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

June 12, 2007

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State of North Dakota,

Shyla Susan Hawes,

Plaintiff-Appellee

Petitioner-Appellant

v.

v

Shyla Susan Hawes,

North Dakota Department of  
Transportation,

Defendant-Appellant.

Respondent-Appellee.

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Supreme Court No. 20070060  
Richland Co. No. 06-K-00553

Supreme Court No. 20070059  
Richland Co. No. 06-C-00410

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**APPEAL FROM THE DISTRICT COURT,  
RICHLAND COUNTY, NORTH DAKOTA**

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**BRIEF FOR APPELLANT**

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## ISSUES PRESENTED

- I. **Whether the district court's jury instructions on actual physical control incorrectly stated the law thereby prejudicing Defendant's substantial rights and requiring reversal.**
- II. **Whether the prosecutor's inflammatory depiction of the defense counsel is obvious error.**
- III. **Whether the administrative agency erred in finding Hawes in violation of N.D.C.C. § 39-08-01 and suspending her driving privileges.**

## STATEMENT OF THE CASE

[¶ 1] This is a consolidated appeal of two decisions arising under the same set of circumstances. On August 22, 2006, Appellant, Shyla Susan Hawes ("Hawes"), was arrested and cited for violating N.D.C.C. § 39-08-01. Complaint and Summons, App. p. A-45.

[¶ 2] On September 21, 2006, Hearing Officer Dale Moench of the North Dakota Department of Transportation issued findings of fact and conclusions of law resulting in the suspension of Hawes' driver's license for ninety-one (91) days. DOT Hearing Officer's Decision, App. p. A-48. On September 25, 2006, Hawes filed a Notice of Appeal and Specification of Error in the District Court of Richland County, North Dakota. Notice of Appeal and Specification of Error, App. p. A-50. Hawes' hearing to appeal the administrative officer's suspension of her license took place before Judge Richard Grosz on December 14, 2006. Order for Hearing and Briefing Schedule, App. p. A-52. On December 26, 2006, the District Court entered judgment affirming the hearing officer's decision to suspend Hawes' driving privileges for ninety-one (91) days. Notice of Entry of Judgment, App. p. A-57. On February 21, 2007, Hawes gave Notice of Appeal to the North Dakota Supreme Court, appealing the District Court's judgment affirming the Hearing Officer's administrative suspension entered against her on September 21, 2006. Notice of Appeal, App. A-58.

[¶ 3] On August 23, 2006, a criminal complaint was filed against Hawes for violating N.D.C.C. § 39-08-01. Complaint and Summons, App. p. A-2. On February 14, 2007, Hawes appeared before Judge Grosz in Richland County, North Dakota, where a jury found her guilty of the charge of Drove or In Actual Physical Control of Motor Vehicle, in violation of N.D.C.C. § 39-08-01. Criminal Judgment, App. p. A-40. On February 21, 2007, Hawes gave Notice of Appeal to the North Dakota Supreme Court of the Jury Verdict and Criminal Judgment entered against her by the District Court on February 14, 2007. Notice of Appeal, App. p. A-40.

[¶ 4] Shyla Susan Hawes now comes before this Court and prays for relief from the criminal and administrative judgments entered against her below.

### **STATEMENT OF THE FACTS**

**A. [¶ 5] Facts concerning the appeal from the trial court's jury instructions.**

[¶ 6] The portion of the trial court's jury instructions relevant to this appeal are as follows:

#### **ACTUAL PHYSICAL CONTROL**

No person shall be in actual physical control of a vehicle upon a highway, street or on public or private areas to which the public has a right of access for vehicular use in the State of North Dakota, if:

- 1) the person has an alcohol concentration of at least .08% by weight at the time of the performance of a chemical test within two hours after being in actual physical control of the vehicle OR,
- 2) The person is under the influence of intoxicating liquor.

A person is "in actual physical control" of a vehicle when the vehicle is operable and a person is in a position to manipulate one or more of the controls of the vehicle that cause it to move or affects its movement in some manner or direction. This is a question of fact for you to decide.

A vehicle is operable if it was operable or could have been made operable while the person was still under the influence of intoxicating liquor or while the person would have had an alcohol concentration of at least .08% by weight at the time of the performance of a chemical test within two hours after being in physical control of the vehicle. This is a question of fact for you to decide

A person has actual physical control of a vehicle when he or she has real (not hypothetical), existing or present bodily restraining or directing influence over, or domination and regulation of, its movements of machinery. This is a question of fact for you to decide.

As a matter of law, a person does not have to be observed in or on a vehicle in order to be found in actual physical control of that vehicle; the question of Defendant's control of a vehicle is one of fact for you to decide.

The location of any ignition key is only one factor among other factors to consider as to whether the Defendant has actual physical control of a vehicle. Whether the Defendant was in actual physical control is a question of fact for you to decide.

Final Instructions to Jurors, App. p. A-34.

**B. [¶ 7] Facts concerning the appeal from the administrative decision to suspend Hawes' driving privileges.**

[¶ 8] On August 22, 2006 at approximately 1:40 a.m., Alicia Williams ("Williams") was driving Hawes' car from O'Kelly's bar in Fargo to Hawes' home in rural Colfax. (Admin. Hr'g Tr. 23:11-12, 25:1-6). Williams' boyfriend followed in his pickup so that he could take Williams home after she drove Hawes and her car home. (Admin. Hr'g Tr. 25:17-20). Williams was not familiar with the area, having recently moved to North Dakota. (Admin. Hr'g Tr. 25:14). While Williams drove Hawes' car south on I-29, Hawes fell asleep. (Trial Tr. vol.1, 92-93, Feb. 14, 2007). Some time later Hawes awoke and informed Williams that she had missed Hawes' exit. (Admin. Hr'g Tr. 26:10-18). At this point, Williams took the next exit off of I-29 and, as the car approached the top of the exit ramp, the car stopped running. (Admin. Hr'g Tr. 26:10-18). Williams attempted to reignite the car several times but failed to do so. (Admin. Hr'g Tr. 26:19-22). Williams then discovered that the car was out of gas. (Admin. Hr'g Tr. 26:24-27:8).

[¶ 9] In an attempt to get help, Williams tried to contact OnStar using the controls in Hawes' car. (Trial Tr. vol. 1, 96). After Williams was unsuccessful, Hawes tried to contact OnStar. (Trial Tr. vol. 1, 96). Williams testified that Hawes was "talking, talking, talking but

nobody was talking back to her and I couldn't get her [Hawes] to understand that." (Trial Tr. vol. 1, 96).

[¶ 10] With no help on its way, Williams and her boyfriend decided to find a gas station, get gas, and return to drive Hawes and her car home. (Admin. Hr'g Tr. 28:13-23). Hawes did not accompany Williams and her boyfriend because she did not want to abandon her brand new car. (Admin. Hr'g Tr. 28:13-23). Because of the late hour and Williams' unfamiliarity with the area, she could not find an open gas station nearby and decided to drive to Fargo. (Admin. Hr'g Tr. 29:20-30:5). Williams eventually returned to the car at approximately 4:20 a.m. (Admin. Hr'g Tr. 30:8-10). When she returned, the car had been moved and Hawes was not present. (Admin. Hr'g Tr. 29:12-14).

[¶ 11] At approximately 3:50 a.m., Deputy Lettow ("Lettow") of the Richland County Sheriff's Office, had observed a vehicle sitting on the Dwight exit ramp off of I-29. (Admin. Hr'g Tr. 4:25-5:10). Lettow approached the vehicle and noticed someone, who he later identified as Hawes, sleeping in the driver's seat. (Admin. Hr'g Tr. 5:19-20, 6:19). Lettow testified that he noticed Hawes' eyes were bloodshot and that he detected an odor of alcohol coming from her breath. (Admin. Hr'g Tr. 7:8-10). Lettow then asked Hawes to perform several field sobriety tests, which she failed. (Admin Hr'g Tr. 7:15-11:17). At that time Lettow read Hawes the implied consent warning and arrested her for driving under the influence or actual physical control. (Admin. Hr'g Tr. 7:15-11:17).

[¶ 12] Lettow testified that Hawes did not mention that her friends had fuel on the way. (Admin. Hr'g Tr. 31:15-16.) Lettow also testified that Hawes would not admit to driving the car; that Hawes said a friend drove her vehicle; that Hawes said she was out of gas; and that Hawes said she was waiting for OnStar to bring fuel. (Admin. Hr'g Tr. 31:18-22.) According to

Hearing Officer Moench's findings of fact, "[a]t the time of the incident, Ms. Hawes stated that she had been driving the vehicle and no mention was made of anyone else having driven the vehicle." (Admin. Hr'g Tr. 34:25-35:2.) Moench found Lettow's testimony credible and the testimony of Williams and Hawes not credible. (Admin. Hr'g Tr. 35:13-14.)

## ARGUMENT

**I. [¶ 13] The trial court's jury instructions on actual physical control constitute a reversible error because the jury instructions incorrectly advised the jury as to the law on a subject central to the case and thereby prejudiced Hawes' substantial rights.**

[¶ 14] "On appeal, jury instructions are fully reviewable." State v. Wilson, 2004 ND 51, ¶ 11, 676 N.W.2d 98 (citing State v. Steffes, 500 N.W.2d 608, 611 (N.D.1993)). Hawes objected to the jury instruction at trial and therefore did not waive or forfeit such right. Due to the objection, this Court reviews the jury instructions under N.D. R. Crim. P. 52(a) and conducts a harmless error inquiry to determine whether the error was prejudicial. City of Mandan v. Baer, 1998 ND 101, ¶ 21, 578 N.W.2d 559, 565, n.5. (holding violation of presence requirement not harmless error); see also United States v. Olano, 507 U.S. 725, 734-35, 113 S. Ct. 1770 (1993) (stating that unlike Fed. R. Crim. P. 52(a), Fed. R. Crim. P. 52(b) places the burden of persuasion on the defendant rather than the Government with respect to prejudice). Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. State v. Thompson, 504 N.W.2d 838, 841 (N.D. 1993) (citing State v. McIntyre, 488 N.W.2d 612 (N.D. 1992)).

[¶ 15] A jury instruction constitutes harmful error if: (1) there is error, (2) related to a subject central to the case, (3) that affects the defendant's substantial rights. Thompson, 504 N.W.2d at 841 n.1 (citations omitted). In deciding whether an error is harmful, this Court

examines the entire record and evaluates the error in the context of the circumstances in which it was made to see if it had a significant impact upon the jury's verdict. State v. Demery, 331 N.W.2d 7, 12 (N.D. 1983). An error affects "substantial rights" when it is prejudicial or affects the outcome of the proceeding. State v. Erickstad, 2000 ND 202, ¶ 22, 620 N.W.2d 136; State v. Strutz, 2000 ND 22, ¶ 20, 606 N.W.2d 886.

[¶ 16] This Court should reverse Hawes' conviction for violating N.D.C.C § 39-08-01 because the district court's jury instruction defining "operable" constitutes prejudicial error by misstating the law and thereby misleading and confusing the jury. The district court's instruction defining "operable" was not a correct statement of North Dakota law. Moreover, the definition of "operable" concerns a subject central to this case because the jury instruction defines "actual physical control" as occurring "when the vehicle is operable." See Final Instructions to Jurors, App. p. A-21. This error affected Hawes' substantial rights because the district court's instructions amounted to a directed verdict for the State thereby prejudicing Hawes and affecting the outcome of the proceeding.

**A. [¶ 17] The operability of Hawes' vehicle is a subject central to the case because the jury instructions define "actual physical control" as occurring when a vehicle is "operable."**

[¶ 18] For a jury instruction to be grounds for reversal, it needs to relate to a subject central to the case. Thompson, 504 N.W.2d at 841 n.5. A subject central to any criminal case is the accused's guilt or innocence. Id. at 842. In this case, whether Hawes was in actual physical control of her vehicle determines her guilt or innocence. For that reason, Hawes challenges the jury instruction on how the operability of a vehicle relates to actual physical control. The challenged instruction states:

"A vehicle is operable if it was operable or could have been made operable while the person was still under the influence of intoxicating liquor or while the person

would have had an alcohol concentration of at least .08% by weight at the time of the performance of a chemical test within two hours after being in physical control of the vehicle. This is a question of fact for you to decide."

Final Instructions to Jurors, App. p. A-34. The "operable" instruction strongly relates to the central subject of the case because the instructions define actual physical control as:

"A person is 'in actual physical control' of a vehicle when the vehicle is *operable* and a person is in a position to manipulate one or more of the controls of the vehicle that cause it to move or affects its movement in some manner or direction. This is a question of fact for you to decide."

Final Instructions to Jurors, App. p. A-34 (emphasis added). This Court should rule that the operability of Hawes' car is a central subject to this case for three reasons. First, this Court's jurisprudence on actual physical control jury instructions and the North Dakota pattern jury instructions approve of defining actual physical control as occurring "when the vehicle is operable." Second, the trial court's instructions required the jury to consider whether Defendant's car was "operable" in order to determine the extent of Hawes' actual physical control. Third, the public policies underlying the prohibition of actual physical control support finding "operable" central to the case.

1. **[¶ 19] This Court's jurisprudence and the North Dakota pattern jury instructions approve of the trial court's instruction as to when a person is "in actual physical control."**

[¶ 20] In City of Fargo v. Novotny, 1997 ND 73, ¶¶ 9,12, 562 N.W.2d 95, this Court approved of an instruction defining actual physical control as occurring "when the vehicle is operable" and held that such an instruction adequately informs the jury of the law. See also State v. Saul, 434 N.W.2d 572, 576-577 (N.D. 1989) (approving as an accurate statement of law instruction that a person is in actual physical control of a vehicle when the vehicle is operable). In fact, the trial court's initial instruction on actual physical control mirrors the North Dakota pattern jury instructions for Actual Physical Control as well as the instructions given in Novotny

and Saul. See Initial Instructions to Jurors, App. p. A-4. Thus, North Dakota law supports defining actual physical control as occurring when the vehicle is operable. Although the definition of actual physical control was correct, the instruction on “operable” constitutes error that is prejudicial when examining the whole of the jury instructions.

**2. [¶ 21] The jury instruction provided for determining when a person is "in actual physical control" requires the jury to determine whether the vehicle is operable.**

[¶ 22] Because the instruction defines "actual physical control" as occurring "when the vehicle is operable", the district court's instruction defining "operable" substantially relates to a subject central to the case. The plain reading of the instruction on actual physical control instructs the jury to consider two questions of fact: whether the vehicle was operable and whether the Hawes was in a position to manipulate the controls of the vehicle causing it to move in some direction. The operability of the car more than substantially relates to the central subject of this case; it is the central subject of this case because Hawes' contention is that because the car had no gasoline, it was inoperable, and this precludes Hawes from exerting actual physical control by manipulating the vehicle causing it to move in some manner or direction.

**3. [¶ 23] The policies behind the prohibition on actual physical control support finding the operability of the vehicle as the central subject of this case.**

[¶ 24] In State v. Larson, 479 N.W.2d 472, 474 (N.D. 1992), this Court stated: "With APC [actual physical control] the legislature addressed the threat of drunken drivers by criminalizing the conduct of those who, while drunk, *maintain the potential to drive*" (emphasis added). In Novotny, this Court stated:

The purpose of the actual physical control offense is to prevent an intoxicated person from getting behind the steering wheel of a vehicle because that person is a threat to the safety and welfare of the public.

Since Ghylin, we have repeatedly determined the actual physical control offense proscribes intoxicated individuals from exercising any dominion over a vehicle, even if the individual is not driving and has no intent to drive, *because the individual could set out on an inebriated journey at any moment*.

Novotny, 1997 ND 73, ¶ 6 (emphasis added). As Larson and Novotny demonstrate, the central policy behind the actual physical control statute is to prohibit actual physical control where a driver retains the ability to threaten the safety and welfare of the public. A vehicle's operability strongly relates to whether a person behind the wheel threatens the safety and welfare of the public.

[¶ 25] The legislature's rationale for prohibiting actual physical control explains why this Court has found actual physical control where police find drivers asleep or find drivers extricating operable cars from ditches. See State v. Haverluk, 2000 ND 178, 617 N.W.2d 652 (stating plain view of ignition keys not required for probable cause to justify an arrest for actual physical control); City of Fargo v. Novotny, 1997 ND 73, 562 N.W.2d 95 (stating driver may not have had intent to drive vehicle but ability to manipulate control's while seated in driver's seat sufficient to convict); City of Fargo v. Komulainen, 466 N.W.2d 610 (N.D. 1991) (affirming conviction where jury found vehicle which idled too rapidly was operable); City of Fargo v. Theusch, 462 N.W.2d 162, 163 (N.D. 1990) (upholding actual physical control conviction where defendant asleep or unconscious when found by the officer); State v. Ghylin, 250 N.W.2d 252, 256 (N.D. 1977) (upholding conviction where driver extricating car from being stuck in ditch); State v. Schuler, 243 N.W.2d 367, 369 (N.D. 1976) (upholding conviction where driver extricating car partially stuck in ditch).

[¶ 26] In the instant case, because her car had no gas, Hawes could not "set out on an inebriated journey at any moment" nor did she "maintain the potential to drive." This distinguishes the instant facts from those of Haverluk, Novotny, Komulainen, Theusch, Ghylin,

and Schuler, because in each of those cases the person charged with actual physical control actively maintained the potential to drive and could have set out on an inebriated journey at any moment. The policies behind the prohibition on actual physical control support this Court ruling that "operable" is a subject central to this Defendant's case.

**B. [¶ 27] The trial court's instruction defining "operable" constitutes reversible error because it misstated the law and confused and misled the jury.**

[¶ 28] For the achievement of clarity, but at the risk of repetitiveness, the district court's jury instruction informing the jury as to when a vehicle is operable is as follows:

A vehicle is operable if it was operable or *could have been made operable* while the person was still under the influence of intoxicating liquor or while the person would have had an alcohol concentration of at least .08% by weight at the time of the performance of a chemical test within two hours after being in physical control of the vehicle. This is a question of fact for you to decide.

Final Instructions to Jurors, App. p. A-34 (emphasis added). The instruction is an unwarranted expansion that amounts to a directed verdict for the State because under the trial court's instruction there is virtually no vehicle that is not or cannot be made "operable."

[¶ 29] In State v. Saul this Court found no error in an actual physical control instruction using the Merriam-Webster Dictionary definition of "operable" as "fit, possible, or desirable to use." 434 N.W.2d 572, 576-77. Similarly, Hawes suggested using the Merriam-Webster definition of "operable" at trial in this case. Although trial courts are not required to submit jury instructions in the specific language the defendant requests, Hawes' proposed instruction, unlike the trial court's instruction, is supported by North Dakota law. See City of Minot v. Rubbelke, 456 N.W.2d 511, 513 (N.D. 1990) (stating trial courts not required to submit instructions requested by the defendant). This Court should rule that this error prejudiced Hawes' substantial rights and, therefore, constitutes reversible error.

1. [¶ 30] **The trial court's instruction defining "operable" misstates North Dakota law.**

[¶ 31] N.D. Cent. Code § 39-08-01 prohibits a person from being in actual physical control of a vehicle while intoxicated and states:

"Persons under the influence of intoxicating liquor or any other drugs or substances not to operate vehicle - Penalty.

1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state . . . ."

N.D.C.C. § 39-08-01(1). This Court defines the essential elements of actual physical control as being:

"(1) the defendant is in actual physical control of a motor vehicle on a highway or upon public or private areas to which the public has a right of access; and (2) the defendant was under the influence of intoxicating liquor, drugs, or other substances."

Rist v. N.D. Dep't of Transp., 2003 ND 113, ¶ 14, 665 N.W.2d 45 (quoting State v. Haverluk, 2000 ND 178, ¶ 15, 617 N.W.2d 652). The statute does not define what constitutes "actual physical control." In State v. Ghylin, this Court explained that the definition of "actual physical control" does not rest on easy distinctions and defined the phrase in these terms:

A driver has 'actual physical control' of his car *when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery.*

It is not dispositive that appellant's car was not moving, and that appellant was not making an effort to move it, when the troopers arrived. *A driver may be in 'actual physical control' of his car and therefore 'operating' it while it is parked or merely standing still so long as [the driver is] keeping the car in restraint or in position to regulate its movements.* Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway.

State v. Ghylin, 250 N.W.2d 252, 254 (N.D. 1977) (citing Commonwealth v. Kloch, 327 A.2d 375, 383 (Pa. Super. 1975)) (emphasis added). Expanding on this definition, this Court in Rist

explained that “[t]he primary factor in determining the offense actual physical control is whether the defendant is able to manipulate the vehicle’s controls.” Rist, 2003 ND at ¶ 14 (citations omitted).

[¶ 32] This Court's language – defining actual physical control as "real (not hypothetical)" domination and regulation over a vehicle, where a defendant "is able to manipulate the vehicle's controls," and present "so long as" the driver can regulate the cars movements – demonstrates that "operable" means presently operable. Operable does not mean operable as the trial court instructed: "a vehicle is operable if it . . . could have been made operable . . . ." Under the trial court's instruction, actual physical control is possible when the driver has hypothetical control over the vehicle and when a driver does not have control over a vehicle's movements. This is clearly contrary to this Court's statements in Ghylin and Rist. The trial court's expansive definition of "operable" constitutes error requiring reversal because this expansive definition prejudiced the outcome of the trial by directing the jury to find the Defendant's vehicle operable in a sense that is unwarranted by North Dakota law.

**2. [¶ 33] This Court's decision in Haverluk does not support the trial court's expansive definition of "operable."**

[¶ 34] In Haverluk this Court stated "we have frequently upheld APC convictions even when the vehicles were inoperable or the operator had no intent to drive." State v. Haverluk, 2000 ND 178, ¶ 16, 617 N.W.2d 178. Despite its apparent broad wording, Haverluk does not support the expansive definition of operable used by the trial court for two reasons.

[¶ 35] First, if the operability of the car had absolutely no bearing on actual physical control, then this Court's approval of jury instructions on actual physical control in Novotny and Saul would make little sense. In those cases, this Court approved jury instructions defining "actual physical control" as occurring when "a vehicle is operable and a person is in position to

manipulate its controls." See Novotny, 2003 ND at ¶ 9, 11 (stating the instructions were a correct statement of law); Saul, 434 N.W.2d at 576-77 (stating trial court instructions correctly and adequately advised jury of the applicable law). Additionally, if Haverluk's use of the word "inoperable" were read as eliminating any notion of operability of the car, the North Dakota pattern jury instructions would be in error because the pattern instructions define actual physical control as occurring when a vehicle is operable.

[¶ 36] Second, a broad reading of Haverluk that precludes inquiry into the operability of the vehicle would result in undesirable consequences. For example, a person found in a car with no engine and no wheels could be convicted of actual physical control if the operability of the car was immaterial. Similarly, the trial court's instruction would allow conviction if the vehicle "could have been made operable." See Final Instructions to Jurors, App. p. A-34. This instruction results in equally undesirable consequences because nearly any vehicle could be made operable. Suppose a person outdoors in the winter comes across an old, abandoned farm truck and gets inside to stay warm, it makes little sense to convict this person of actual physical control where the vehicle cannot presently move, and the person cannot "set out on an inebriated journey." Under the trial court's instruction, the vehicle "could be made operable," conviction is appropriate, and a person seeking to avoid conviction should keep walking.

[¶ 37] The more the definition of an "operable" vehicle attenuates from the actual present operableness of the vehicle, the more meaningless the word becomes. An instruction of "operable" should reflect the present operability of the vehicle and those cases where the operator is only momentarily prevented from "continue[ing] their inebriated journey." This Court should rule that the instruction defining "operable" is error because it is an expansive and unwarranted extension of North Dakota law.

3. **[¶ 38] North Dakota actual physical control case law supports a definition of operable that reflects a defendant's ability, in the present tense, to manipulate a vehicle's controls in such a way that the driver may set out on an inebriated journey at any moment.**

[¶ 39] The ability to at least control a vehicle's movements is the key factor behind this Court's actual physical control decisions. The trial court's instructions on "operable" are in error because the instructions direct the jury to find the Defendant's vehicle "operable", and thus in Defendant's actual physical control, when the Defendant did not have any ability to control her vehicle's movements. Although this Court has upheld convictions where a defendant's vehicle was temporarily inoperable, the instant case is distinguishable. It is factually distinguishable because Hawes' car had no gasoline, which is different from cases where a defendant's car is operable but stuck in a ditch. The instruction on actual physical control in this case extends the definition of "operable" far beyond the cases where this Court has previously upheld actual physical control convictions.

[¶ 40] This Court has upheld actual physical control decisions where the defendant's vehicle was temporarily stuck in a ditch and the defendant was actively attempting to continue on their inebriated journey. See State v. Saul, 434 N.W.2d 572, 577 (N.D. 1989) (upholding actual physical control conviction where defendant extricating car from ditch stating "[i]n this case the automobile was fit to use and there was no evidence that the controls . . . were not in proper working order."); State v. Ghylin, 250 N.W.2d 252, 255 (N.D. 1977) (upholding actual physical control conviction where defendant attempting to get vehicle out of ditch and vehicle almost broke free when officer arrived); State v. Schuler, 243 N.W.2d 367, 369-70 (N.D. 1976) (upholding conviction for actual physical control where front wheels of car on road, rear wheels in ditch, and defendant sitting behind steering wheel with keys in ignition and transmission in

drive position). In the instant case, Hawes' vehicle was not in working order and Hawes was not just momentarily precluded from driving down the highway.

[¶ 41] Furthermore, this Court has upheld actual physical control decisions where the defendant was found asleep and the car was fit to drive. See North Dakota Dep't of Transp. v. Rist, 2003 ND 113, ¶¶ 13, 17, 665 N.W.2d 45 (upholding conviction where defendant found slumped over and no evidence of inoperability of pickup offered); City of Fargo v. Novotny, 1997 ND 73, ¶¶ 11-12, 562 N.W.2d 95 (upholding conviction where defendant found asleep in running car); City of Fargo v. Theusch, 462 N.W.2d 162, 163 (N.D. 1990) (upholding conviction where defendant found asleep with ignition keys in front pocket); City of Fargo v. Komulainen, 466 N.W.2d 610, 611-12 (N.D. 1991) (upholding conviction where defendant found asleep in vehicle and rejecting defendant's argument that evidence of vehicle's rapid idle precluded jury from finding the vehicle operable). Although Lettow found Hawes asleep in her vehicle, these cases are distinguishable from the instant case. Unlike in Rist and Komulainen, evidence of the operability of the vehicle was presented during trial and the challenge to the district court proceedings is that the jury instructions amounted to prejudicial error.

[¶ 42] Finally, in Salvaggio v. North Dakota Dep't of Transp., 477 N.W.2d 195 (N.D. 1991), this Court rejected the defendant's argument that a driver must be in the vehicle in order to have the present ability to control the vehicle. 477 N.W.2d at 197-198. In Salvaggio, the defendant's car was stuck in a ditch and the defendant was outside the car attaching tire chains when approached by a highway patrolman. Id. at 196. This Court found significant the fact that the patrolman observed the defendant attempting to put tire chains on the vehicle and overheard the defendant say "all I got to do is get the chain on and I'll be able to get out." Id. at 197. These facts provided reasonable grounds for the hearing officer to reasonably conclude that Salvaggio

was in actual physical control of his vehicle. *Id.* at 198. In the instant case, Hawes was not putting gasoline into the tank when the officer arrived, and was not mere seconds away from driving down the road.

[¶ 43] All of these cases have a key theme in common – the ability, in the present tense, to manipulate an operable vehicle's controls in such a way that the defendant may set out on an inebriated journey at any moment. In the instant case, Hawes' vehicle was out of gas, and there was no contention that Hawes had driven the vehicle to the location where the officer found it. The trial court's instruction on "operable" directs the jury to find Hawes' vehicle operable based on hypothetical control of the vehicle, without regard to Hawes' actual ability to manipulate her vehicle's controls and without regard to Hawes' present capability to set out on an inebriated journey. This Court should rule that the trial court's operable instruction constitutes prejudicial error because North Dakota law does not support the instruction.

**C. [¶ 44] The trial court's error relates to a subject central to the case and affected Defendant's substantial rights because the jury instructions amount to a directed verdict in favor of the State and affected the outcome of the proceeding.**

[¶ 45] The trial court's jury instructions, rather than using the common dictionary definition of operable provided by Hawes, defined operable in such an expansive manner so as to constitute a directed verdict for the State. The instruction defined "operable" so expansively as to leave no possibility for the jury to reasonably doubt the vehicle's operability because the instruction provided that "operable" meant hypothetically operable. This Court should reverse Hawes' conviction and rule that the jury instructions amounted to a directed verdict for the state, thereby prejudicing Hawes' substantial rights.

[¶ 46] When separated into its components, the instruction provides that a vehicle is operable (and therefore capable of being under Defendant's actual physical control) under three

circumstances: (1) A vehicle is operable if it was operable; (2) A vehicle is operable if it could have been made operable while the person was still under the influence of intoxicating liquor; (3) A vehicle is operable if it could have been made operable while the person would have had an alcohol concentration of at least .08% by weight at the time of the performance of a chemical test within two hours after being in physical control of the vehicle.

[¶ 47] The first circumstance is redundant and can only confuse and mislead the jury. The second and third circumstances direct the jury to find Hawes' vehicle operable where the vehicle is not presently operable in any ordinary sense of the word. These circumstances direct the jury to find Hawes' vehicle operable on the basis of conjecture and hypothesis. The State provided no evidence as to the potential or probable length of the influence of intoxicating liquors, nor any evidence as to the potential length of time that Hawes could have had a blood alcohol concentration over .08%. The language "could have been made operable" tells the jury in essence: the defendant's vehicle is operable if there is any circumstance imaginable under which the defendant's inoperable vehicle could be made fit to drive and you believe the defendant would still be intoxicated at that time.

[¶ 48] These instructions prejudiced Defendant's substantial rights. The instruction is error because it defines "operable" in a manner not in accord with North Dakota law. This error is prejudicial when considering the whole of the jury instructions and the facts of this case; the instruction defines actual physical control as occurring when the vehicle is operable and the Defendant built her defense around the fact that the vehicle was inoperable. This Court should reverse Defendant's conviction for actual physical control and rule that the jury instructions constituted error prejudicing Defendant's substantial rights.

**II. [¶ 49] Prosecution committed obvious error when he called Defense Counsel's presentation "balderdash."**

[¶ 50] Obvious error is an error or defect that affects substantial rights and may be considered on review even though it was not brought to the trial court's attention. N.D. R. Crim. P 52 (2007.) Furthermore, obvious error is an error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. Id. To determine whether an error affecting substantial rights of the defendant has been committed, the entire record must be considered and the probable effect of the error determined in the light of all the evidence. Id. In deciding if there was obvious error, this Court considers the probable effect of a prosecutor's improper comments on the jury's ability to judge the evidence fairly. State v. Evans, 1999 ND 70, ¶ 9, 593 N.W.2d 336, 340. If a prosecutor makes improper statements of fact that are not supported by the evidence, those statements "are presumed to be prejudicial unless harmless in themselves." Id. (citing State v. Mehralian, 301 N.W.2d 409, 418 (N.D. 1981)). A single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated. U.S. v. Cannon, 88 F.3d 1495, 1503 (8<sup>th</sup> Cir. 1996).

[¶ 51] In rebuttal to defense council's closing argument at trial, the prosecutor stood up, looked at defense council, smiled, and said "Ladies and gentlemen of the Jury... Balderdash! Smoke and Mirrors!" Transcript of Jury Trial, App. p. A-43, line 8-9. The prosecutor was unambiguously implying that council for the defense was lying and attempting to deceive the jury. Cambridge Advanced Learner's Dictionary defines balderdash as an "old-fashioned exclamation meaning nonsense or something that is stupid or not true." Cambridge Advance Learner's Dictionary, Cambridge University Press 2007. Dictionary.com defines balderdash as "senseless, stupid, or exaggerated talk." Dictionary.com, Dictionary.com Unabridged (v 1.1). Random House, Inc. The defense did not object to the prosecutor's statement at trial because

defense counsel did not immediately recognize the demeaning nature of this out-dated expression.

[¶ 52] In State v. Lopez, the prosecution said in its closing arguments, “You heard their lawyers say not guilty. Well lady and gentlemen of the jury you know they were lying to you at that time.” 500 S.W.2d 844, 846 (Tex. Crim. App. 1973). The court found that the prosecution’s statement denied the accused the presumption of innocence to which he was entitled. In People v. Thomas, the prosecutor referred to a member of the defense council as a liar and argued that the reasoning of the defense was insane. 316 N.E.2d 190, 195 (Ill. App. Ct. 1976). The court in this case found that these statements, along with others, were inflammatory, inexcusable and warranted remand for a new trial. Id.

[¶ 53] The Prosecution substantially prejudiced the defendant’s right to a fair trial by calling defense counsel a liar and suggesting that the defense’s argument was nothing but an attempt to deceive the jury and lead them away from the truth. The prosecution’s derogatory remark took aim at defense counsel’s creditability and caused the jury to doubt the legitimacy of the argument, not because of its merit, but because of the insinuation of the prosecution. As stated in People v. Lynch, “It is the bounden duty of courts to insist that a defendant be fairly convicted, because if he is not so convicted he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law.” 140 P.2d 418, 424 (Cal. Ct. App. 1943). Hawes’ conviction was based on the inflammatory statements made by the prosecution, not the evidence. This amounts to obvious error and must be reversed.

**III. [¶ 54] The administrative agency erred in finding Hawes in violation of N.D.C.C. § 39-08-01 because the decision is not supported by the preponderance of the evidence and is not in accordance with the law.**

[¶ 55] The Administrative Agencies Practices Act, N.D.C.C ch. 28-32, governs the review of administrative license suspensions. Bucholz v. North Dakota Dep't of Transp., 2002 ND 23, ¶ 6, 639 N.W.2d 490. The review is limited to the record before the agency and the decision of the district court is not reviewed. Ringsaker v. North Dakota Dep't of Transp., 1997 ND 127, ¶ 5, 596 N.W.2d 328. The agency's decision is affirmed unless: (1) a preponderance of the evidence does not support the agency's findings; (2) the agency's findings of fact do not support its conclusions of law and its decision; (3) the agency's decision violates the constitutional rights of the appellant; (4) the agency did not comply with the Administrative Agencies Practice Act in its proceedings; (5) the agency's rules or procedures have not afforded the appellant a fair hearing; or (6) the agency's decision is not in accordance with the law. Wheeling v. North Dakota Dep't of Transp., 1997 ND 193, ¶ 5, 569 N.W.2d 273 (citation omitted).

The review of an administrative agency decision thus involves a three-step process of determining whether or not the findings of fact are supported by a preponderance of the evidence, the conclusions of law are sustained by the findings of fact, and the decision is supported by the conclusions of law.

Redwood Village Partnership, Ltd. v. North Dakota Dep't of Human Services, 430 N.W.2d 333, 335 (N.D. 1988); see also Moran v. North Dakota Dep't of Transp., 543 N.W.2d 767, 769 (N.D. 1996). The ultimate conclusion of whether the facts meet the legal standard is a question of law fully reviewable upon appeal. See Wheeling, 1997 ND at ¶ 5.

[¶ 56] The preponderance of the evidence does not support the agency's findings of fact and conclusions of law regarding probable cause to arrest Hawes for two principle reasons. First, the hearing officer erred in finding that Hawes had been driving the vehicle at the time of

the incident. Second, the hearing officer erred in finding defendant in actual physical control of an operable vehicle. The agency's decision to suspend Hawes' drivers license is not in accordance with the law because Hawes' vehicle was not operable. This Court should reverse North Dakota Department of Transportation's decision to suspend Hawes' driver's license.

**A. [¶ 57] The preponderance of the evidence does not support the agency's finding that Hawes was driving her vehicle and therefore, as a matter of law, Hawes could not be found to be driving while intoxicated.**

[¶ 58] The hearing officer found that "[a]t the time of the incident, Ms. Hawes indicated that she had been driving the vehicle, and no mention was made of anyone else having driven the vehicle." (Admin. Hr'g Tr. 34:25-35:2.) This finding is not supported by a preponderance of the evidence. Additionally, the DOT can only suspend driving privileges for driving under the influence if tests to determine a person's intoxication are completed within two hours of driving. N.D.C.C. § 39-20-04.1 (2007). Therefore, the hearing officer could not have used driving under the influence as a basis for the suspension of Hawes' driving privileges because there is no evidence of the time of driving.

[¶ 59] Furthermore, Deputy Lettow's testimony, which the hearing officer found credible, supports the proposition that Hawes did not drive: "She had stated to me that a friend was driving her vehicle and left her there, and she ran out of gas. Would not admit to driving the car, but that her friend drove instead . . ." (Admin. Hr'g Tr. 31:18-21.) This statement by Deputy Lettow, the credible witness, is in direct opposition to the agency's findings of fact. Additionally, Lettow's official police report, which states that Hawes claimed a friend drove her car to the location, corroborates his testimony. The weight of the evidence demonstrates that Hawes never drove her vehicle, and therefore, the agency could not conclude that the arresting officer has reasonable grounds to believe Hawes drove while intoxicated. This Court should reverse the agency's

suspension of Hawes' driver's license because the agency's determination that Hawes drove while intoxicated is not supported by a preponderance of the evidence.

**B. [¶ 60] The agency's conclusion that Hawes was in actual physical control of a vehicle is not in accordance with the law because Hawes' vehicle was inoperable.**

[¶ 61] The hearing officer concluded that Deputy Lettow had reasonable grounds to believe that Hawes was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of North Dakota Century Code § 39-08-01. The conclusion that Hawes was in actual physical control of a vehicle is not in accordance with the law. As explained in parts I.A.3. and I.B., supra, Hawes could not be in actual physical control of her vehicle because it had no gasoline. Hawes did not have real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, her vehicle's movements of machinery. Nor did Hawes have actual physical control in the sense of Ghylin: "so long as the driver is keeping the car in restraint or in position to regulate its movements." 250 N.W.2d at 254. In a closely analogous case, where a defendant charged with actual physical control was found asleep in a vehicle rendered inoperable by the defendant's friends, the Minnesota Court of Appeals stated: "where an intoxicated [occupant] had no intention of driving the vehicle and the vehicle was mechanically inoperable, the occupant was not in physical control of the vehicle even though the ignition keys were located on the dashboard." Roberts v. Comm'r of Pub. Safety, 371 N.W.2d 605, 607-08 (Minn. Ct. App. 1985) (holding no physical control where friends disconnected ignition coil and left defendant asleep in vehicle). The Minnesota Court described Roberts' situation as "the effect is the same as if Roberts had been discovered asleep in a wagon." Id. at 607. In the instant case, Hawes' friends rendered the vehicle inoperable by driving the vehicle until it was out of gas. Lettow discovered Hawes asleep, and the effect is as

if Lettow discovered Hawes asleep in a wagon. This Court should reverse the agency's suspension of Hawes' driver's license because the agency's determination that Hawes was in actual physical control of her vehicle is not in accordance with the law.

### CONCLUSION

[¶ 62] This Court should reverse the jury's verdict because the district court's jury instruction on operable is error on a central subject to this case that prejudiced Defendant's substantial rights. This Court should also find the prosecution's inflammatory description of the defense counsel's presentation to constitute obvious error that affected a substantial right and warrants a new trial. Finally, this Court should reverse the North Dakota Department of Transportation's suspension of Hawes' driving privileges because the decision is not in accordance with the law and the preponderance of the evidence does not support the agency's findings of fact.

[¶ 63] For the reasons set forth, Appellant respectfully requests that the North Dakota Supreme Court reverse the decisions of the District Court of Richland County and the North Dakota Department of Transportation.

\_\_\_\_\_/s/  
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