

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20120357

State of North Dakota,

Plaintiff-Appellee,

- vs -

Kawo Otis Flah

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CR. NO. 08-2012-CR-767
THE HONORABLE BRUCE A. ROMANICK, PRESIDING

BRIEF

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“Now ladies and gentlemen as the Judge stated , when weighing the credibility of witnesses you can take into account there interest in the outcome of the case. What do Officer Hocher and Detective Grensteiner have to gain? Nothing. They’re still employed. They have no reason to lie about what was said or what wasn’t said at that residence that night. Yes, the Defendant’s girlfriend was charged and she pled. Detective Grensteiner also told you its very common for more that one person to use the same pipe and to be charged with using the same pipe. Who has an interest in the outcome of the case”?

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ABBREVIATIONS

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STATEMENT OF THE ISSUES

[¶1] ISSUE I: Is the following statement by the prosecutor in his closing argument improper:

“Now ladies and gentlemen as the Judge stated , when weighing the credibility of witnesses you can take into account there interest in the outcome of the case. What do Officer Hoher and Detective Grensteiner have to gain? Nothing. They’re still employed. They have no reason to lie about what was said or what wasn’t said at that residence that night. Yes, the Defendant’s girlfriend was charged and she pled. Detective Grensteiner also told you its very common for more that one person to use the same pipe and to be charged with using the same pipe. Who has an interest in the outcome of the case”?

NATURE OF THE CASE

[¶2] Kawo Flah was charged in the Complaint for possession of drug paraphernalia on April 2, 2012.

[¶3] The Jury Trial on the above charge was held on September 4, 2012.

[¶4] The Jury found Mr. Flah guilty and he was sentenced on September 4, 2012.

[¶5] Mr. Flah appealed the judgment and sentence on September 24, 2012.

[¶6] The Notice of Appeal was filed on September 24, 2012.

[¶7] The Clerk's Certificate on Appeal was filed on October 23, 2012.

[¶8] The Clerk's Supplemental Certificate of Appeal was filed on December 7, 2012.

[¶9] The case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶10] This case began on April 2, 2012 when Bismarck Police Officer Amanda Hocher was sent to apartment 27 at 715 East Interstate Avenue in Bismarck, North Dakota to investigate a possible domestic disturbance. T.P.21,L.1-18, P.22., L.6-15. When Officer Hocher knocked on the door of apartment 27, she could hear someone yelling in the apartment and she noticed the door was damaged. T. P.22, L.16-22. Two individuals came to the door, Kawo Flah and Nicole Jackson. T. P.22, L.23-25, P. 23, L.1.

[¶11] About that time two other Bismarck Police Officers arrive at apartment 27. These two police officers take Mr. Flah with them for questioning. Officer Hocher then began her questioning of Ms. Jackson. While Officer Hocher was talking to Mr. Jackson they went into the kitchen. T. P.23, L.3-11. While they were in the kitchen Officer Hocher sees what she believes is a marijuana pipe and decides the pipe is drug paraphernalia. T. P.23, L.24-25, P.24, L.1-5. Both Mr. Flah and Ms. Jackson were questioned about he marijuana pipe. During the

questioning of Mr. Flah, Officer Hocher says she heard Mr. Flah say the marijuana pipe was his and that he smoked marijuana the night before. T. P.25, L.6-16.

[¶12] Another Bismarck Police Officer who was at apartment 27 at 715 East Interstate Avenue in Bismarck, North Dakota on April 2, 2012 was Narcotics Detective Loren Grensteiner. T. P.31, L.17-17, P.32, L. 3-6. While there he was shown the marijuana pipe. T. P.32, L.19-25. That pipe was tested at the State Lab and during the testing marijuana residue was found on the pipe. T. 33, L.20-25, P.34, L.1-2.

[¶13] Mr. Flah was placed under arrest for possession of drug paraphernalia and searched by Officer Grensteiner. During the search Officer Grensteiner finds a small bag of marijuana in Mr. Flah's left pants pocket. T. P.34, L.24-25, P.35., L.1-2.

[¶14] Ms. Jackson was also charged with possession of drug paraphernalia (The drug paraphernalia in both cases was the marijuana pipe). T. P.36, L.22-25, P.37., L.1-3.

[¶15] Officer Grensteiner never heard Mr. Flah say the marijuana pipe was his or that he smoked marijuana the night before. T. P.37, L.7-12.

[¶16] Mr. Flah took the stand during his trial. According to Mr. Flah's testimony on April 2, 2012 he was living with Nicole Johnson in apartment 27, at 715 East Interstate Avenue in Bismarck, North Dakota and when Officer Hocher arrived he invited her in T. P.45, L.4-8.

[¶17] When asked during the trial about the marijuana pipe Mr. Flah said, the pipe wasn't his, he never smoke marijuana from that pipe, that that pipe belonged to Ms. Jackson and Ms. Jackson plead guilty to possession of that pipe. T. P.45, L.19-25, P. 46, L.1

ISSUE

[¶18] **Is the following statement by the prosecutor in his closing argument improper:**

“Now ladies and gentlemen as the Judge stated , when weighing the credibility of witnesses you can take into account there interest in the outcome of the case. What do Officer Hocher and Detective Grensteiner have to gain? Nothing. They’re still employed. They have no reason to lie about what was said or what wasn’t said at that residence that night. Yes, the Defendant’s girlfriend was charged and she pled. Detective Grensteiner also told you its very common for more that one person to use the same pipe and to be charged with using the same pipe. Who has an interest in the outcome of the case”?

ARGUMENT

[¶19] In this case the prosecutor in her closing argument vouched for the truth and veracity of Bismarck Police Officers Hocher and Grensteiner when she said: “Now ladies and gentlemen as the Judge stated , when weighing the credibility of witnesses you can take into account there interest in the outcome of the case. What do Officer Hocher and Detective Grensteiner have to gain? Nothing. They’re still employed. They have no reason to lie about what was said or what wasn’t said at that residence that night. Yes, the Defendant’s girlfriend was charged and she pled. Detective Grensteiner also told you its very common for more that one person to use the same pipe and to be charged with using the same pipe. Who has an interest in the outcome of the case”

[¶20] A North Dakota case that involves a prosecutors improper closing argument vouching for a police officer’s trial testimony is *City of Williston v. Hegstad*, 1997 ND 56, 562 NW2d 91 [13].

The prosecutor’s argument the police officers’ “job was to tell the truth” was not confined to the evidence. The jury may have relied on the prosecutor’s opinion about the officers’ “job” and ““surrender[ed] their own common sense in weighing testimony.””. Azure, 801 F.2d at 341, quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). The prosecutor’s argument may have ““ so bolster[ed] the officers’] testimony as artificially

to increase its probative strength with the jury.’” Azure, 801 F.2d at 341, quoting Homan v. United States, 279 F.2d 767, 772 (8th Cir.), cert. denied, 364 U.S. 866, 81 S.Ct. 110, 5 L.Ed.2d 88 (1960). The prosecutor’s argument was improper.

[¶21] According to State vs Evans 1999 ND 70, 573 NW2d 336 [10]. The United States Supreme Court has addressed improper prosecutor comments in argument to the jury:

[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor’s opinion carries with the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.

[¶22] In the case now before the court the defense didn’t object at trial when the prosecutor in her closing argument said: “Now ladies and gentlemen as the Judge stated , when weighing the credibility of witnesses you can take into account there interest in the outcome of the case. What do Officer Hoher and Detective Grensteiner have to gain? Nothing. They’re still employed. They have no reason to lie about what was said or what wasn’t said at that residence that night. Yes, the Defendant’s girlfriend was charged and she pled. Detective Grensteiner also told you its very common for more that one person to use the same pipe and to be charged with using the same pipe. Who has an interest in the outcome of the case”

[¶23] A failure to object makes it more difficult but Defendants can still prevail on appeal according to Evans Supra ... [9] When there has been no objection to a prosecutor’s argument, we do not reverse unless the challenged remarks constitute obvious error affecting a defendant’s substantial rights. State v. Harmon, 1997 ND 233, ¶26, 575 N.W.2d 635; State v.

Barnett, 543 N.W.2d 774, 779 (N.D. 1996). We exercise our authority to notice obvious error cautiously and only in exceptional circumstances in which the defendant has suffered serious injustice. State v. Olander, 1998 ND 50, ¶11, 575 N.W.2d 658; State v. McClean, 1998 ND 21, ¶9, 575 N.W.2d 200. In deciding if there was obvious error, we consider the probable effect of the prosecutor's improper comments on the jury's ability to judge the evidence fairly. State v. Weatherspoon, 1998 ND 148, ¶23, 583 N.W.2d 391.

[¶24] Evans Supra says ...[¶14] In determining if a prosecutor's improper remarks in jury argument prejudicially affected the defendant's substantial rights, so as to deprive the defendant of a fair trial, a reviewing court considers "(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of [Defendants'] guilty; and (3) the curative actions taken by the trial court." United States v. Eldridge, 984 F.2d 943, 946-47 (8th Cir. 1993)." United States v. Cannon, 88 F.3rd 1495, 1502 (8th Cir. 1996).

[¶25] When the cumulative effect of the above prosecutor's statement in closing argument is examined it appears that:

1. What the prosecutor said in her closing argument about the officer's truth and veracity of the officers was not in response to anything the defense had done or said.
2. What the prosecutor said in closing argument invaded the province of the jury as to whether or not the police officers who testified were telling the truth.
3. What the prosecutor said in closing argument bolstered the officers testimony and artificially increased the probative strength of their officers testimony to the jury.
4. The case now before the court presented only one issue for the jury and that was should the jury believe the State's story or Mr. Flah's? There is no doubt the State's improper

closing argument put the States thumb on the seal of justice and that thumb may well have tipped the balance in favor of the States.

CONCLUSION

[¶26] For the above and foregoing reasons the case should be remanded to the District Court for a new trial.

Dated this 21st day of December, 2012.

/s/ Benjamin C. Pulkrabek _____
Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶27] 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 December 21, 2012, she served, by e-mail and mail a copy of the following:

APPELLANT'S BRIEF

to: e-mail

Dawn Deitz
Burleigh County State's Attorney's Office
dmdeitz@nd.gov

Mailed to:

Kawo Otis Flah
Bur. Co. Detention Center
P.O. Box 1416
Bismarck, ND 58502-1416

The undersigned further certifies that on December 21, 2012, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF.

/s/ Sharon Renfrow _____
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek