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**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

**JUN - 2 2016**

**STATE OF NORTH DAKOTA**

<b>State of North Dakota,</b>	)	
	)	<b>Supreme Court No. 20160034</b>
<b>Plaintiff/Appellee,</b>	)	
	)	<b>District Court No. 51-2014-CR-02842</b>
	)	
<b>vs.</b>	)	
	)	
	)	
<b>Desilee Lori Grajczyk,</b>	)	
	)	
<b>Defendant/Appellant.</b>	)	

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**BRIEF OF PLAINTIFF-APPELLEE**

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**Appeal from Criminal Judgment Entered on January 8, 2016  
In District Court, Ward County, State of North Dakota  
The Honorable Douglas L. Mattson, Presiding**

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## STATEMENT OF THE ISSUES

- I. **Whether the trial court erred in giving the North Dakota Pattern Jury Instruction on direct and circumstantial evidence.**
- II. **Whether the State commented on the defendant's right to remain silent in closing argument.**

## STATEMENT OF THE CASE

[¶ 1] Desilee Lori Grajczyk was arrested and charged with Possession of a Controlled Substance with Intent to Deliver (Methamphetamine), a Class A Felony; Possession of a Controlled Substance with Intent to Deliver (Marijuana), a Class B Felony; and Possession of Drug Paraphernalia, a Class C Felony, on December 12, 2014. (See Appellant's App. pp. 7-9).

[¶ 2] Grajczyk made her Initial Appearance on all charges on December 15, 2014. At that time, Grajczyk entered not guilty pleas. (See Transcript of Initial Appearance).

[¶ 3] On January 22, 2015, a Preliminary Hearing was held. (See Transcript of Preliminary Hearing). The State presented testimony and the District Court found probable cause existed. An Arraignment was held and Grajczyk entered not guilty pleas to all charges. Id.

[¶ 4] On May 6, 2015, Grajczyk appeared for her Pretrial Conference. (See Transcript of Pretrial Conference). At that time, Grajczyk continued in her pleas of not guilty and requested the matter be set for trial. Id. The District Court issued an Order for Trial on May 6, 2015. (See Appellant's App. p. 13). The Order set out that trial of the case would begin August 13, 2015, and would be set for two (2) days. Id.

[¶ 5] The State filed its proposed jury instructions on May 18, 2015. (See Appellant's App. pp. 20-25). Grajczyk submitted her jury instructions on July 31, 2015. (See

Appellant's App. pp. 27-29).

[¶ 6] The jury trial began August 13, 2015. The District Court filed its jury instructions on August 14, 2015. (See Appellant's App. pp. 30-73).

[¶ 7] The jury returned guilty verdicts on all three charges on August 14, 2015. (See Transcript of Jury Trial pp. 290-297). The District Court ordered a pre-sentence investigation be completed, and Grajczyk was subsequently sentenced on January 8, 2016. (See Appellant's App. pp. 73-80).

[¶ 8] Grajczyk filed a timely Notice of Appeal from the Criminal Judgment. (See Appellant's App. p. 81).

#### **STATEMENT OF THE FACTS**

[¶ 9] Desilee Lori Grajczyk was arrested and charged with Possession of a Controlled Substance with Intent to Deliver (Methamphetamine), a Class A Felony; Possession of a Controlled Substance with Intent to Deliver (Marijuana), a Class B Felony; and Possession of Drug Paraphernalia, a Class C Felony, on December 12, 2014.

[¶ 10] Grajczyk made her Initial Appearance on all charges on December 15, 2014. At that time, Grajczyk entered not guilty pleas. On January 22, 2015, a Preliminary Hearing was held. The State presented testimony and the District Court found probable cause existed. An Arraignment was held and Grajczyk entered not guilty pleas to all charges. On May 6, 2015, Grajczyk appeared for her Pretrial Conference. At that time, Grajczyk continued in her pleas of not guilty and requested the matter be set for trial. The District Court issued an Order for Trial on May 6, 2015. The Order set out that trial of the case would begin August 13, 2015, and would be set for two (2) days.

[¶ 11] On August 13, 2015, prior to the commencement of jury selection, the District

Court held an in-chambers hearing to discuss preliminary jury instructions and the format of trial. At the in-chambers hearing, Grajczyk, through counsel, objected to the District Court providing the jury with the North Dakota Pattern Jury Instruction for direct and circumstantial evidence. (See Transcript of Jury Trial pp. 5-10). The District Court removed the instruction from its preliminary jury instructions and permitted counsel an opportunity to gather appropriate case law before making a ruling on whether or not the jury instruction would be given to the jury at the close of trial. Id.

[¶ 12] The jury trial commenced, a jury was selected, and opening statements were given by the State and Grajczyk's counsel. After the opening statements, the District Court recessed for lunch from 11:50 AM to 1:10 PM. (See Transcript of Jury Trial p. 106). At some point during the recess, the District Court and counsel met in-chambers to readdress Grajczyk's objection to the North Dakota Pattern Jury Instruction for direct and circumstantial evidence. Id. at pp. 106-113. After hearing arguments, the District Court ruled it would give the North Dakota Pattern Jury Instruction for direct and circumstantial evidence, as written, during its final instructions to the jury. Id. at p. 113.

[¶ 13] The State called its first witness, Trooper Brandon Sola. (See Transcript of Jury Trial p. 114). Trooper Sola testified that on December 12, 2014, Trooper Sola received a dispatch from State Radio of a reckless driver. Id. at p. 117. Trooper Sola was provided with the reporting party's information and made contact. Id. at pp. 117-118. The reporting party identified the vehicle, and Trooper Sola began observations. Id. at pp. 118-120.

[¶ 14] Trooper Sola observed that the vehicle crossed the right fog line three times and the centerline once. (See Transcript of Jury Trial p. 120). Trooper Sola initiated a traffic

stop of the vehicle. Id. Trooper Sola approached the vehicle and identified the driver as Desilee Lori Grajczyk. Id. While speaking with Grajczyk, Trooper Sola detected an odor of marijuana coming from the vehicle. Id. at pp. 121-122.

[¶15] A search of the vehicle was commenced by law enforcement. (See Transcript of Jury Trial p. 122). Trooper Sola located two (2) plastic grocery type bags in the driver's side door. Id. at pp. 122-124. Inside the bags, Trooper Sola found two (2) cell phones, and a box and a scale rubber-banded together. Id. at pp. 124-126. Inside the box were three (3) small baggies containing a white crystal substance that appeared to be methamphetamine. Id. Trooper Sola also located a large baggie of marijuana, a small clear container of marijuana, a tin container with another baggie of marijuana, and a glass smoking pipe consistent with ingesting methamphetamine. Id. Trooper Sola also found a glasses container which held a baggie of a crystal substance, wedged between the driver's seat and the center console. Id. at pp. 127-128. Inside of Grajczyk's purse, law enforcement located another glasses case, identical to the one located between the driver's seat and the center console, which contained \$450.00 cash and eight (8) capsules containing a white substance. Id. at p. 128.

[¶ 16] After the State and Grajczyk rested their respective cases, closing arguments were given by counsel to the jury. (See Transcript of Jury Trial pp. 228-265). The State gave its closing argument, summarized the evidence presented, and asked that the jury return three (3) guilty verdicts. Id. at pp. 228-237.

[¶ 17] Grajczyk, by and through trial counsel, also gave a closing argument. (See Transcript of Jury Trial pp. 237-260). In its argument of the case, trial counsel told the jury: "There was no indications by the officer of electronic messages, things of that

nature. There were no statements of the Defendant indicating that she had any sort of history or intention to deliver these controlled substances, okay.” Id. at pp. 243-244. Grajczyk’s trial counsel additionally argued to the jury that the State did not test items for Grajczyk’s fingerprints and the State did not produce pay/owe sheets. Id. at pp. 237-260. [¶ 18] The State then gave a rebuttal argument to the jury. (See Transcript of Jury Trial pp. 261-265). The State specifically addressed trial counsel’s assertions regarding fingerprints, pay/owe sheets, and the absence of an admission by Grajczyk that she intended to deliver the controlled substances. Id. at pp. 262-264. The State conceded that trial counsel was correct, none of those items existed, and argued that regardless of the absence of those specific items, sufficient evidence existed to find that Grajczyk committed each criminal offense beyond a reasonable doubt. Id. at pp. 261-265.

[¶ 19] After deliberation, the jury returned guilty verdicts on all counts. (See Transcript of Jury Trial pp. 290-297)

[¶ 20] Grajczyk filed a timely Notice of Appeal from the Criminal Judgment. (See Appellant’s App. p. 81).

## **LAW AND ARGUMENT**

### **I. Whether the trial court erred in giving the North Dakota Pattern Jury Instruction on direct and circumstantial evidence.**

#### **A. Standard of Review.**

[¶ 21] On appeal, this Court “review[s] jury instructions as a whole and consider[s] whether they correctly and adequately advise the jury of the applicable law and do not mislead or confuse the jury.” State v. Noorlun, 2005 ND 189, ¶ 7, 705 N.W.2d 819 (citing State v. Jaster, 2004 ND 223, ¶ 17, 690 N.W.2d 213). “If jury instructions, when considered in their entirety, correctly advise the jury of the applicable law, there is no



error even though a trial court refuses to submit a requested instruction that is a correct statement of the law, or even if part of the instructions, standing alone, may be insufficient or erroneous.” Id. This Court “will reverse a conviction only if the instructions, as a whole, are erroneous, relate to an essential subject in the case, and affect a substantial right of the accused.” Id.

**B. The trial court did not err in giving the North Dakota Pattern Jury Instruction on direct and circumstantial evidence.**

[¶ 22] “The purpose of jury instructions is to apprise the jury of the state of the law.” State v. Huber, 555 N.W.2d 791, 793 (N.D. 1996) (quoting State v. Murphy, 527 N.W.2d 254, 256 (N.D. 1995)). “Taken as a whole, the jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury.” State v. Huber, 555 N.W.2d 791, 793 (N.D. 1996) (quoting State v. Schneider, 550 N.W.2d 405, 407 (N.D. 1996)).

[¶ 23] The District Court gave the North Dakota Pattern Jury Instruction, NDJI K 5.16 Direct and Circumstantial Evidence, to the jury. (See Appellant’s App. p. 46). The District Court advised, “A fact can be proved by either direct evidence or circumstantial evidence, or by both. [...] The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive. 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.” Id.

[¶ 24] The District Court apprised the jury of the state of the law in North Dakota in regards to direct and circumstantial evidence. “A conviction may be justified on

circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt.” State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819 (citing State v. Steinbach, 1998 ND 18, ¶ 16, 575 N.W.2d 193). “A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts.” State v. Nakvinda, 2011 ND 217, ¶ 17, 807 N.W.2d 204 (quoting State v. Kinsella, 2011 ND 88, ¶ 14, 796 N.W.2d 678). The applicable law, in regards to circumstantial evidence, is that a conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable a juror to find the Defendant guilty beyond a reasonable doubt.

[¶ 25] Grajczyk asserts that the instruction given by the District Court failed to set forth the correct legal language for a jury instruction on direct and circumstantial evidence; specifically, Grajczyk claims that a 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.” Such an assertion is not only in direct conflict with the state of the law, but is also a misstatement of the purpose and requirements of jury instructions.

[¶ 26] In Gail v. Dingle, 2010 U.S. Dist. LEXIS 16004, pp. 26-28 (8th Cir. 2010), the assertion was made that the trial court committed plain error when it instructed the jury on circumstantial evidence but failed to include the additional requirement that the circumstances proved must be consistent with the hypothesis of guilt and inconsistent with any rational hypothesis except guilt. The Court in Gail v. Dingle, found the “claim [was] without merit. Under federal law, a defendant is not entitled to an instruction that circumstantial evidence must exclude every reasonable hypothesis other than guilt, when

a reasonable doubt instruction is given.” (citing Holland v United States, 348 U.S. 121, 139-40 (1954)). The United States Supreme Court acknowledged that there is support in lower courts for the instruction Grajczyk asserts must be given; however, the Court found that “the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.” Holland v United States, 348 U.S. 121, 139-40 (1954).

[¶ 27] The trial court did not err in giving the North Dakota Pattern Jury Instruction on direct and circumstantial evidence. Taken as a whole in this matter, the jury instructions correctly and adequately informed the jury of the applicable law and did not mislead or confuse the jury. The District Court not only gave the North Dakota Pattern Jury Instruction, NDJI K 5.16 Direct and Circumstantial Evidence, to the jury, but also properly instructed the jury on the standards of reasonable doubt. (See Appellant’s App. pp. 44, 46).

[¶ 28] Grajczyk’s request for remand and an order granting a new trial should be denied.

**II. Whether the State commented on the defendant’s right to remain silent in closing argument.**

**A. Standard of Review.**

[¶ 29] This Court “may notice a claimed error not brought to the district court’s attention if there was an error that is plain and affects substantial rights.” State v. Rivet, 2008 ND 145, ¶ 6, 752 N.W.2d 611 (citing Hawes v. N.D. Dept. of Transp., 2007 ND 177, 741 N.W.2d 202). This Court will “exercise [its] authority to notice obvious error cautiously and only in exceptional circumstances where the defendant has suffered serious injustice.” Id. “In deciding if there is obvious error, [this Court] considers the probable effect of the prosecutor’s improper comments on the jury’s ability to judge the evidence

fairly.” Id. “The error should be corrected where it seriously affects the fairness, integrity or public reputation of judicial proceedings.” Id.

**B. The State did not comment on the defendant’s right to remain silent in closing argument.**

[¶ 30] “Improper comments on a defendant’s right to remain silent is constitutional error which may be reviewed on appeal even though not objected to at the time of trial.” State v. Rivet, 2008 ND 145, ¶ 9, 752 N.W.2d 611 (citing State v. Schneider, 270 N.W.2d 787, 792 (N.D. 1978)). “A prosecutor’s improper use of a defendant’s post-arrest silence is an error for which the harmless error analysis is appropriate.” State v. Rivet, 2008 ND 145, ¶ 10, 752 N.W.2d 611 (citing State v. Janda, 397 N.W.2d 59, 66 (N.D. 1986)). “Reviewing courts must ignore harmless errors, including most constitutional violations.” Id. “A harmless error is ‘any error, defect, irregularity or variance that does not affect substantial rights’ and ‘must be disregarded.’” State v. Rivet, 2008 ND 145, ¶ 10, 752 N.W.2d 611 (citing N.D.R.Crim.P. 52(a)). “Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” State v. Rivet, 2008 ND 145, ¶ 10, 752 N.W.2d 611 (quoting State v. Schneider, 270 N.W.2d 787, 792 (N.D. 1978)). “To determine the effect of the error on a defendant’s constitutional rights we must consider the entire record and the probable effect of the actions alleged to be error in light of all the evidence.” Id. “The beneficiary of a constitutional error has the heavy burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id.

[¶ 31] Grajczyk first asserts the State commented on her right to remain silent during closing argument. Grajczyk chooses an isolated portion of the State’s rebuttal argument,

does not consider the context of the statement within the entire record, and misrepresents that the State was referring to Grajczyk in the following statement: “For instance, there is no fingerprints and she didn’t tell you why. There were no pay/owe sheets. There was money that was located, so that was incorrect. There is no statements by Miss Grajczyk that she intended to deliver.” (See Transcript of Jury Trial p. 262).

[¶ 32] Grajczyk additionally asserts the State commented on her right to remain silent when the State said, “No statements from Miss Grajczyk that she intended to deliver.” (See Transcript of Jury Trial p. 264). Again, Grajczyk chooses an isolated portion of the State’s rebuttal argument and does not consider the context of the statement within the entire record.

[¶ 33] When the entire record is reviewed, it is clear that the State was not commenting on Grajczyk’s right to remain silent. Grajczyk, by and through trial counsel, gave a closing argument. (See Transcript of Jury Trial pp. 237-260). In its argument of the case, trial counsel told the jury: “What are some of the things you don’t see? You don’t see any sort of pay/owe sheets. [...] There was no indications by the officer of electronic messages, things of that nature. There were no statements of the Defendant indicating that she had any sort of history or intention to deliver these controlled substances, okay.” Id. at pp. 243-244. Grajczyk’s trial counsel additionally argued, “Now, in relationship to, and this one might go a little bit more to the whole idea of the willful possession. I asked the officer, well, were any of these items fingerprinted even, were any sort of attempt made to determine whether or not Miss Grajczyk had actually touched these items? No. No explanation was provided via the testimony that you have here today or via the testimony you have. [...] Now, again, I am not going to have an opportunity to address

you again. Miss Miller [the State] might come and say, well here's an explanation. Here's an explanation. Here's an explanation." Id. at pp. 246-247.

[¶ 34] Following trial counsel's closing argument, the State gave a rebuttal argument to the jury. (See Transcript of Jury Trial pp. 261-265). The State specifically addressed trial counsel's assertions regarding fingerprints, pay/owe sheets, and the absence of an admission by Grajczyk that she intended to deliver the controlled substances. Id. at pp. 262-264. "Mr. Baumann has indicated, this is kind of like look at the shiny object. Look over here. [...] Ignore the facts. I need you to look at the shiny objects. That's a lot of what just happened here. For instance, there is no fingerprints and she didn't tell you why. There were no pay/owe sheets. There was money that was located, so that was incorrect. There is no statements by Miss Grajczyk that she intended to deliver. He is right. There isn't. But where in these elements does it say that somebody can't willfully possess with intent to deliver unless there is fingerprints, or unless there is pay/owe sheets, or unless somebody tells us how much it sold for? You know why it's not there? Because delivery does not equal selling or dealing." Id. at pp. 261-262.

[¶ 35] The State, when it made the statement, "For instance, there is no fingerprints and she didn't tell you why," was not referring to Grajczyk failing to provide an explanation, but was "quoting" a point made by Grajczyk's trial counsel in his closing: the State (a female prosecutor) did not tell you why there are no fingerprints. Likewise, the State was "quoting" Grajczyk's trial counsel in his assertion that there were no statements of Grajczyk indicating that she had an intention to deliver the controlled substances when the State said, "There is no statements by Miss Grajczyk that she intended to deliver." The fact that the State was referring to Grajczyk's trial counsel's arguments and

statements is evidenced by the State's very next statement: "He is right. There isn't." The State is conceding the absence of fingerprints, pay/owe sheets, and an admission by Grajczyk. It is clear that the State is not commenting on Grajczyk's right to remain silent.

[¶ 36] Grajczyk's second assertion, that the State commented on her right to remain silent by stating, "No statements from Miss Grajczyk that she intended to deliver," like the first claim is wholly inaccurate. (See Transcript of Jury Trial pp. 264). Again, the State was responding to the assertion made by Grajczyk's trial counsel in his closing argument that the State lacked a statement by Grajczyk that she intended to deliver the controlled substances. The State argued to the jury, "No statements from Miss Grajczyk that she intended to deliver. Nope. Sure don't." Id. And again, the State is conceding it has not presented a specific piece of evidence as asserted by Grajczyk's trial counsel.

[¶ 37] The statements alleged to be comments on Grajczyk's right to remain silent, after review of the entire record, are clearly not what Grajczyk asserts them to be. There is no error, and certainly there is no plain error that affects Grajczyk's substantial rights. The ability of the jury to judge the evidence fairly was not adversely impacted by the statements of the State. If there was any adverse impact, it would have weighed against the State, as the State was conceding the absence of particular pieces of evidence desired by Grajczyk.

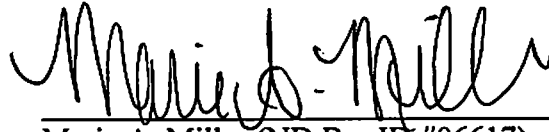
[¶ 38] Grajczyk's request for remand and an order granting a new trial should be denied.

### CONCLUSION

[¶ 39] Grajczyk has failed to demonstrate that the District Court erred in giving the North Dakota Pattern Jury Instruction for direct and circumstantial evidence.

Additionally, the State did not comment on the Grajczyk's right to remain silent in closing argument, and even if the Court finds the State did comment on the Grajczyk's right to remain silent, it was harmless error. As such, the verdicts of guilty and the Criminal Judgment should be affirmed.

Dated this 2<sup>nd</sup> day of June, 2016.

A handwritten signature in black ink, appearing to read "Marie A. Miller". The signature is written in a cursive style with a horizontal line underneath it.

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