

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff-Appellee,)
)
)
)
 vs.) SUPREME COURT NO. 20220215
)
) District Court No. 53-2019-CR-01726
 Dacotah Ryder Hanson,)
)
 Defendant-Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THE JUNE 24, 2022 JUDGMENT
 THE WILLIAMS COUNTY COURT IN WILLISTON, NORTH DAKOTA
 THE HONORABLE JOSH B. RUSTAD PRESIDING

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED

[¶ 1] I. Due to the slow rollover of the 1969 Ford pickup truck, was there insufficient evidence that Defendant was the driver of said vehicle?

[¶ 2] II. During closing argument, did the prosecutor commit reversible error when he commented on Defendant's right to not testify?

STATEMENT OF THE CASE

[¶ 3] Defendant-Appellant Dacotah Ryder Hanson appeals from the June 24, 2022 Judgment. Defendant seeks reversal on the grounds that there was insufficient evidence that he drove the vehicle and the prosecutor improperly commented on him not testifying at trial.

[¶ 4] On November 6, 2019, the State filed two Complaints. On the first Complaint, the State charged Defendant with Leaving the Scene of An Accident Involving Death, a Class B Felony, in violation of N.D.C.C. § 39-08-04. (R1) On the second Complaint, the State charged Defendant with Manslaughter, a Class B Felony, in violation of N.D.C.C. § 12.1-16-02. (R2) The State alleged that Defendant, whilst extremely intoxicated, drove his 1969 Ford pickup truck in a reckless manner, causing the death of his passenger and

he fled the scene without contacting authorities. (R1 and R2)

[¶ 5] On March 7, 2022, the three day jury trial commenced. The State presented 11 witnesses, including four North Dakota Highway Patrol troopers, and over 50 exhibits. Most of the exhibits were pictures of the accident scene. Subsequently, the jury found Defendant guilty on both counts. (R120, R121)

[¶ 6] Per N.D.R.Crim.P. 29(c), on March 18, 2022, Defendant filed his Motion Pursuant to Rule 29 for Judgment of Acquittal. (R181) On March 30, 2022, Judge Josh B. Rustad entered his Order Denying Defendant's Motion for Acquittal to N.D.R.Crim. 29. (R189) Judge Rustad held there was substantial evidence that Defendant was the driver. (R181:3:¶9)

[¶ 7] Thereafter, on June 24, 2022, the court entered Judgment and sentenced Defendant. On both counts, Defendant was sentenced to ten years of imprisonment, first serve five years, with the balance suspended for a period of three years of supervised probation. Both counts to run concurrent. (R212, R222:57:23-58:21)

[¶ 8] Subsequently, on July 21, 2022, Defendant filed his Notice of Appeal. (R214)

STATEMENT OF THE FACTS

[¶ 9] The facts relevant to the issues are in dispute. On or about November 28, 2018, a fatal motor vehicle accident occurred just north of the airport in Tioga, North Dakota. When officers responded they observed a 1969 Ford pickup truck tipped on its right passenger door side.

(R223:96:1-14, R129, R132) The victim, who was already dead, was trapped underneath the truck. (R223:98:6-11, R135) Officers observed foot prints in the snow leading away from the vehicle towards the road. (R223:130:10-22, R223:133:14-22, R139, R140, R141, R142) From a video from a airport hanger, a male is observed walking away from the vicinity of the accident into town. (R224:117:3-122:17)

[¶ 10] Through accident road construction, it was determined that prior to the accident, the driver of the 1969 Ford pickup truck was driving in a reckless manner, by doing numerous donuts. (R224:174:7-183:9, R177, R224:211:8-14) The 1969 Ford pickup truck was registered to Defendant. (R224:20:19-25, R224:102:23-24)

[¶ 11] Sgt. Joshua Gudvangen testified that this was not a full rollover accident. Instead the vehicle tipped over onto the passenger side. It was not a very violent crash as items in the truck bed were still intact.

(R224:97:7-98:8) Sgt. Gudvangen testified he found Defendant's cell phone and cigarettes near the scene.

(R224:104:23-106:3)

[¶ 12] Both Defendant and the victim had consumed large amounts of alcohol that night. Dallas Miller, a mutual friend of both, testified that they were all playing billiards in a pool league shortly before the accident. Everybody was intoxicated. (R224:19:8-20:18) Defendant had consumed 10 to 15 drinks that night. (R224:220:13-14) The victim's BAC was .235. (R225:26:4) Dallas Miller saw the victim start and warm up the 1969 Ford pickup truck that night. (R224:21:12-21)

[¶ 13] Defendant had two interviews with law enforcement. His story and statements were inconsistent. Defendant said "there is a good possibility" he was the driver during the accident. (R224:220:15-22)

[¶ 14] Dr. William Massello performed the autopsy on the victim. He died of mechanical asphyxia caused by the pressure of the vehicle on his body. (R225:24:19-20) Dr. Massello opined that the victim was probably alive for approximately ten minutes after the accident. (R225:25:6-9)

ARGUMENT

[¶ 15] I. Due to the slow rollover of the 1969 Ford pickup truck, there was insufficient evidence that Defendant was the driver of said vehicle.

[¶ 16] Under State v. Rourke, 2017 ND 102, ¶ 17, 893 N.W. 2d 176, a motion for judgment of acquittal at the trial court under N.D.R.Crim.P. 29 preserves the issue of insufficiency of evidence for appellate review. Here, the Motion Pursuant to Rule 29 for Judgment of Acquittal preserves the issue for appellate review. (R181)

[¶ 17] The standard of review for insufficient evidence states that:

“A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact-finder could have found the defendant guilty beyond a reasonable doubt. When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial in such a case.”
State v. Kringstad, 353 N.W.2d 302, 306 (N.D. 1984).

[¶ 18] The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt.
State v. Schneider, 550 N.W.2d 405 (N.D. 1996); In Re

Winship, 397 U.S. 358, 364, (1970). Beyond a reasonable doubt requires that a firm and abiding conviction of the Defendant's guilt exist based on a full and fair consideration of all the evidence presented at trial and not from any other source. NDJI Criminal K-1.10

[¶ 19] Here, the State had to prove beyond a reasonable doubt on both charges that Defendant was the driver of the 1969 Ford pickup truck at the time of the accident. It was not sufficient that he was an occupant of the vehicle. Nor was it sufficient that he fled the scene and is captured on video leaving the scene. Proof beyond a reasonable doubt that he was the driver was sine qua non for the convictions.

[¶ 20] Looking at the evidence, the weight of the evidence establishes it was more likely that the victim was driving the 1969 Ford pickup truck during the accident. The evidence was unrefuted the victim was the last one seen in the driver's seat of the 1969 Ford pickup. (R224:21:12-21) Common sense and everyday experience tells jurors that generally the person who starts and warms up the vehicle, is the intended driver. Sgt. Gudvangen testified the victim committed the crime of Actual Physical Control since he had a BAC of .235. (R224:147:10-21) This refuted the

bogus testimony the victim never drove under the influence.

Under North Dakota law, Actual Physical Control is

considered a form of Driving Under the Influence.

N.D.C.C. § 39-08-01(1)(a); N.D.C.C. § 39-08-01(1)(b).

[¶ 21] The State did tell the jury the truth when the trooper testified it "was impossible" to prove Defendant committed a DUI on the night of the accident.

(R224:133:17-19) But the State told the jury a half-truth. The intoxication of Defendant was easily proved based on the unrefuted evidence he has consumed 10-15 drinks and was intoxicated. But instead, the real reason the DUI "was impossible to prove" was the State could not prove Defendant was the driver of the 1969 Ford pickup truck that night!

[¶ 22] The Waterloo of the State's case was illustrated by Sgt. Joshua Gudvangen:

"In this case, there was no full rollover, it was **basically tipped over** to the passenger side, and that is where it came to rest.

Q. Did you notice any crush damage to the roof?

A. No.

Q. What about the driver's side?

A. No.

Q. What about the bed area of the pickup?

A. The bed area of the pickup for being a roll-over, it was obvious just based on initial scene observations that **it was a slow rollover** in relative terms of rollovers. There are multiple objects in the back of the bed that were stuck, like, in place, that if it's a hard rollover everything rolls over and basically gets ejected and then spread out depending on the velocity and the speed [emphasis added]." (R224:97:15-98:3)

Sgt. Gudvangen testified the pickup truck sustained minimal damage. "Relatively speaking, for the age of the vehicle, it was in good condition. Indicating that it wasn't a very violent crash or collusion with the field." (R224:98:17-19)

[¶ 23] The unrefuted evidence is that this was a slow rollover. In fact, Sgt. Gudvangen characterized this as a tip. Based on the evidence, the two occupants had time to move towards the driver's door to escape during the slow tip. It is utter conjecture and speculation, who was driving at the time of the accident. All the evidence showed was after the vehicle had landed, the victim was trapped near the passenger door.

[¶ 24] Contrary to modern vehicles, the 1969 Ford pickup truck did not have seat belts or a center console. The bench seats enable the occupants to move easily inside the vehicle. State's Exhibit #45 clearly proved the occupants could have easily moved positions during the slow tip.

(R171)

[¶ 25] II. During closing argument, the prosecutor committed reversible error when he commented on Defendant's right to not testify.

[¶ 26] If prosecutorial misconduct so infected a trial with unfairness, the resulting conviction constitutes a denial of due process, which mandates a reversal. State v. Duncan, 2011 ND 85, 796 N.W.2d 672. "[W]hether a prosecutor's misconduct rises to a level of a due process violation, we decide if the conduct, in the context of the entire trial, was sufficiently prejudicial to violate a defendant's due process rights." Id. at ¶ 12.

[¶ 27] A fundamental constitutional law principle is that a prosecutor cannot comment on Defendant's failure to testify at trial. This right derives from a defendant's Fifth Amendment privilege against self-incrimination. State v. Flohr, 310 N.W.2d 735, 736 (N.D. 1981).

[¶ 28] Here, during closing argument, the State commented on Defendant not testifying. "So how'd Dacotah get out from under somebody who's pinned by a 1969 Ford Truck? That's a lot of weight to bench press; isn't it? But the defense doesn't have an explanation for how the Defendant supposedly extricated himself. MR SKEES: Objection, Your Honor. The State's coming dangerously close to saying that the Defendant needed to testify." (R225:79:24-80:4)

However, this prejudicial statement cannot be measured in a vacuum. Instead the entire closing argument must be analyzed to give its proper weight.

[¶ 29] The State repeatedly called defense counsel dishonest and deceitful by calling him a "magician" and putting on a "magic show" for doing his job by attempting to create reasonable doubt. (R225:68:19-24, R225:71:8-16) "To be prejudicial, absent a fundamental error, improper closing argument by the state's attorney must have stepped beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has supported in the evidence." State v. Schimmel, 409 N.W.2d 335, 342 (N.D. 1987).

[¶ 30] Here, this is the antithesis of a justice seeker! Calling opposing counsel dishonest because they engage in subterfuge steps well beyond the bounds of acceptable and reasonable criticism of the evidence. However, it is extremely effective because regardless what defense counsel does it hurts his credibility with the jury. If defense counsel does not object, the improper comments taint the jury. However, like here, when he finally objects to the over-the-top argument, the jury believes defense counsel is

engaged in subterfuge because he is attempting to hide the truth from them.

[¶ 31] Appellant believes oral argument would be beneficial to the Court because these issues are important, particularly the prosecutorial misconduct issue.

CONCLUSION

[¶ 32] WHEREFORE, the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the June 24, 2022 Judgment and enter a judgment of acquittal, or alternatively, grant Defendant a new trial.

Dated this 25th day of October, 2022.

/s/ Richard E. Edinger

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CERTIFICATE OF COMPLIANCE

[¶ 33] The undersigned certifies that the principal brief complies with the page limitations set forth in Rule 32(a)(8)(B). The brief is only 15 pages in length.

Dated this 25th day of October, 2022.

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Dacotah Ryder Hanson,)	
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Appellant.)	

CERTIFICATE OF SERVICE

Richard Edinger hereby certifies and swears that:
[¶ 1] On October 25, 2022, I electronically filed Appellant's Brief via the Supreme Court portal and I simultaneously served said document onto Mr. Nathan K. Madden, Assistant State's Attorney, via the portal.

Dated this 25th day of October, 2022.

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Richard Edinger hereby certifies and swears that:

[¶ 1] On October 25, 2022, I electronically filed Appellant's Brief via the Supreme Court portal and I simultaneously served said document onto Mr. Nathan K. Madden, Assistant State's Attorney, via the portal by serving said document to his last known email address of 53sa@co.williams.nd.us.

[¶ 2] On October 31, 2022, I electronically filed Appellant's Brief (corrected) via the Supreme Court portal and I simultaneously served said document onto Mr. Nathan K. Madden, Assistant State's Attorney, via the portal by serving said document to his last known email address of 53sa@co.williams.nd.us.

Dated this 31st day of October, 2022.

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