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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20160034

State of North Dakota,

Plaintiff and Appellee

-vs-

Desilee Lori Grajczyk,

Defendant and Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTH WEST JUDICIAL DISTRICT
WARD COUNTY CR. NO. 51-2014-CR-02842
THE HONORABLE DOUGLAS L. MATTSON PRESIDING

BRIEF

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MAY 3, 2016

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ABBREVIATIONS

Trial Transcript - TT

Page – P.

Line – L.

Appendix – App.

STATEMENT OF THE ISSUES

[¶1] 1. Did the trial court err when it gave the jury the current standard North Dakota Jury Instruction on direct and circumstantial evidence?

[¶2] 2. Was it error and was that error obvious error according to North Dakota Rule of Criminal Procedure 52(b) for the prosecutor in her closing argument to comment on the defendant's right to remain silent?

NATURE OF THE CASE

[¶3] Defendant appellant Desilee Lori Grajczyk was charged on December 12, 2014 with the following crimes:

1. Possession of a controlled substance schedule 1 with intent to deliver a class A felony;

2. Possession of a controlled substance schedule 1 with intent to deliver a class B felony;

3. Possession of drug paraphernalia a class C felony.

To all of the above charges Ms. Grajczyk on August 14 2015 pled not guilty.

[¶4] A preliminary hearing on the three above felony charges was held on January 12, 2015.

[¶5] At the conclusion of that hearing probable cause was found to believe that Ms. Grajczyk could have committed all three of the felonies charged.

[¶6] A criminal information charging Ms. Grajczyk with the three above felonies was filed on January 22, 2015.

[¶7] A pretrial conference was held on May 6, 2015.

[¶8] An order for trial was issued on May 12, 2015.

[¶9] The states jury instructions with essential elements of the offenses and definitions was filed on May 18, 2015.

[¶10] A notice of endorsement of additional witnesses on the states information was filed on June 6, 2015.

[¶11] A status conference was held on July 24, 2015.

[¶12] The defendant filed his requested jury instructions on July 31, 2015. These instructions did not include an instruction on direct and circumstantial evidence.

[¶13] The court's preliminary jury instructions were filed on August 14, 2015 and the final jury instructions were filed on the same day.

[¶14] Ms. Grajczyk's jury trial began on August 13, 2015 and on August 14, 2015 the jury found Ms. Grajczyk guilty on all three felony charges.

[¶15] The court ordered a presentence report for Ms. Grajczyk on August 14, 2015 and the presentence investigation was completed on November 20, 2015.

[¶16] The sentencing of Ms. Grajczyk took place on January 8, 2016 and the criminal judgment was filed on January 11, 2016.

[¶17] The notice of appeal was filed by Ms. Grajczyk on January 26, 2016 along with the order for transcripts.

[¶18] The clerk certificate of appeal was filed on February 2, 2016 and the clerk's supplemental certificate of appeal was filed on March 11, 2016.

[¶19] This case is now on appeal before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶20] On December 12, 2014, North Dakota Highway Patrol officer Brandon Sola observed a vehicle in Ward County that was weaving and was crossing both the

centerline and the fog lines. Officer Sola, because of what he observed, decided to stop the vehicle and charge the driver was reckless driving.

[¶21] After officer Sola got the vehicle stopped he got out of his vehicle and walked toward the stopped vehicle. When officer Sola reached the stopped vehicle he could smell the odor of marijuana coming from the stopped vehicle.

[¶22] When the driver of the stopped vehicle opened the door officer Sola could see two grocery bags inside the door.

[¶23] Before officer Sola searched the vehicle he called for backup. His backup was Christopher Vigness, who is also an officer of the North Dakota Highway Patrol.

[¶24] Officer Sola then searched the stopped vehicle and found what he believed to be methamphetamine, marijuana, and drug paraphernalia. All of these items were sent to the state crime lab for testing. After the testing the crime lab determined that what officer Sola found was methamphetamine, marijuana, and drug paraphernalia.

[¶25] The states attorney in Ward County charged Ms. Grajczyk with the following crimes:

1. Possession of controlled substance schedule 1 with intent to deliver;

2. Possession of controlled substance schedule 1 with intent to deliver;

3. Possession of drug paraphernalia.

[¶26] Ms. Grajczyk pled not guilty to all three of the above charges.

[¶27] Ms. Grajczyk had a jury trial on the above three charges and at the end of the jury trial, she was found guilty on each of the three charges.

ARGUMENT

¶28] **ISSUE I. Did the trial court err when it gave the jury the current standard North Dakota jury instruction on direct and circumstantial evidence?**

[¶29] The standard for determining the sufficiency of a jury instruction is found in the following language in State vs Steel 211 NW 2d 855 (N.D. 1973). "In determining the sufficiency of any part of this instruction you must consider instruction as a whole. In upholding the instruction when parts of the instruction were criticized, this court in State vs Williams ¶3 said: instructions must be considered as a whole, and when so considered they correctly advise the jury as the law it is sufficient, although a portion thereof standing alone may be insufficient or erroneous State vs Williams 150 NW 2d 80 pages 844 and 845 (N.D. 1967).

[¶30] In this case the trial court in its closing jury instructions gave the North Dakota current jury instruction on direct and circumstantial evidence. The following is the language of that standard jury instruction:

Direct Circumstantial Evidence

A fact in dispute may be proved by the direct evidence or circumstantial evidence, or by both. If an eyewitness testifies about what the witness saw, that is an example of direct evidence.

If the ground is bear when you go to sleep but is covered with a blanket of snow when you awake, this is circumstantial evidence that it snowed while you were asleep.

The law makes no distinction between direct and circumstantial evidence you should give all evidence of weight and value you believe is entitled to receive. A

conviction may be justified on circumstantial alone if the circumstantial evidence has such probative force as to enable you to find the defendant guilty beyond a reasonable doubt.

[¶31] The above jury instruction can be found in the court's final jury instructions. APP. P. 46.

[¶32] Ms. Grajczyk's attorney objection to the above current standard North Dakota Jury Instruction, can be found in the TT,P. 5, Lines 8 to 10.

I guess, Your Honor, we do have an objection in relationship to the direct and circumstantial evidence instruction.

That objection continued on TT, P. 5,L. 24 to P. 6,L. 4.

I guess, Your Honor, we would just ask that that instruction not be included. We did not request that instruction. We would ask that the court go to the old instruction the way it was before it was modified. But I guess we are just simply asking that instruction not be given.

[¶33] The language in the above direct and circumstantial instruction that is objectionable" A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable you to find the defendant guilty beyond a reasonable doubt. (Emphasis added)

[¶34] The reason this language is objectionable is that the correct legal language for a jury instruction on direct and circumstantial evidence is found in two earlier North Dakota cases. The first is State v Tucker 58 N.D. 84 (1929). The second case is State v Steele 211 NW 2d 855 (N.D. 1973). According to Tucker, "This means that the state may prove facts, which we call circumstances, which tend to connect the defendant with the

commission of the crime. And if each such circumstance is proven to your satisfaction beyond a reasonable doubt and all such circumstances, when taken together, convince your mind beyond a reasonable doubt of the guilt of the defendant then of verdict of guilty is warranted even though the evidence tending to connect the defendant the commissioner crime is entirely circumstantial. The circumstances proved by the state tending to connect the defendant with the commissioner crime must be consistent with each other that means any circumstance which is contradictory of any other circumstance or which does not fit into the whole array of circumstances cannot be considered by the jury. And all circumstances taken together, with all reasonable, legitimate inferences to be drawn there from, must not only be consistent with the guilt of the defendant but must exclude every other reasonable theory arising from the evidence in this case, upon which theory the defendant may be made innocent. In other words, gentlemen, if you find the evidence beyond a reasonable doubt that Hans C. Bjone was murdered at the time and place charged in the indictment than the next question for you to consider is does the evidence convince me beyond a reasonable doubt that the defendant, Francis Tucker, killed him? And before you will be warranted in saying that you are so convinced the circumstances shown in the evidence must be such as to exclude every reasonable theory arising from the evidence except that of guilt of the defendant. If upon consideration of all of the evidence you may say that all of the facts and circumstances proven may be true and yet, upon any reasonable theory arising from the evidence the defendant may be still innocent, then the circumstantial evidence is not sufficient to warrant a conviction. On the other hand, if you can say and feel that you are convinced by the evidence, beyond a reasonable doubt, of the guilt of the defendant and there is no reasonable theory arising

from the evidence by which a defendant may be innocent that it is your duty to find the defendant guilty, although the evidence to connect the defendant with the commissioner crime the all circumstantial."

[¶35] According to the second case, Steele "a fact in dispute may be proven by either direct evidence or circumstantial evidence or by both."

[¶36] "Direct evidence such as a credible testimony when eyewitnesses, is the sort which directly proves a fact in dispute without the aid of an inference in which in itself, if true, establishes the fact."

[¶37] "Circumstantial evidence consists of facts and circumstances in the case from which the jury may reasonably infer, from the common experience of mankind, the existence of a fact in dispute."

[¶38] "The defendant may be found guilty even though no one saw him commit the act, if the circumstantial evidence is such as to satisfy you of his guilt beyond a reasonable doubt. While the criminal offense may be proved by circumstantial evidence, the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence. If the circumstantial evidence refutes every reasonable hypothesis of the defendant's innocence it, is entitled to as much weight as direct evidence." (Emphasis added.)

[¶39] Steele goes on to say "without adopting the inference – upon – inference rule, it is our view that the defendant's rights were protected against the evil intended to be avoided by the rule, by the courts instruction that the jury must find the defendant guilty beyond all reasonable doubt and that when the circumstances are consistent with

the hypothesis of the accused's innocence as well as with his guilt the jury must find him innocent.*** "State v Champagne 198 N.W. 2d 218 at 299 (N.D. 1972).

[¶40] The direct and circumstantial jury instruction given in the case now before the court allows a jury to find the defendant guilty on circumstantial evidence alone if the circumstantial evidence has such probative force to enable them to find the defendant guilty beyond a reasonable doubt.

[¶41] Because of the above language in Tucker and Steele a North Dakota jury instruction on direct and circumstantial evidence must contain a statement that the circumstantial evidence must exclude every reasonable hypothesis of innocence, and if it does not the jury must find the defendant not guilty.

[¶42] **ISSUE II. Was it error and was that error obvious error according to ND Rules of Criminal Procedure 52(b) for the prosecutor in her closing argument to comment on the defendant's right to remain silent?**

[¶43] The first time the prosecutor referred to Ms. Grajczyk's right to remain silent she said the following in her closing argument: TT, P. 262, Lines 4 to 8. For instance, there is no fingerprints and she didn't tell why. There were no pay/owe sheets. There was money that was located, so that was correct. There is no statement by Ms. Grajczyk that she intended to deliver. The second time the prosecutor commented on Ms. Grajczyk's right to remain silent is in her closing argument was: TT , P. 264, Lines 3 and 4 "no statement from Ms. Grajczyk that she intended to deliver."

[¶44] Neither Ms. Grajczyk or her attorney objected to either of the above statements made by the prosecutor in her closing argument. When there is no objection by the defendant or her attorney to a statement made by the prosecutor, North Dakota rule

of criminal procedure 52(b) requires that any statement of the prosecutor, in order to be considered on appeal, must be found to be obvious error, and that it affects the substantial rights of the defendant. Only then will the statement by the prosecutor can be considered on appeal even though it wasn't objected to by the defendant or her attorney and at trial it was not brought to the attention of the trial court.

[¶45] The Fifth Amendment to the United States Constitution prevents prosecutors from commenting on the defendant's remaining silent and not testifying at trial.

Fifth Amendment to the United States Constitution:

Article 5

No person shall be held to answer for a capital otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject to same offense to be twice put in jeopardy of his life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived any life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Miranda vs Arizona, 384 U.S. 436, 468, 86 S.Ct, 1602, 16 L. Ed.2d 694 (1966), the United States Supreme Court commented in Footnote 37, in pertinent part:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore use at trial the fact that he stood mute our claimed his privilege in the face of an accusation. (Citation omitted)" (emphasis added.)

[¶46] In Miranda Supra, the United States Supreme Court, in a footnote, commented upon the aspersions which might be cast to any comment upon the defendant's invocation of his Fifth Amendment privilege or remaining silent, when it said, at page 468, note 37, 86 S.Ct. at page 1624:

"Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman....' Devlin, The Criminal Prosecution in England 32 (1958)."

[¶47] The court then went on, in the same footnote, to limit such comment when it said:

"In accordance with our decision today, it is impossible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custody interrogation.

The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. (citations admitted.)" (emphasis supplied.)

[¶48] In North Dakota, a defendant's right to remain silent is found in State v Bragg, 221 N.W.2d 793, 800 (N. D. 1974).

[¶49] The court in Bragg relied on the following three cases from Michigan:

In People v Bobo. 390 Mich. 355, 212 N.W. 2d 190, (1973), the Michigan Supreme Court said:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Non-utterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did."

[¶50] In People v Severance, 43 Mich.App. 394, 204 N.W. 2d 357, 358 (1972), a Michigan Court of Appeals posed the question as follows:

"Was it reversible error to allow a police officer to testify that after the defendant had been one of his constitutional rights, he remain silent, despite the absence of objection thereto?

[¶51] In determining that such testimony was reversible error, the Michigan Appeals court said in Severance, supra 204 N.W. 2d at 359:

"The rule is now firmly established that the prosecution may not use at trial

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(221 N.W. 2d 801)

> the fact that a defendant exercised his privilege of silence in face of accusation, for such would penalize the defendant for exercising the privilege, People v Jablonski, 38 Mich. App. 33, 195 N.W. 2d 777 (1972)....
>
> Admission of such tenant testimony is reversible error unless we can say that it is harmless error under the ruling in Chapman versus California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh. Den. 386 U.S. 987, 87 S.Ct,. 1283, 18 L.Ed.2d 241 (1967).
>
> "The admission of such testimony obviously was error... It would appear that the better rule is that there is absolutely no probative value in eliciting that the defendants were informed of the rights unless the prosecutor intends to offer a confession or statement made by the defendants. Since there is a potential prejudicial effect from the mere mention of the rights statement, even in the absence of testimony that the defendant wished to exercise those rights, such statement should be excluded."

[¶52] In North Dakota, two cases that deal with prosecutors asking questions that require witnesses answers to include a statement about the defendant's right to remain silent are State v Schneider 270 N.W. 2d 287 (ND 1978) and State v Allery 322 N.W. 2d 228 (ND 1982). Both Schneider and Allery agree that:

1. Testimony by a prosecutor's witness about a Defendant's right to remain silent is an improper comment on the defendant's constitutional right to remain silent.
2. That a prosecutor's testimony about the defendants right to remain silent can be reviewed by the North Dakota Supreme Court even if the defendant did not object during the trial because of Rule 52(b) NDR of Crim. Procedure.
3. That establishing error occurred because the prosecutions witness testified about a defendant's silence is not enough to get a reversal of a verdict of guilty.

4. That to get a reversal of a guilty verdict the error must be considered on the entire record and the probable effect of the action alleged to be error will be in light of the of the evidence.

[¶53] In Schneider, after considering the entire record and the probably effect of the actions alleged to be in error in light of the evidence, it was determined the error was harmless. In Allery, after considering the entire record and the probable effect on the actions alleged to be error in light of the evidence, it was decided the error was reversible and the case was remanded for a new trial. The difference in the totality of the circumstances between Schneider and Allery was that in Schneider, the impermissible comment on the silence was harmless because at trial, Schneider testified he had been operating a car, while in Allery there was several doubtful issues that were grounds for reaching a different conclusion. The different conclusions requirement is set out in Coppage v State 2014 ND 42, 843 NW2 291 (10... Establish a reasonable probability that the result of the trial would have been different.

[¶54] Had the prosecutor not commented on in her closing argument about Mrs. G's right to remain silent and the proper jury instruction on direct and circumstantial evidence been given, there is a reasonable probability the results of the trial would have been different.

CONCLUSION

[¶55] For the above and foregoing reasons this case it should be remanded to the District Court with an order granting Ms. Grajczyk a new trial.

DATED this 3rd day of May, 2016.

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CERTIFICATE OF SERVICE

[¶56] 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 May 3rd, 2016 she served, by e-mail and mailed a copy of the following:

To: Marie Ann Miller
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Mailed to: Desilee Lori Grajczyk
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The undersigned further certifies that on May 3rd, 2016, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S APPENDIX AND BRIEF.

/s/ Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Firm