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APRIL 16, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	Supreme Court No. 20140367
vs.	)	
	)	District Court No. 09-2014-CR-00681
Jan David Hornor,	)	
	)	
Defendant-Appellant.	)	

Appeal from Criminal Judgment and Commitment dated October 20, 2014.
Cass County District Court
East Central Judicial District
The Honorable Steven E. McCullough, Presiding

APPELLEE'S BRIEF

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[¶2] **TABLE OF AUTHORITIES**

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[¶3] JURISDICTIONAL STATEMENT

[¶4] This court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6 and N.D.C.C. § 29-28-06 pursuant to Mr. Hornor's timely appeal in accordance with N.D.R.App.P. 4(b)(1)(a).

[¶5] ISSUE PRESENTED

I. [¶6] Did the trial court err when it failed to give a jury instruction about the State's failure to produce evidence during the trial?

[¶7] STATEMENT OF THE CASE

[¶8] Defendant Jan David Hornor was charged by Information alleging five counts on February 28, 2014, of: Count 1 Manufacturing Methamphetamine – 3rd Offense, Class A Felony; Count 2 Possession of Methamphetamine, Class C Felony; Count 3 Possession of Amphetamine, Class C Felony; Count 4 Possession of Drug Paraphernalia, Class C Felony; Count 5 Possession of Drug Paraphernalia, Class A Misdemeanor. (Appellant's App. at 1.) Defendant had a contested preliminary hearing on July 23, 2014. (Appellant's App. at 4.) The court found probable cause for all five charges. (Appellant's App. at 4-5.) A jury trial was held on October 14 - 16, 2014, with the Honorable Judge Steven McCullough presiding. (Appellant's App. at 5-7) Defendant represented himself pursuant to a Motion. (Appellant's App. at 4-5.) Judge McCullough extensively questioned Defendant regarding his obligations concerning the Rules of Criminal Procedure in conducting a jury trial while representing himself. (Status Conference Transcript 5:9-10:25.)

[¶9] The jury found Defendant guilty on all five counts. (Appellant's App. at 7.) Defendant was sentenced to twenty years imprisonment for Count 1, with sentences for all other charges running concurrently. Judgment was entered on October 20, 2014. Id. Defendant timely filed Notices of Appeal on several occasions. (Appellant's App. at 7-8.) The Clerk's Certificates of Appeals were filed on November 18 and 24, 2014. (Appellant's App. at 8.)

[¶10] **STATEMENT OF FACTS**

[¶11] On February 24, 2014, Officer Dan Heidbreder and Officer Matt Giddings collected trash from the curb in front of Defendant's residence at 3510 Kelly Street North, Fargo, ND. (Transcript (Tr.) at 164:17-20.) The trash contained several items that were indicative of a one-pot-methamphetamine laboratory. (Tr. at 164:17-165:14.) A search warrant was obtained and executed on February 27, 2014. (Tr. at 82:9-13.) Officers collected many contraband items from Defendant's home including, but not limited to: two mason jars containing solvent, a bottle of muriatic acid, bottles and tubes with residue of methamphetamine, digital scales with residue, glass pipes with residue, coffee filter with residue, funnel with residue, plastic tubing with residue, a blue capsule of amphetamine or dextroamphetamine, a plastic bag with marijuana, and two open cold packs. (Tr. at 133:16-140:20.) Defendant was arrested and charged with the five counts described above.

[¶12] During the trial on October 14-16, 2014, jury instructions were finalized with the consent of both parties. (Tr. at 334:17-335:7.)

[¶13] On appeal, Defendant claims it was obvious error for the trial court to fail to include an instruction based on NDJI-Civil C-80.30(2001), commonly referred to as an "adverse-inference instruction". (Appellant's Brief 28-30.) Defendant's proposed instruction states:

> The Failure to Produce Evidence
>
> If a Party has failed to offer evidence under control of the Party and 1) the evidence would be available to that Party by the exercise of reasonable diligence, 2) the evidence was not equally available to the adverse Party, 3) a reasonably prudent person under the same or similar circumstances who had reason to believe the evidence to be favorable, would have offered the evidence, and 4) no reasonable explanation for the failure is given, you may infer that the evidence would have been unfavorable to that Party.

(Appellant's Brief 28.)

[¶14] **STANDARD OF REVIEW**

[¶15] This Court reviews the substance of jury instructions according to the following standards:

> Jury instructions should fairly inform the jury of the law applicable to the case. They should also fairly cover the claims made by both sides of the case. Instructions on issues or matters not warranted by the evidence are erroneous, but constitute reversible error only when calculated to mislead the jury or, in other words, when they are prejudicial.
> ....
> When a trial court has chosen a specific instruction, a reviewing court should not be quick to second-guess its choice, if there is evidence or inferences from the evidence to support it. The trial process is still more art than science. Only scant evidence may be needed to support a jury instruction. Where there is no evidence to support a particular theory, there should be no instruction on it; but if the evidence admits of more than one inference, an instruction is proper.

Harfield v. Tate, 1999 ND 166, ¶ 6, 598 N.W.2d 840 (quoting Dale v. Cronquist,

493 N.W.2d 667, 670 (N.D. 1992) (citations omitted)).

[¶16] "When the issue has not been properly preserved for review, …, our inquiry is limited to determining whether the alleged error constitutes an obvious error which affects substantial rights of the defendant." State v. Johnson, 379 N.W.2d 291, 292 (N.D. 1986)(citations omitted).

[¶17] LAW AND ARGUMENT

I. [¶18] The Trial Court did not err by not including a "Failure to Produce Evidence" instruction because it would not have fairly informed the jury of the law applicable to the case.

A. [¶19] Defendant must show there is obvious error affecting a substantial right.

[¶20] Because Defendant did not object to the jury instructions at trial, nor request the instruction put forth in this appeal, this Court is "limited to determining whether the alleged error constitutes obvious error affecting substantial rights of the [D]efendant under Rule 52(b), N.D.R.Crim.P." State v. Purdy, 491 N.W.2d 402, 409 (N.D. 1992) (citing State v. Potter, 452 N.W.2d 71, 72 (N.D. 1990)). This Court must use its power to notice obvious error "cautiously and only in exceptional situations where the defendant has suffered serious injustice." Purdy, 491 N.W.2d at 409 (citing State v. Heintze, 482 N.W.2d 590, 593 (N.D. 1992)).

[¶21] Obvious error will only be found when a defendant has met the burden to show "(1) error, (2) that is plain, and (3) that affects substantial rights." State v. Horn, 2014 ND 230, ¶12, 857 N.W.2d 77 (quoting State v. Miller, 2001 ND 132, ¶25, 631 N.W.2d 587)). "An error is obvious when there is a clear

deviation from an applicable legal rule under current law." Horn, 2014 ND 230, ¶12, 857 N.W.2d 77.

[¶22] To overturn the trial court's decision, this Court, even if it finds error, must also find that a defendant's substantial right has been violated. "In cases of nonconstituional error where a court has failed to provide a jury instruction and there was no objection by the aggrieved party, [the court's] task is to determine whether the error had a significant impact upon the verdict." State v. Johnson, 2009 ND 76, ¶11, 764 N.W.2d 696 (citing State v. Kraft, 413 N.W.2d 303, 308 (N.D. 1987)).

[¶23] In this case, the lack of an adverse-inference jury instruction had no impact on the verdict. At trial, the State presented evidence that: the place searched was Defendant's residence; items of paraphernalia were found in Defendant's bedroom and common areas; some paraphernalia were related to the manufacturing of methamphetamine and the use of drugs; methamphetamine and amphetamine were found. Fingerprinting this evidence would not necessarily add value to the jury's decision process.

[¶24] This Court is charged with considering "the jury instructions as a whole, and determin[ing] whether they correctly and adequately inform the jury of the applicable law, even though part of the instructions when standing alone may be insufficient or erroneous." State v. Estrada, 2013 ND 79, ¶¶13-14, 830 N.W.2d 617 (quoting State v. Smith, 1999 ND 109, ¶11, 595 N.W.2d 565)). The jury instructions in this case contained sufficient provisions to establish the presence of

contraband in Defendant's residence, a place where he had dominion and control over the objects. The inclusion of an adverse-inference instruction would not have supplied enough weight to Defendant's argument that the evidence did not belong to him for it to be effective. The evidence in this case overwhelmingly supported the jury's guilty verdict and therefore, if there was an error, it was harmless.

B. [¶25] The proposed instruction would have been misleading and confusing to jurors.

[¶26] The trial court was correct when it did not include the jury instruction, the "adverse-inference instruction". The instruction would have misled and confused the jury because it incorrectly implies several factors. First, that the State required fingerprint evidence for its case-in-chief against Defendant; second, that fingerprint evidence was exclusively available to the State; third, that the State had knowledge of fingerprint evidence which it kept from Defendant; and fourth, that fingerprint evidence would have shown Defendant's innocence. The elements of the instruction do not accurately reflect the circumstances of Defendant's case, therefore, including the instruction would have amounted to error.

[¶27] Defendant's proposed instruction contains four elements, each of which must be met in order for a juror to correctly conclude that evidence not presented by one party was not favorable to the other party's case. The first element, "1) the evidence would be available to that Party by the exercise of reasonable diligence," could mislead a jury because it implies the State, by

electing not to take fingerprints from the evidence, was not acting diligently. It is, perhaps, the least misleading of the four elements because it is true that the State had access to the evidence and fingerprints could have been taken.

[¶28] The second element, "2) the evidence was not equally available to the adverse Party," is not met under the circumstances of this case. While it is true that the State retains physical control of evidence after its collection, it is not true to say that Defendant was denied access to the evidence for the purpose of preparing his defense. N.D.R.Crim.P. 16(a)(1)(D) requires:

> Upon a defendant's written request, the prosecuting attorney must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies or portions of any of these items, if the item is within the prosecution's possession, custody, or control, and:
> (i) the item is material to preparing the defense:
> (ii) the prosecution intends to use the item in its case-in-chief at trial: or
> (iii) the item was obtained from or belongs to the defendant.

Thus Defendant had equal access to the evidence presented in this case, even though Defendant did not exercise his right to access it. Defendant simply had to make a request to have the items tested – either by the State or by an expert of his own chosing.

[¶29] This Court has indicated that when evidence is inadvertently destroyed by police or prosecution that the adverse-inference instruction may be appropriate. See, State v. Ostby, 2014 ND 180, ¶17, 853 N.W.2d 556. However, the circumstances of this case are distinct from those in Ostby. In Ostby, the State failed to preserve several items of evidence, making the items unavailable to the

defendant for testing or use at trial. Id. at ¶13. In the instant case, the evidence was always available to Defendant through the standard rules of discovery. In every criminal proceeding, it will always be the case that the state retains the evidence after its collection, but this does not lead to the conclusion that the evidence is unavailable to Defendant.

[¶30] A jury cannot be expected to be familiar with the rules of discovery, yet a jury could easily conclude that the State retains possession of evidence after its collection. In this way, a jury would be confused and misled by the adverse-inference instruction because it does not adequately address the reality of evidence preservation and Rule 16 discovery requests.

[¶31] The third element of the adverse-inference instruction, "3) a reasonably prudent person under the same or similar circumstances who had reason to believe the evidence to be favorable, would have offered the evidence," also does not accurately address the circumstances of this case. The instruction is misleading because it implies the State had the evidence in its possession, made qualitative and substantive determinations about the evidence, and chose not to submit it to the jury. This is inaccurate because the state, although it held the objects in evidence, never subjected the evidence to fingerprint analysis.

[¶32] The circumstances of this case are analogous to those in State v. Schmidt in which the defendant argued that an adverse-inference instruction was appropriate because video surveillance relevant to his case had inadvertently been erased by a private third party. 2012 ND 120, ¶¶27-31, 817 N.W.2d 332. The

defendant in Schmidt proposed an instruction that stated, "If you find that the State has destroyed or lost, caused to be destroyed or lost or allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." Id. at ¶ 29. This Court found the jury instruction was not appropriate because it "implies the State had evidence in its possession that it eventually lost or destroyed." Id. at ¶30.

[¶33] As in Schmidt, Defendant's proposed instruction for this case implies that the state had evidence and "had reason to believe the evidence to be favorable," when in fact the state had no evidence and took no position on whether the theoretical evidence was favorable or unfavorable. In this way, the third element of the proposed adverse-inference instruction would have been misleading and confusing to the jury.

[¶34] Finally, the fourth element of the instruction, "4) no reasonable explanation for the failure is given," is also not supported by this case. Because the state was under no obligation to present evidence that it did not have, this final element is inherently misleading. Taken as a whole, the adverse-inference instruction would not have accurately represented the law to the jury and the instruction would have confused and misled the jury. The instructions for this case, as they were presented to the jury, provided appropriate and sufficient instructions to guide the jury's interpretation of evidence, testimony, and legal theories. Because the jury received instructions that accurately informed them of the law applicable to the case, this Court should uphold the convictions of the trial

court. See, Harfield v. Tate, 1999 ND 166, ¶ 6, 598 N.W.2d 840.

C. [¶35] Other elements of the jury instructions sufficiently addressed the circumstances and legal theories of this case.

[¶36] When jury instructions are reviewed on appeal, they should be considered "as a whole to determine if they fairly and adequately advise the jury of the law." Ebach v. Ralston, 510 N.W.2d 604, 608 (N.D. 1994). When a party requests a particular instruction, the trial court "need not give instructions in the specific language requested where the substance thereof is already fully and fairly covered . . . ." Wasem v. Laskowski, 274 N.W.2d 219, 226 (N.D. 1979) (citing Haugen v. Mid-State Aviation, Inc., 144 N.W.2d 692 (N.D. 1966)).

[¶37] The jury instructions in this case contained several standard provisions that sufficiently covered the legal theories presented to the jury. The State advanced the theory that the contraband found in Defendant's residence was constructively possessed by Defendant. (Tr. at 435:4-24.) The definition of constructive possession was addressed directly by one of the jury instructions. (Appellant's App. at 78.) Other instructions, including those on Direct and Circumstantial Evidence and Weight and Credibility, created a clear and accurate representation of the law for the jurors. (Appellant's App. at 57-58, 64.)

[¶38] Defendant's defense, that the items admitted into evidence were not his because they did not have his fingerprints, was not entitled to an adverse-inference instruction because the theory had no evidence to support it. The lack of any fingerprint evidence is not the same as an affirmative showing that there were

no fingerprints. "In a criminal case, a defendant is entitled to a jury instruction on a valid applicable theory, but only if there is some evidence to support it." State v. Steffes, 500 N.W.2d 608, 611 (N.D. 1993) (citing N.D.R.Crim.P. 30). Without supporting evidence, the adverse-inference instruction was correctly excluded from the jury instructions.

[¶39] The adverse-inference instruction was not appropriate in this case because the evidence in question, fingerprint evidence, was never collected. The State was not required to collect fingerprint evidence because circumstantial evidence of constructive possession is sufficient evidence for conviction. "Circumstantial evidence alone may justify a conviction if it is of such probative force as to enable the trier of fact to say that the defendant is guilty beyond a reasonable doubt." State v. Olson, 290 N.W.2d 664, 670-71 (N.D. 1980).

[¶40] This Court has repeatedly found that circumstantial evidence is sufficient to establish possession for the purpose of a conviction of drug or paraphernalia possession. See, e.g. State v. Christian, 2011 ND 56, ¶14, 795 N.W.2d 702 (upholding a conviction because the "circumstantial evidence created a reasonable inference Christian willfully possessed cocaine because the cocaine was found in her bedroom—a place where she had the ability to exercise dominion and control), State v. Morris, 331 N.W.2d 48, 53 (N.D. 1983) (holding that the "State may also show possession by proving the individual constructively possessed the substance"). Because the State did not require fingerprints for its case-in-chief, and because no fingerprint evidence was collected, the adverse-

inference instruction would not have accurately represented the law and would have been misleading and confusing to the jury.

D. [¶41] The State cannot be required to request and perform every available test for every piece of evidence.

[¶42] If this Court were to find that the adverse-inference instruction should have been included by the trial court, the effect would be to require the State to perform every available test on every piece of evidence, regardless of whether the test would be useful to either party at trial. For example, a defendant could just as easily claim that because the state failed to perform DNA testing on drug paraphernalia the jury should assume the outcome of the test would have been detrimental to the State's case.

[¶43] Minnesota has addressed an issue analogous to the one before this Court. In State v. Davidson, a defendant was charged with felony possession of a firearm. 351 N.W.2d 8 (Minn. 1984). No attempt was made by the prosecution or the defense to obtain fingerprints from the seized firearm. Id. at 12. The Minnesota Supreme Court then considered whether the trial court's decision to disallow defense counsel from making a closing argument that created an adverse-inference concerning the lack of fingerprints found on a firearm:

> Bearing in mind that the state's failure to produce the evidence did not necessarily support the inference defendant wanted to jury to draw; that the comment could have potentially confused the jury . . . we conclude that the trial court did not abuse its discretion in ruling as it did. This holding is not inconsistent with our general view that defense counsel must be given considerable leeway in closing argument.

Id. The case now before this Court presents a similar set of circumstances: the issue is not that no fingerprints were found after they were searched for; the issue is that neither party ever attempted to obtain fingerprint evidence. Especially when the evidence was equally accessible to both parties, there can be no finding that the trial court failed to address any deficiencies of the evidence in the jury instructions. See, Travelers Cas. Ins. Co. of Am. v. Williams Co. Const., 2014 N.D. 160, ¶20, 851 N.W.2d 164. In both Davidson and the case before this Court, any inclusion of an argument or a jury instruction that implies that evidence was collected and withheld misleads and confuses the jury.

[¶44] CONCLUSION

[¶45] Therefore, the State respectfully requests this Court affirm the jury verdict finding Defendant guilty of all charges.

Respectfully submitted this 16th day of April, 2015.

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Kendra E. Olson
Law Clerk
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[¶46] CERTIFICATE OF SERVICE

[¶47] A true and correct copy of the foregoing document was sent by e-mail on the 16th day of April, 2015, to: Benjamin C. Pulkrabek at pulkrabek@lawyer.com

Gary E. Euren