defendant's assertion of his right, was not stated by Hinojosa but by his attorney Monty Mertz.

> "It's your decision Your Honor. I am not going to concede it. I am not going to waive anything on behalf of Mr. Hinojosa. And just for what it's worth, I object. And fully understanding what the Moore case says and what Your Honor—this is just a serious case I'm just not going to – be

put in a position of waiving anything or conceding anything." (Tr. 12/21/09, 10.) Although this is not a specific request to continue with the current trial date, it is a statement that that right was not going to be waived.

[¶49] The fourth issue, prejudice to Defendant, has not been shown. This Court has stated that the "delay is not presumptively prejudicial." State v. Murchison, 541 N.W.2d 435, 439 (ND 1995). We have held prejudice can take three forms: " 'oppressive pretrial incarceration', 'anxiety and concern' caused by the delay, and an impaired defense." Id. (citation omitted). Foster, at ¶12.

This Court has also stated:

> "We have repeatedly held that a "party raising a constitutional challenge should bring up the heavy artillery or forgo the attack entirely." (citation omitted). … More importantly, Bergstrom failed to allege any prejudice to him due to the delay.

Bergstrom, at ¶19. Neither at the time of the motion hearing nor in his Brief did Defendant or his attorney describe what prejudice might or did result from the continuation of the trial beyond the ninety day period. Defendant simply stands on his right under the statute to have a trial within ninety days. In fact at the hearing on Dec. 21, Attorney Mertz stated:

> Your honor, I can't argue prejudice. He's got a prison term until next May, next spring. He's going to be incarcerated at

> a minimum until then. I can't identify – I have to be candid with the court. I can't identify prejudice.

(Tr. 12/21/09, 10-1.)

[¶50] As in Bergstrom, Defendant has not brought up the "heavy artillery". He has made no assertion whatsoever of any prejudice to him due to the delay. Defendant has failed to show he has met the burden of the four prong test.

[¶51] **II. <u>There was sufficient evidence for the trial court's denial of Defendant's Rule 29 Motion to Acquit.</u>**

[¶52] First is the question of whether this issue is properly before the Court. At trial Defendant made a Rule 29 Motion to Acquit after the close of the State's case. This Motion was denied. After the Jury Verdict, Defendant did not renew the Motion either after the guilty verdict or after the discharge of the jury. In State v. Deutscher, this Court held:

> An argument similar to Deutscher's was presented in Carlisle v. United States, 517 U.S. 416,422, (1996), and the United States Supreme Court held: "[P]etitioner's reading makes a farce of subdivision (b) of Rule 29, which provides that a court may reserve decision on the motion for judgment of acquittal and decide it after submission to the jury. There would be no need for this procedure if, even without reserving, the court had continuing power to grant judgment of acquittal on its own." We interpret N.D.R.Crim.P. 29 in the same manner. If a defendant was not required to renew her motion, N.D.R.Crim.P. 29(b), which allows a trial court to reserve its decision on a Rule 29(a) motion, would be moot. We hold that the defendant must timely move for a judgment of acquittal, or renew such a motion, after a guilty verdict or after the discharge of the jury, unless the court has reserved its decision on a prior motion under N.D.R.Crim.P. 29(b).

Deutscher, 2009 ND 98, ¶ 17, 766 N.W.2d 442. Since the Rule 29 Motion was not renewed, this issue is not properly before this Court.

[¶53] Even if this issue is before the Court, Judge Corwin properly denied the Motion. Defendant claims Judge Corwin should have granted the Rule 29 Motion for Acquittal because there was a lack of evidence to support the element of within 1000 feet of the real property of a school. However, there was sufficient competent evidence presented. The trial judge's decision is based upon the same type of review as this Court's.

> In deciding a motion for judgment of acquittal, the district court, upon reviewing the evidence most favorable to the prosecution, "must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt."

State v. Gonzales, 2000 ND 32, ¶ 14, 606 N.W.2d 873. (Citations omitted). Further:

> When ruling on a motion for judgment of acquittal under Rule 29, N.D.R.Crim.P., the district court must assume the truth of the evidence supporting the State's case and then decide whether 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.

Id. ¶ 15.

[¶54] The judge properly gave this issue to the jury because there was a dispute as to the facts. Trial Exhibit 2 is a map showing the location of the delivery and the location of the school. It provides two measurements, one from nearest property line to nearest property line and one from nearest building edge to nearest building edge. It is true that there is not a

measurement from the place of the delivery to the nearest school property line. However, there was significant testimony through direct and cross regarding the reliability and accuracy of the method used by Det. Leo Rognlin and the location of the delivery. The Judge was able to assess the map with the measurements. It is readily apparent from the map that the property line and building line of the property where the delivery took place are the same. It is equally obvious that there is a significant difference between the closest property line of the school and the school building itself.

[¶55] At trial defense counsel used cross examination to bring out the issue of a straight line measurement versus the actual path a person would have to travel. In State v. Burch, 545 So 2d 279, (Fla. App. D4 1989), the court stated "the 1,000 foot distance requirement should reasonably be measured in a straight line to the school's properties nearest boundary line, as the crow flies, and to suggest that the distance should be calculated by some circuitous pedestrian route would be a tortuous reading of the statute that would violate this plain intent and meaning. See also, Steelman v. State, 602 NE2d 152 (Ind. App. 1992). "Jury reasonably could have discerned that distance between the back door and front of the building that was not more than 100 feet." State v. Pagan, 918 A.2d 1036 (Conn. 2007).

[¶56] Also raised at trial through cross examination is the issue of which part of the school property should be measured as the closest point. The statute states: "within 1,000 feet [300.4 meters] of, the real property comprised in a

public or private elementary or secondary school,…" N.D.C.C. § 19-03.1-23.1(1)(a). The wording "real property" has a specific meaning. According to N.D.C.C. § 1-01-49(13), "real property" shall be coextensive with lands, tenements, and hereditaments. Also, N.D.C.C. § 47-01-03 provides:

> **Real property defined.** Real property or even immovable property shall be consist of : 1) land; 2) that which is affixed to land including manufactures homes as defined in Section 41-09-02 with respect to which the requirements of subsections 1 through 3 of Section 39-05-35, as applicable, have been satisfied; 3) that which is incidental or appurtenant to land; and 4) that which is immoveable by law. N.D.C.C. § 47-01-05 defines fixtures as "a thing as deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or embedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

Thus, by using the term "real property", the legislature obviously meant to include both the land and anything on the land including buildings. The logical interpretation is that the site of a delivery must occur within 1,000 feet of the closest portion of the real property of the school. That would be the closest property line.

[¶57] On these facts, viewed in light most favorable to the prosecution, there was sufficient evidence for Judge Corwin's decision to deny the motion.

[¶58] **III. <u>The jury had sufficient evidence from Trial Exhibit 2, Docket Entry 68, that the transaction took place within 1,000 feet of the real property of a school.</u>**

[¶59] This is the same issue raised by Defendant in Issue II - the State did not prove that the place of delivery was within 1,000 feet of the school.

The facts and law stated in the State's argument for Issue II apply here as well – only in relation to the jury's deliberation rather than the judge's.

[¶60] One method the jury could have used in its acceptance of the distance could have been to adjust the line beginning at the school building and moving it to the nearest property line and correspondently moving the line from the nearest property line/building line where the delivery took place to the actual place of the delivery which was in the middle of the building on the west side. It is apparent that the distance from the school building to the nearest property line is a greater distance than the distance from the building property line of the delivery to the middle of that building where the delivery actually took place. Therefore, a jury could have reasonably determined that the distance was actually less than 904 feet. In any event, whatever method they used, the jury made a determination that the evidence showed that the delivery took place within 1,000 feet of the real property of a school.

[¶61] On these facts, viewed in light most favorable to the prosecution, there was sufficient evidence for the guilty verdict.

[¶62] **CONCLUSION**

[¶63] Therefore, the State respectfully requests this Court affirm the trial court's granting of the State's Motion to Continue, denial of the Rule 29 Motion to Acquit, and the jury's guilty verdict.

_____
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[¶64] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on the 4th day of February, 2011, to: pulkrabek@lawyer.com

_____
Gary E. Euren