STATE OF NEBRASKA, APPELLEE, V. SARAH R. MCGEE, APPELLANT.

___ N.W.2d ___

Filed September 23, 2011. No. S-10-1065.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** Occupants of a private vehicle traveling together by choice may be assumed to have some personal or business association with each other. Knowledge or suspicion that one of the occupants has been involved in criminal activity occurring within the vehicle or involving the vehicle serves as a basis for reasonable suspicion that the other occupants may be participants in that activity.
3. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
4. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
6. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
7. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
8. **Convictions: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.

9. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
10. **Investigative Stops: Motor Vehicles: Controlled Substances: Circumstantial Evidence.** While a passenger's mere presence in a vehicle with contraband is insufficient to support a finding of joint possession, a passenger's possession of an illegal substance can be inferred from his or her proximity to the substance or other circumstantial evidence that affirmatively links the passenger to the substance.
11. **Investigative Stops: Motor Vehicles: Controlled Substances: Evidence.** Generally, a passenger's joint possession of a controlled substance found in a vehicle can be established by evidence that (1) supports an inference that the driver was involved in drug trafficking, as distinguished from possessing illegal drugs for personal use; (2) shows the passenger acted suspiciously during a traffic stop; and (3) shows the passenger was not a casual occupant but someone who had been traveling a considerable distance with the driver.
12. **Investigative Stops: Motor Vehicles: Controlled Substances.** A finder of fact may reasonably infer that a driver with a possessory interest in a vehicle who is transporting a large quantity of illegal drugs would not invite someone into his or her vehicle who had no knowledge of the driver's drug activities.
13. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
14. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

A vehicle driven by Anthony M. Laws in which Stuart D. Howard and Sarah R. McGee were passengers was stopped for speeding by a Nebraska State Patrol officer. When consent to search was denied, a trained drug detection canine unit was called. The canine alerted, and a search disclosed over 700 pounds of marijuana in a camper being towed by the vehicle.

Laws, Howard, and McGee were all charged with possession of a controlled substance with intent to deliver.[1] After their motions to suppress were denied, each was convicted. We addressed the convictions of Laws and Howard in a separate opinion released today. This appeal addresses McGee's challenge to the denial of her motion to suppress and to the sufficiency of the evidence to support her conviction.

FACTS

The facts relating to the vehicle stop and canine sniff are identical to the facts stated by this court in our consolidated opinion on the appeals of Laws and Howard.[2] We refer the reader to that published opinion for an extensive discussion of the underlying facts. For purposes of this appeal, it is sufficient at this point to state that after 727.5 pounds of marijuana were found in a popup camper being towed by the vehicle in which McGee was a passenger, McGee was charged with possession of a controlled substance, marijuana, with intent to deliver. She initially filed a plea in abatement, arguing that the evidence at the preliminary hearing was insufficient to show probable cause, in that the evidence did not show that she had knowledge of or reasonably should have had knowledge that the marijuana was in the camper or that she had control of the camper or constructive control of the marijuana. The court overruled the plea in abatement.

McGee then filed a motion to suppress the evidence found as a result of the search of the vehicles. She generally argued that the patrol officer lacked reasonable suspicion to detain the vehicle's occupants for the canine sniff and that the results of the canine sniff were unreliable and could not serve as a basis for probable cause to search. Laws and Howard filed similar motions, and after conducting a combined evidentiary hearing, the district court overruled all three motions to suppress.

McGee was then tried to a jury. After a 4-day trial, the jury was unable to reach a verdict and the district court declared a mistrial. Prior to retrial, McGee filed a motion to dismiss

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[1] See Neb. Rev. Stat. § 28-416 (Reissue 2008).

[2] See *State v. Howard, ante* p. 352, ___ N.W.2d ___ (2011).

the charge against her, alleging that the State had failed to disclose exculpatory evidence that materially prejudiced her initial trial, in violation of *Brady v. Maryland*.[3] The evidence in question was a statement made by Laws during settlement negotiations with the State, which the parties refer to as a "proffer" statement.

The district court determined that the State failed to disclose Laws' proffer statement to McGee either prior to or during her initial trial. It concluded that although this may have resulted in a *Brady* violation, dismissal of the charge against McGee was not an appropriate remedy. The court therefore overruled McGee's motion to dismiss. The State then filed a motion in limine seeking to bar McGee from presenting evidence of the proffer statement given by Laws to law enforcement, contending that it was inadmissible hearsay. The district court sustained the motion in limine, rejecting McGee's argument that Laws' statement fell within an exception to the hearsay rule.[4]

The case then proceeded to retrial. The State sought to convict McGee as a principal or, alternatively, under the theory that she aided and abetted Laws and Howard. The jury found McGee guilty. After her motion for new trial was overruled, McGee was sentenced to a term of 2 to 4 years in prison. She filed this timely appeal.

ASSIGNMENTS OF ERROR

McGee assigns, consolidated and restated, that the trial court erred in (1) finding that the arresting officer had reasonable suspicion to detain her while awaiting the arrival of the canine unit and failing to suppress the physical evidence resulting from the search and seizure of the vehicle, (2) finding the length of time that she was detained without a warrant was reasonable, (3) finding adequate foundation for admission of the results of the canine sniff of the vehicle, (4) denying her motion to dismiss for insufficient evidence made at the close

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[3] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[4] See Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008).

of the State's case in chief during the first trial, (5) denying her renewed motion to dismiss for insufficient evidence made at the close of all evidence during the first trial, (6) failing to grant her motion to dismiss the charge against her based on the State's failure to disclose exculpatory evidence before or during her first trial, (7) failing to find that Laws' statements during the proffer interview fell within a hearsay exception and were admissible, (8) denying her motion to dismiss for insufficient evidence made at the close of the State's case in chief during the second trial and accepting the guilty verdict when insufficient evidence supported it, (9) overruling her plea in abatement, and (10) denying bond pending appeal.

ANALYSIS

REASONABLE SUSPICION JUSTIFIED FURTHER DETENTION

[1] McGee argues that the district court erred in finding that there was reasonable suspicion to detain her for the canine sniff. Generally, she contends that the factors considered by the district court in its analysis related only to Laws and Howard and that thus, the factors were not sufficient to detain her. When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.[5]

[2] In our separate opinion related to Laws and Howard, we concluded that the district court did not err in finding reasonable suspicion to detain the vehicle and its occupants for the canine sniff. Although many, but not all, of the factors relied upon by the district court focused on Laws and Howard, it is undisputed that McGee was a passenger in the vehicle with Laws and Howard and that she had traveled with them on the entire trip. Occupants of a private vehicle traveling together by choice may be assumed to have some personal or business

[5] *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008).

association with each other.[6] We agree with other courts which have held that knowledge or suspicion that one of the occupants has been involved in criminal activity occurring within the vehicle or involving the vehicle serves as a basis for reasonable suspicion that the other occupants may be participants in that activity.[7] For all of the reasons articulated in our separate opinion related to Laws and Howard, we conclude that the district court did not err in finding reasonable suspicion to detain the vehicle's occupants for the canine sniff.

LENGTH OF DETENTION NOT UNREASONABLE

McGee argues that the length of time she was required to wait for the canine sniff was unreasonable. For the reasons articulated in our opinion related to Laws and Howard, we find this assignment of error to be without merit.

CANINE SNIFF WAS RELIABLE

McGee also argues that the evidence was insufficient to support a finding that the canine was sufficiently reliable so that its alert supported a finding of probable cause to search. McGee did not raise this argument in her motion to suppress. To the extent the issue is properly before us in this appeal, it is without merit for the reasons articulated by this court in the opinion related to Laws and Howard.

SUFFICIENCY OF EVIDENCE AT FIRST TRIAL IS IRRELEVANT

McGee assigns as error the denial of her motions to dismiss made at the close of the State's case and again at the end of the first trial. The motions were based upon insufficient evidence to convict her of the crime charged.

McGee's first motion, made at the close of the State's case, was waived when McGee elected to present evidence in her defense.[8] And resolution of the second motion is unnecessary,

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[6] *People v. In Interest of H.J.*, 931 P.2d 1177 (Colo. 1997).

[7] *Id.* See, also, *U.S. v. Price*, 184 F.3d 637 (7th Cir. 1999); *U.S. v. Tehrani*, 49 F.3d 54 (2d Cir. 1995); 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 9.5(f) (4th ed. 2004).

[8] See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

because the evidence presented by the State against McGee at her initial trial did not result in a conviction. The U.S. Supreme Court has held that retrial of a defendant after a mistrial due to a hung jury is not barred, regardless of the sufficiency of the evidence at the first trial.[9]

DISMISSAL OF CHARGES NOT WARRANTED

McGee argues that the district court erred when it failed to grant her motion to dismiss filed after the first trial resulted in a mistrial. She claimed that dismissal of the charge prior to a retrial was proper because the State violated *Brady v. Maryland*[10] when it failed to provide her with Laws' proffer statement prior to or during her initial trial.

[3] In *Brady*, the U.S. Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment."[11] We have stated:

> "Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial."[12]

However, "the mere determination that evidence was withheld does not automatically indicate that the prosecution violated its *Brady* duty."[13] Although the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence, there is no real constitutional violation unless "the nondisclosure was so serious that there is a

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[9] *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

[10] *Brady v. Maryland, supra* note 3.

[11] *Id.*, 373 U.S. at 87.

[12] *State v. Lykens*, 271 Neb. 240, 249, 710 N.W.2d 844, 851 (2006), quoting *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[13] *State v. Lykens, supra* note 12, 271 Neb. at 251, 710 N.W.2d at 852.

reasonable probability that the suppressed evidence would have produced a different verdict."[14] There are three components of a true *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[15]

Here, the State admits that Laws' proffer statement was not provided to McGee prior to her first trial. Assuming without deciding that the proffer statement was material under the *Brady* standard and thus the failure to disclose was a true *Brady* violation, we find that the district court did not err in refusing to dismiss the charge against McGee.

Generally, *Brady* violations occur during trials that result in a defendant's conviction.[16] The remedy for such violations is the granting of a new trial.[17] Although some courts have determined that dismissal of all charges against a defendant is a possible remedy for a *Brady* violation, courts have done this only in rare and unusual circumstances.[18] These circumstances generally involve complete destruction of material evidence by the prosecution or the prosecution's repeated and systemic disregard for the duty to disclose exculpatory evidence.[19] We find nothing in the record before us that would justify such remedy. Instead, this is the type of *Brady* violation that would entitle McGee to a new trial if she had been convicted by the

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[14] *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

[15] *Id.*, 527 U.S. at 281-82.

[16] See, e.g., *State v. Lykens, supra* note 12; *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

[17] See, e.g., *State v. Castor, supra* note 16.

[18] See, *Government of Virgin Islands v. Fahie*, 419 F.3d 249 (3d Cir. 2005); *U.S. v. Fitzgerald*, 615 F. Supp. 2d 1156 (S.D. Cal. 2009); *U.S. v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004); *U.S. v. Diabate*, 90 F. Supp. 2d 140 (D. Mass. 2000); *U.S. v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998); *People v. McCann*, 115 Misc. 2d 1025, 455 N.Y.S.2d 212 (N.Y. Crim. 1982).

[19] *Id.*

jury at the first trial. Here, because her first trial resulted in a mistrial and McGee was aware of the proffer statement prior to her second trial, she has received the general equivalent of a new trial based on the *Brady* violation, in that she had the use of the information at her second trial. The district court did not err in denying the motion to dismiss the charge based on the alleged *Brady* violation.

LAWS' STATEMENTS WERE INADMISSIBLE HEARSAY

The district court found that Laws' proffer statement was hearsay and was inadmissible at McGee's retrial. McGee argues that the evidence was admissible as an exception to hearsay under § 27-804(2)(c), which provides that if a declarant is unavailable as a witness, a statement he or she previously made is not hearsay if it was

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Laws invoked his Fifth Amendment privilege not to testify prior to McGee's retrial and was thus unavailable as a witness.[20] McGee argues that Laws' proffer statement was trustworthy because it was against his penal interest and was made while he was in police custody, lending credibility.

Without detailing the contents of the proffer statement, we conclude that the district court did not err in ruling on its admissibility. The proffer statement was given as part of plea negotiations between Laws and the State. Laws' agreement with the State expressly provided that "[n]o statements made or

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[20] See, *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991); 2 McCormick on Evidence § 253 (Kenneth S. Broun ed., 6th ed. 2006).

other information provided by you during the 'off-the-record' proffer or discussion will be used against you in any prosecution." Because by the nature of the agreement Laws' statement could not have been used to prosecute him, it was not against his penal interest and did not subject him to civil or criminal liability.

EVIDENCE AT SECOND TRIAL WAS SUFFICIENT

[4,5] McGee also claims that the State presented insufficient evidence to convict her at the second trial. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[21] And whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[22]

[6,7] The jury was instructed that it could convict McGee either as a principal or as an aider and abettor. In its closing argument, the State argued only the aiding and abetting theory. In Nebraska, a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.[23] Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.[24]

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[21] *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011); *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

[22] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

[23] *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006).

[24] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

Under the circumstances of this case, in order to be guilty of aiding and abetting, McGee must have (1) known about the marijuana in the camper and (2) encouraged or assisted Laws and Howard in transporting the marijuana. Viewed in the light most favorable to the prosecution, based on the circumstantial evidence before it, a rational jury could have found these essential elements were met beyond a reasonable doubt.

[8,9] In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.[25] Constructive possession of an illegal substance may be proved by direct or circumstantial evidence.[26]

[10-12] In *State v. Draganescu*,[27] we considered whether circumstantial evidence was sufficient to support a reasonable inference that a passenger in a vehicle being used to transport illegal drugs was in joint possession of the contraband. We noted that while a passenger's mere presence in a vehicle with contraband is insufficient to support a finding of joint possession, a passenger's possession of an illegal substance can be inferred from his or her proximity to the substance or other circumstantial evidence that affirmatively links the passenger to the substance.[28] Generally, a passenger's joint possession of a controlled substance found in a vehicle can be established by evidence that (1) supports an inference that the driver was involved in drug trafficking, as distinguished from possessing illegal drugs for personal use; (2) shows the passenger acted suspiciously during a traffic stop; and (3) shows the passenger was not a casual occupant but someone who had been traveling a considerable distance with the driver.[29] We agreed with the conclusion of other courts that a finder of fact may reasonably infer that a driver with a possessory interest in a vehicle who is transporting a large quantity of illegal drugs would not invite

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[25] *State v. Babbitt, supra* note 22.

[26] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[27] *Id.*

[28] *Id.*

[29] *Id.*

someone into his or her vehicle who had no knowledge of the driver's drug activities.[30]

The same principles apply to the question of whether one aided and abetted another in the possession of a controlled substance with intent to deliver. In this case, State Patrol officer Robert Pelster testified that drug traffickers sometimes use a "disclaimer" in order to avoid suspicion. He testified that one type of "disclaimer" is a person that rides along on a drug transportation trip in order to make the trip look like a family outing. The sheer volume of the marijuana found in the camper supports an inference that Laws and Howard were trafficking the drugs and that both of them knew the marijuana was in the camper and intended to distribute it. A reasonable juror, after hearing the evidence, could conclude that McGee affirmatively assisted in this endeavor by agreeing to act as the "disclaimer."

A key piece of evidence is the videotape of the traffic stop. In that video, when questioned by Pelster about the nature of the trip, McGee informs him that the group had gone to Flagstaff, Arizona, to see the Grand Canyon; that they had stayed for the weekend; and that they had "had a good time out there." This statement, however, was largely contradicted by statements made by McGee to Investigator Alan Eberle in the interview conducted after her arrest. McGee told Eberle that the group did not leave Detroit, Michigan, until Friday, May 29, 2009, at approximately 3:30 p.m.; that they drove straight through and arrived in Flagstaff late Saturday evening; and that after briefly meeting up with Howard's cousins in a dark desert, they slept for approximately 6 hours at a hotel and then left Flagstaff at approximately noon on Sunday. At one point, McGee told Eberle that she saw "red rocks" that she assumed was the Grand Canyon, but at another point, she told him it was dark when they arrived in Flagstaff. McGee professed in her interview with Eberle that the purpose of her trip was to have a romantic getaway with Howard and to see the Grand Canyon, and yet she stated that when they arrived at what she

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[30] See *id.*

thought was the Grand Canyon, she refused to leave the vehicle because she was desperately afraid of snakes. A reasonable juror could conclude that this was not a "weekend trip" to the "Grand Canyon" for the purpose of having a "good time," and could therefore infer that McGee's statement to Pelster was misleading and was an active attempt to encourage the drug-transporting endeavor and assist Laws and Howard in avoiding detection.

In addition, McGee told Eberle that they were returning to Detroit early because she received a telephone call that a family member was ill. However, she did not mention this fact to Pelster during the stop on the interstate, even though the stop took almost 2 hours. And in fact, the rental agreement for the vehicle reflected an expiration date of June 2, 2009, the day after the traffic stop in Nebraska. McGee also told Eberle that they stayed at a Red Roof Inn in Flagstaff, but evidence was presented that there is no hotel by that name at the location she identified. A different hotel at that location had no record that McGee, Laws, or Howard had ever stayed there and had no room number corresponding to that which McGee gave Eberle.

Although other explanations for McGee's conduct were plausible, we find that viewing the evidence in the light most favorable to the prosecution, a reasonable jury could find from all the surrounding circumstances that by agreeing to go along on the trip, and particularly in giving the statement to Pelster about the trip, McGee was attempting to help Laws and Howard avoid detection. And a reasonable jury could also find that the fact that McGee assisted Laws and Howard in attempting to avoid detection demonstrated that she was aware of the drugs in the camper. The evidence was sufficient to support McGee's conviction.

PLEA IN ABATEMENT PROPERLY OVERRULED

McGee argues that the district court erred in overruling her plea in abatement. She contends that insufficient evidence was presented at the preliminary hearing to bind her over for trial.

[13] Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt

which is supported by sufficient evidence.[31] Because the evidence was sufficient to support McGee's conviction, any error at the plea in abatement stage was cured.

[14] McGee assigns that the district court erred in refusing her bond pending her appeal. But this assignment of error is not argued in her brief. Errors that are assigned but not argued will not be addressed by an appellate court.[32] We therefore do not reach this assignment of error.

CONCLUSION

For all of the foregoing reasons, we affirm McGee's conviction and sentence.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[31] *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

[32] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

THOMAS L. PEARSON, APPELLANT, V. ARCHER-DANIELS-MIDLAND MILLING COMPANY, APPELLEE.

___ N.W.2d ___

Filed September 23, 2011. No. S-10-1142.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.