

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

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State of North Dakota,  
Plaintiff and Appellee,

vs.

Jose Pena Garcia,  
Defendant and Appellant.

Supreme Court No. 20110090

District Court No. 18-10-K-1809

ON APPEAL FROM THE MARCH 11, 2011 CRIMINAL JUDGMENT FROM THE  
DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT  
GRAND FORKS COUNTY, NORTH DAKOTA THE HONORABLE JOEL D. MEDD,  
PRESIDING.

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**BRIEF OF APPELLEE**

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Carmell Mattison (06052)  
Assistant States Attorney  
Grand Forks County  
P.O Box 5607  
Grand Forks, ND 58206  
(701) 780-8281

Jennifer Albaugh  
Senior Legal Intern  
Grand Forks County  
P.O. Box 5607  
Grand Forks, ND 58206  
(701) 780-8281

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## **STATEMENT OF THE ISSUE**

- I. Whether the Defendant failed to adequately brief the issue for appeal by not including the applicable standard of review or citations to authorities to support Defendant's legal Argument, which are two elements required by the North Dakota Rules of Appellate Procedure.**
- II. Whether the Assistant State's Attorney committed prosecutorial misconduct by stating North Dakota Supreme Court case law to the jury, when the statement was a fair and reasonable inference drawn from the evidence and was consistent with North Dakota's governing statutes, case law, and the instructions provided to the jury.**

## STATEMENT OF THE CASE

[¶1] The Appellant, Jose Pena Garcia, appeals a Criminal Judgment entered on March 11, 2011. Appellant's App. at 1.

[¶2] On September 28, 2010, an Information was filed which charged Mr. Pena Garcia with Actual Physical Control, a Class B Misdemeanor. Id. at 4. The matter was scheduled for trial on March 1, 2011. Id. at 2. The Defense was served with the State's Supplemental Jury Instruction on February 28, 2011. Id. at 5. On March 1, 2011, a jury trial was held in Grand Forks County District Court before the Honorable Joel D. Medd. Transcript of Jury Trial at 4 ("Tr."). After the State's case-in-chief, Mr. Ogren made a Motion for Judgment of Acquittal, which was denied. Id. at 94-96. The Defense rested and renewed its Motion for Judgment Acquittal, which was again denied. Id. at 124-25. The Defense also made a Motion for a Mistrial, based on the comment of the Assistant State's Attorney, during her rebuttal closing argument. Id. at 143-44. The Court also denied this motion. Id. at 144.

[¶3] The jury returned a guilty verdict. Id. 158-59. The Court then proceeded to sentencing. Id. at 161. Mr. Pena Garcia was sentenced to 30 days in the Grand Forks County Correctional Center with 26 days suspended for a period of one year. Appellant's App. at 7. Mr. Pena Garcia was also sentenced to one year of unsupervised probation. Id. at 7. Mr. Pena Garcia timely filed his Notice of Appeal on March 30, 2011. Appellant's Brief at 1.

## STATEMENT OF THE FACTS

[¶4] On September 25, 2010, Deputy Brandon Rakoczy and Corporal Thomas Inocencio were patrolling the City of Larimore. Transcript of Jury Tr. 45. While patrolling the 700 block of Washington Avenue they noticed a parked pickup truck with its headlights and taillights on. Id. at 46. During this time, they didn't approach the vehicle and continued patrolling the area. Id.

[¶5] Deputy Rakoczy and Corporal Inocencio observed the vehicle again within a half an hour. Id. at 47. The pickup still had its headlights and taillights on and the officers noticed a man's legs coming from the driver's side of the pickup. Id. At this time the officers decided to approach the vehicle. Id. at 47-48. Deputy Rakoczy approached the driver's side of the pickup and Corporal Inocencio approached the passenger's side of the pickup. Id. at 49.

[¶6] When Deputy Rakoczy approached the driver's side door he observed a man with his legs on the ground and the front of his body lying flat, face first into the driver's seat. Id. Deputy Rakoczy attempted to wake the man up by announcing his presence and placing his hand on the man's back and shaking him. Id.

[¶7] While Deputy Rakoczy attempted to wake up the man, Corporal Inocencio approached the passenger side of the vehicle. Id. Deputy Rakoczy and Corporal Inocencio noticed that the vehicle was running and because of this Corporal Inocencio reached in and turned off the vehicle. Id. at 50. Deputy Rakoczy testified that he made approximately four attempts to wake the man up before he was responsive. Id.

[¶8] After the man woke up, Deputy Rakoczy noticed the man's pants were wet in his groin area. Id. Furthermore, Deputy Rakoczy testified that he could smell alcohol coming from the man and that the man's eyes were bloodshot, glossy, and watery. Id. at

58. Deputy Rakoczy also noticed an empty can of Bud Light on the driver's side floorboard. Id. at 59. There were also several open beer cans and containers of alcohol in the box of the pickup. Id. at 59. These observations led Deputy Rakoczy to believe the man may be under the influence of alcohol and therefore, asked the man to perform some field sobriety tests. Id. at 50.

[¶9] Deputy Rakoczy requested the man come back to his patrol vehicle. Id. at 51. Initially the man's demeanor was aggressive and he was uncooperative. Id. at 50-51. Due to his demeanor, Corporal Inocencio requested assistance and Deputy Luke Olson responded. Id. at 75-76. Although agitated, the man complied with the request of Deputy Rakoczy. Id. at 51. The man's balance was poor and Deputy Rakoczy had to assist him back to the patrol vehicle. Id. Deputy Rakoczy administered the finger count test, the full alphabet test, the reverse count test, the partial alphabet test, and the Horizontal Nystagmus Gaze test. Id. at 53. The man failed all of the field sobriety tests. Id. at 53-57. Deputy Rakoczy and Corporal Inocencio identified the man as Jose Pena Garcia. Id. at 77.

[¶10] During the field sobriety tests, Deputy Luke Olson was speaking with Mr. Pena Garcia's girlfriend, Delmira Hernandez. Id. at 88. Ms. Hernandez indicated to Deputy Olson that she wanted to know if her boyfriend was going to jail and if she would be able to bail him out. Id. at 89. Deputy Rakoczy and Corporal Inocencio informed Deputy Olson that Mr. Pena Garcia was being arrested and charged with Actual Physical Control. Id. Deputy Olson told Ms. Hernandez her boyfriend was being arrested. Id. While discussing the situation with Ms. Hernandez, Deputy Olson noticed the smell of



alcohol coming from her. Id. Due to the smell of alcohol, Deputy Olson recommended that she get a ride to the jail, if she were to pick up Mr. Pena Garcia. Id.

[¶11] Deputy Rakoczy and Corporal Inocencio placed Mr. Pena Garcia into custody at approximately 3:00 a.m. and transported him to the University of North Dakota Police Department to undergo a chemical test. Id. at 78; Appellant's App. at 4. Corporal Inocencio used the Intoxilyzer 8000 to administer the chemical test. Transcript of Jury Tr. at 77. Mr. Pena Garcia registered a blood alcohol level of .198% by weight at 4:13 a.m. Id. at 81.

[¶12] The State requested that the Court supplement the State's Proposed Jury Instructions by adding additional language, regarding the criminal charge of Actual Physical Control. Id. The additional language included the following statement: "[t]he key factor in determining actual physical control is whether the defendant is able to manipulate the vehicle's controls. The defendant's ability to manipulate the vehicle controls is a question of fact for the jury. The presence of the vehicle ignition key is not essential to the offense." Id.

[¶13] On March 1, 2011, prior to the commencement of the jury trial, the Court held a conference to discuss any preliminary matters. Transcript of Jury Tr. 5. One of the preliminary matters discussed included the issue of jury instructions. Id. at 11-17. The discussion of jury instructions focused primarily on the Supplemental Jury Instructions submitted by the State. Id.; see also Appellant's App. at 5 (Copy of the proposed supplement to the Jury Instructions submitted by the State).

[¶14] Although the Court indicated that North Dakota Supreme Court case law was not usually included in jury instructions, the concerns of both the State and Defense were heard. Id. at 12-17.

[¶15] The Court indicated that the issue was that the keys do not need to be in the vehicle's ignition for a person to be charged with Actual Physical Control and stated that "the basic fundamental premise of the law if you are drunk, stay out of a vehicle. If you can and if you can, if you can operate it, it's actual physical control. . . ." Id. at 15. The Court noted the substance of the law is that a person is in actual physical control if they can move the vehicle and whether that person was in actual physical control of the vehicle is an issue to be decided by the jurors. Id.

[¶16] Although the Court decided to hear all the evidence before deciding on the State's Supplemental Jury Instructions, it noted that the jury instruction may go in if the Defense represented to the jury that the Defendant cannot be convicted, unless the vehicle's keys were in the ignition. Id. at 16.

[¶17] After the State and Defense rested, the Court revisited the issue of the State's Supplemental Jury Instructions and indicated they would not be included in the jury instructions. Id. at 125-26. Prior to closing arguments, the jury was told "that arguments of counsel are not evidence but are a summation of what counsel believes the evidence has shown." Id. at 127. After the closing arguments the jury was provided with the remaining jury instructions, one stated the following:

An attorney is an officer of the court. It is an attorney's duty to interview witnesses in advance of trial and present evidence on behalf of a client, to make proper objections, and to argue fully a client's cause. However, the argument or other remarks of an attorney, except admissions and stipulations noted in the course of the trial, must not be considered by you as evidence.

If counsel or I have made any comments or statements concerning the evidence which you found are not supported by the evidence, you should disregard them and rely on your own recollection or observation. If counsel have made any statements as to the law which are not supported by these instructions you should disregard those statements.

Id. at 152-53.

[¶18] The jury found the Defendant guilty of Actual Physical Control. Id. at 158-

59.

## LAW AND ARGUMENT

- I. The Defendant failed to adequately brief the issue for appeal, pursuant to North Dakota Rules of Appellate Procedure

[¶19] Procedure in the North Dakota Supreme Court is governed by the North Dakota Rules of Appellate Procedure. N.D.R.App.P. 1(a). Pursuant to the North Dakota Rules of Appellate Procedure, all briefs submitted to the North Dakota Supreme Court must comply with these rules. N.D.R.App.P. 28, 32. Every brief submitted to the North Dakota Supreme Court must contain an argument. Id. at 28(b)(7). The argument must contain “appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies[.]” Id. at 28(b)(7)(A). Additionally, each argument must contain “for each issue, a concise statement of the applicable standard of review.” Id. at 28(b)(7)(B). The applicable standard of review must appear in the discussion of the issue or under a separate heading before the discussion of the issue. Id.

[¶20] This Court will not address arguments that are not “adequately articulated, supported, and briefed.” State v. Noack, 2007 ND 82, ¶ 8, 732 N.W.2d 389, 392 (citing State v. Haibeck, 2006 ND 100, ¶ 9, 714 N.W.2d 52, 55). In State v. Noack, the Defendant failed to articulate his argument clearly. Id. The Court stated, it “will not engage in unassisted searches of the record for evidence to support a litigant’s position.” Id. It was further stated, “[j]udges are not ‘expected to be psychics, with the ability to divine a party’s true intentions.... The parties have the primary duty to bring to the court’s attention the proper rules of law applicable to a case.’” Id. (citing State v. Goulet, 1999 ND 80, ¶ 10, 593 N.W.2d 345, 348).

[¶21] Although this Court recognized that the Defendant was pro se, it was determined that every brief must reasonably comply with North Dakota Rules of Appellate Procedure 28. Noack, 2007 ND 82, ¶ 9, 732 N.W.2d 389. In stating this, the Court indicated that there are three absolute imperative requirements that must be followed before the brief will be reviewed. Id. One of these imperative requirements is that the brief include the “appellant's legal argument, including the authorities on which the appellant relies.” Id. Because the Defendant failed to include these essential elements in his brief, the Court dismissed the case. Id.

[¶22] Similarly in this case, the Defendant has failed to include essential elements in his brief. See Appellant’s Brief. Although the Defendant is represented by counsel, the submitted brief must follow the North Dakota Rules of Appellate Procedure. See Noack, 2007 ND 82, ¶ 9, 732 N.W.2d 389. Defense Counsel has failed to establish the applicable standard of review, which is required by North Dakota Rules of Appellate Procedure 28(b)(7)(B). See Appellant’s Brief. In addition, the Defendant has failed to include citations to the authorities on which he relies. See Appellant’s Brief.

[¶23] This Court has indicated citations to the authorities that support an appellant’s legal argument are imperative requirements. Noack, 2007 ND 82, ¶ 9, 732 N.W.2d 389. Absence of the applicable standard of review and citations to supporting authority does not provide this Court the opportunity to conduct a meaningful review of the Defendant’s issue and therefore, the appeal should be dismissed.

- II. The Assistant State's Attorney did not commit prosecutorial misconduct by stating North Dakota Supreme Court case law, during her rebuttal closing argument

[¶24] The North Dakota Supreme Court has recently discussed the proper scope of closing arguments. State v. Rivet, 2008 ND 145, ¶¶ 4-5, 752 N.W.2d 611, 614. The Court stated that control of closing argument is within the discretion of the trial court. *Id.* at ¶ 4. However, "arguments by counsel must be confined to facts in evidence and the proper inferences that flow therefrom." *Id.* (citing City of Williston v. Hegstad, 1997 ND 56, ¶ 8, 562 N.W.2d 91, 93). The Court went on to say that "a prosecutor may not create evidence by argument or by incorporating personal beliefs." *Id.* at ¶ 5 (citing State v. Clark, 2004 ND 85, ¶ 9, 678 N.W.2d 765, 769).

[¶25] Previously, the Court has explained that it "will not reverse on grounds the prosecutor exceeded the scope of permissible closing argument absent a clear showing of an abuse of discretion." State v. Muhle, 2007 ND 132, ¶ 41, 737 N.W.2d 647, 657 (citing State v. Schmidkunz, 2006 ND 192, ¶ 7, 721 N.W.2d 387, 391; State v. Clark, 2004 ND 85, ¶ 6, 678 N.W.2d 765, 768).

[¶26] The Court went on to state:

"Unless the error is fundamental, a defendant must demonstrate a prosecutor's comments during closing argument were improper and prejudicial." Muhle, 2007 ND 132 ¶ 41, 737 N.W.2d 647 (citing Schmidkunz, 2006 ND 192, ¶ 7, 721 N.W.2d 387. "In order to be prejudicial, the improper closing argument 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 support in the evidence.'" Muhle, 2007 ND 132 ¶ 41, 737 N.W.2d 2d 647 (citing Schmidkunz, 2006 ND 192, ¶ 7, 721 N.W.2d 387); see also State v. Skorick, 2002 ND 190, ¶ 17, 653 N.W.2d 698 (stating, "[w]hen reviewing to determine if the comment or remark was so offensive to prejudice the defendant, we need to consider all of the evidence presented at trial.")

Id. at ¶ 41.

[¶27] Thus, the Defendant must prove that the State's closing argument "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 support in the evidence." Schmidkunz, 2006 ND 192, ¶ 7, 721 N.W.2d 387). "The control and scope of opening and closing arguments is largely a matter left to the discretion of the trial court, and a case will not be reversed on the ground that the prosecutor exceeded the scope of permissible closing argument unless a clear abuse of discretion is shown." State v. Schimmel, 409 N.W.2d 335, 342 (N.D.1987). The defendant must demonstrate that the prosecution's comments in closing argument were improper and prejudicial." Id.

[¶28] An abuse of discretion by the district court is never assumed, and the burden is on the party seeking relief affirmatively to establish it. State v. Schmidkunz, 2006 ND 192 ¶ 15, 721 N.W.2d 387.

A. The Assistant State's Attorneys comment was invited by the closing argument of Defense counsel

[¶29] In State v. Evans, this Court stated that "two improper arguments do not make for a right result." 1999 ND 70, ¶ 14, 593 N.W.2d 336, 341. It has been stated that "courts often decline to reverse convictions in appeals challenging a prosecutor's improper remarks if the prosecutor's remarks were in response to improper remarks made by defense counsel by treating them as an invited response." Id. In order to determine if a prosecutor's statement was invited this Court should "weigh the impact of the prosecutor's remarks and take into account defense counsel's opening salvo" and determine if the statement prejudiced the defendant. Id. The Assistant State's Attorneys comment was an invited response by the Defense counsel's closing statement and therefore not error.

[¶30] Defendant's theory of the case is that one cannot be in actual physical control of a vehicle without the keys because otherwise the vehicle is not moving and therefore not operable.

[¶31] During his closing argument, the Defense counsel stated the following:

The important part about these keys are in the elements of this case. Obviously for actual physical control the person, and you will be able to look at those elements, has to be able to be in a position to manipulate one or more controls of that vehicle and cause it to move or affect its movements. Well, that's the importance of the keys. Without the keys the vehicle goes nowhere."

Transcript of Jury Tr. at 136.

[¶32] The Assistant State's Attorney objected to this comment and the Court overruled. Id. at 136-37. The Defense counsel continued and insinuated that vehicle keys were necessary to move a vehicle by stating, "[t]hat's the importance of the keys. You know. We have to establish that this vehicle could be moved." Id. 137.

[¶33] At this time the Assistant State's Attorney started her rebuttal closing argument and made the following statement:

Defense wants you to believe that the State has to prove where the keys are beyond a reasonable doubt. . . . State does not have to prove that. That is the law. To find a defendant guilty of APC there doesn't have to be testimony of where the keys went. Our North Dakota Supreme Court has stated the presence of an ignition key is not dispositive to the offense of actual physical control. Similarly, whether or not a vehicle is operable is also not dispositive.

Id. at 140.

[¶34] Defense counsel objected to this statement. Id. The jury was dismissed, so the Court, Assistant State's Attorney, and Defense counsel could discuss the objection. Id. at 141. After the discussion, the Court sustained the objection. Id. at 150. The State finished her rebuttal closing argument. Id. at 151.



[¶35] Because defendant invited this response by the state's attorney, he should not be able to argue that these comments deprived him of a fair trial. The state's attorney's comment was a fair and reasonable argument based upon defendant's theory of the case.

[¶36] Defense counsel insinuated to the jury that one of the elements the State has to prove is the location of the keys. Id. at 134-36. The jury was provided a jury instruction that listed the essential elements required to find an individual was in actual physical control of a motor vehicle while under the influence of intoxicating alcohol. Appellant's App. at 6. The location of the vehicle's keys is not an essential element of the offense; however, arguably the jury was led to believe that the keys were an essential element to the case when the Defense counsel said, "[t]he important part about these keys are in the elements of this case. Obviously for actual physical control the person, and you will be able to look at those elements, has to be able to be in a position to manipulate one or more controls of that vehicle and cause it to move or affect its movements. Well, that's the importance of the keys. Without the keys the vehicle goes nowhere." Transcript of Jury Tr. at 136.

[¶37] In State v. Schimmel, the defendant was convicted of driving under the influence of intoxicating liquor. 452 N.W.2d 289, 298 (1990). Throughout the entire proceeding, the defense counsel challenged the validity of the State's blood test. Id. at 299. Although a chemist from the North Dakota State Toxicologist's Office testified, the defense counsel attacked the chemist's qualifications, knowledge, expertise, education, and the method used by the State Toxicologist's Office to analyze blood samples. Id. During rebuttal, the prosecutor responded by stating that the defense counsel could have

requested an independent blood test if they were unsure of the process used by the chemist. Id. at 300.

[¶38] The defense counsel objected alleging this statement was an attempt to shift the burden. Id. The objection was overruled. Id. On appeal, the defendant argued the statement was prosecutorial misconduct. Id. Alternatively, the State argued that it was an invited statement caused by the defense counsel's attack on the aptitude of the chemist. Id.

[¶39] This Court concluded that the statement of the State was expected after the attack of the defense counsel. Id. at 301. Because the statement was an invited response by the defense counsel, the defendant's conviction was affirmed. Id. at 306.

[¶40] In light of defense counsel's remarks, the Assistant States Attorney's comment was a fair rebuttal argument to the Defendant's theory of the case. The statement by the Assistant State's Attorney was an invited response by the Defense counsel and should have been expected.

B. The Assistant State's Attorneys comment regarding the dispositive nature of the ignition keys did not step beyond any fair and reasonable inference of the evidence and therefore, did not substantially affect the rights of the Defendant

[¶41] The Court has consistently stated "inappropriate prosecutorial comments, standing alone, do not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." State v. Ebach, 1999 ND 5, ¶ 10, 589 N.W.2d 566, 571. Id. (citing State v. Weatherspoon, 1998 ND 148, ¶ 23, 583 N.W.2d 391, 397).

[¶42] In State v. Ebach, the Defendant alleged that the prosecutor made several improper comments including that of, "misstat[ing] the law regarding the value of the

stolen property[.]” 1999 ND 5, ¶ 4, 589 N.W.2d 566. The prosecutor stated the following:

The Court will give you an instruction, I understand, how you’re to determine the value of the property that was taken. And I believe the instruction will say something about you are to give it the highest value by any reasonable standard. I did not say the lowest or the middle. The law is, according to what I believe the Court will give you, is it [sic] is the highest value. You are permitted to use purchase price. You are actually permitted to use replacement price.

Id. at ¶ 12.

[¶43] The defense counsel objected, moved for a mistrial, and requested the court provide the jury with a curative jury instruction. Id. Following the defense counsel’s objection, the trial court told the jury “you’ve heard some values that have been given by testimony through witnesses. And after I give you the instruction, you’ll give that testimony that has been provided its appropriate weight and credibility.” Id. at ¶ 12.

[¶44] On Appeal, this Court determined that the “prosecutor’s statement [was] consistent with [North Dakota’s] governing statutes, case law and the instruction given to the jury.” Id. at ¶ 13. Although the trial court gave cautionary instruction to the jury, the defendant maintained that the “cumulative effect of the prosecutor’s improper comments” could not be cured. Id. at ¶ 16. However, this Court disagreed stating, “[t]he mere quantity of alleged errors is not in itself the measure for reversal.” Id.

[¶45] This Court further stated, “[e]rror is reversible only if it appears from the record that the injury was prejudicial, that substantial injury resulted and a different decision probably would have resulted absent the error.” Id. After a thorough examination of the record, this Court determined the asserted errors were not errors and if they were errors, they were not unfairly prejudicial to the defendant. Id. Because there

was no prosecutorial misconduct in the state's closing argument, the defendant's conviction was affirmed. Id. at ¶ 30.

[¶46] This case bears similarities to Ebach. Specifically, Defense counsel objected to a statement Assistant State's Attorney made during her rebuttal closing argument. The Assistant State's Attorney made the following statement:

In every jury trial that we have there is also what I term as a red herring. And the red herring in this case is the keys. Defense wants you to believe that the State has to prove where they keys are beyond a reasonable doubt. That's the red herring.

State does not have to prove that. That is the law. To find a defendant guilty of APC there doesn't have to be testimony of where the keys went. Our North Dakota Supreme Court has stated the presence of an ignition key is not dispositive to the offense of actual physical control. Similarly, whether or not a vehicle is operable is also not dispositive. The case --

Transcript of Jury Tr. at 140.

[¶47] After the Defense objected to this statement, the Court dismissed the jury to discuss the objection and underlying issue, regarding the location of the vehicle keys.

Transcript of Jury Tr. 140. During this discussion, the Court stated it was improper for the State to read case law to the jury and sustained the objection. Transcript of Jury Tr. 143. Defense counsel indicated that the case law could have tainted the jury pool and requested a mistrial, which the Court denied. Id. at 141-43. The Court indicated that the written and verbal instructions issued to the jury were succinctly stated and would govern the jurors' decision. Id. at 143.

[¶48] The Assistant State's Attorney's comment, during the her rebuttal closing argument, was a fair and reasonable inference drawn from the evidence and was consistent with North Dakota's governing statutes, case law, and the instructions provided to the jury, as were the prosecutor's comments in Ebach.

[¶49] The Court determined that the vehicle's keys do not need to be in the vehicle's ignition to be found in Actual Physical Control. Id. at 14. In addition, the Court stated the following:

I think it would be if there is an argument to say if the defendant wishes to argue as matter of law that the law says if the key is not in the ignition they can't be convicted I think we would say whoa, whoa, wait a minute. I think we are getting too far but so I think we probably need to see what happens as far as with the jury instruction and lot of these are contextual so, so if there is a representation to the jurors that the defendant didn't have the keys in the ignition so you cannot convict them, then I think the jury instructions may go in.

Id. at 16.

[¶50] During the jury trial, Deputy Brandon Rakoczy and Corporal Thomas Inocencio testified that when they approached the vehicle of the Defendant it was running. Id. at 50, 74. They further testified that Corporal Inocencio opened the passenger side door and turned off the vehicle. Id. Although neither Officer collected the vehicle's keys, they both testified that the vehicle was running when they approached it. Id.

[¶51] The Assistant State's Attorneys statement was consistent with North Dakota Supreme Court case law. In Rist v. North Dakota Dept. of Transp., the Defendant was charged and convicted of Actual Physical Control and appealed the Administrative Hearings decision. 2003 ND 113, ¶ 1, 665 N.W.2d 45, 46-47. The Defendant argued that because the Deputy had not determined the location of the vehicle's keys he could not be charged with Actual Physical Control. Id. at ¶ 4. The district court overruled the administrative hearing decision and concluded that the "offense of actual physical control requires ignition keys or evidence the vehicle can be started without keys." Id. at ¶ 4. However, this Court determined that the "primary factor in determining the offense of

actual physical control is whether the defendant has the ability to manipulate the controls of the vehicle.” Id. at ¶ 14.

[¶52] This Court further stated, “the presence of an ignition key is not dispositive to the offense of actual physical control. Similarly, whether or not a vehicle is operable also is not dispositive of this offense.” Id. at ¶ 17 (citing State v. Haverluk, 2000 ND 178, ¶ 16, 617 N.W.2d 652, 657). Because the ignition keys or evidence of ignition keys is not an essential element to the charge of Actual Physical Control the decision of the district court was reversed and administrative hearing decision was reinstated. Id. at ¶ 18.

[¶53] The Assistant State’s Attorneys statement during her rebuttal closing argument mirror statements made by the North Dakota Supreme Court. Because the State’s rebuttal closing argument was consistent with North Dakota’s governing statutes, case law, and jury instructions the Defendant’s conviction should be affirmed. Furthermore, the Defendant has failed to prove this statement prejudiced him resulting in a substantial injury and that a different decision probably would have resulted if the error had not occurred.

C. The Supreme Court should review the District Court’s decision using an abuse-of-discretion standard, but if the Court chooses to use a harmless error standard, any potential error was harmless

[¶54] The State contends that error was not committed during the State’s closing argument, but if there was error that error was harmless. North Dakota Rule of Criminal Procedure 52(a) states, “Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded.” In State v. Chihanski, the North Dakota Supreme Court explained how the harmless error standard works:

The federal constitutional harmless error standard was first enunciated by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967). This

Court adopted the standard in State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974). “Under the Chapman [standard], federal constitutional errors do not automatically require reversal if it is shown that they were harmless, but ‘before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.’” State v. Flamm, 351 N.W.2d 108, 110 (N.D. 1984); N.D.R.Crim.P. 52(a), Explanatory Note. In declaring this belief, the court must be convinced “that the error did not contribute to the verdict.” Flamm, 351 N.W.2d at 110. Furthermore, before making this declaration, the court must review the entire record and determine, in light of all the evidence, the probable effect of any constitutional error upon a criminal defendant’s rights. State v. Schneider, 270 N.W.2d 787, 793 (N.D. 1978); N.D.R.Crim.P. 52(a), Explanatory Note.

540 N.W.2d 621, 623-24 (N.D. 1995) (alterations in original).

[¶55] A defendant’s “criminal conviction will only be reversed if, after viewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational fact finder could have found the defendant guilty beyond a reasonable doubt.” State v. Ebach, 1999 ND 5, ¶ 24, 589 N.W.2d 566, 574. In light of the evidence in favor of the Defendant’s guilt, the conviction in this case was not attributable to any possible error and any error that may have occurred was harmless beyond a reasonable doubt. Thus, the Defendant’s conviction should be affirmed.

[¶56] In State v. Schimdkunz, the defendant was convicted of murder. 2006 ND 192, ¶ 1, 721 N.W.2d 387, 390. On appeal, the defendant presented several arguments, one of which alleged prosecutorial misconduct. Id. at ¶ 5. The defendant argued that the prosecutor commented on taped interviews with his expert witnesses, which were not admitted into evidence. Id. During his closing argument, the prosecutor questioned the substance of the tapes and stated, “[t]here were other things I would have liked to have shown on the tape.” Id. at ¶ 9.

[¶57] On appeal, this Court noted that the substance of the tapes was limited to portion heard by the jury. Id. at ¶ 10. This Court expressed concern, regarding the

prosecutor's statement stating, "the prosecutor's comments in closing arguments regarding the tapes were improper in suggesting they provided more evidence not heard by the jury." Id. at ¶ 11. However, this Court could not conclude that the statements affected the defendant's substantial rights. Id. Moreover, this Court could not determine "that the prosecutor's single comment, which did not state any specific evidentiary facts, carried with it enough weight to impact the jury's verdict and [defendant's] ability to receive a fair trial. Id. at ¶ 11. Because there were no errors and even if there were errors they were harmless the defendant's conviction was affirmed. Id. at ¶ 29.

[¶58] Similarly in this case, the evidence in favor of the Defendant's guilt is great. The State provided the testimony of Deputy Brandon Rakoczy and Corporal Thomas Inocencio. See Transcript of Jury Tr. 43-86. Both Officers testified that when they approached the vehicle it was running. Id. at 50, 74. In addition, both Officers testified that Corporal Inocencio approached the vehicle on the passenger side and opened the door. Id. According to their testimony, Corporal Inocencio reached across the vehicle and turned it off. Id. The Defendant testified that he was intoxicated and passed out in the vehicle and assumed Ms. Hernandez had the keys, but he was not certain. Id. at 120.

[¶59] Deputy Rakoczy testified that he made approximately four attempts to wake the man up before he was responsive. Id. at 50. After the man woke up, Deputy Rakoczy noticed the man's pants were wet in his groin area. Id. Deputy Rakoczy further testified that he could smell alcohol coming from the man and that the man's eyes were bloodshot, glossy, and watery. Id. at 58. Deputy Rakoczy noticed an empty can of Bud Light on the driver's side floorboard. Id. at 59. There were also several open beer cans and containers of alcohol in the box of the pickup. Id. at 59. These observations led Deputy Rakoczy to



believe the man may be under the influence of alcohol and therefore, asked the man to perform some field sobriety tests. Id. at 50.

[¶60] Deputy Rakoczy requested the man come back to his patrol vehicle. Id. at 51. The man's balance was poor and Deputy Rakoczy had to assist him back to the patrol vehicle. Id. Deputy Rakoczy administered the finger count test, the full alphabet test, the reverse count test, the partial alphabet test, and the Horizontal Nystagmus Gaze test. Id. at 53. The man failed all of the field sobriety tests. Id. at 53-57. Deputy Rakoczy and Corporal Inocencio identified the man as Jose Pena Garcia. Id. at 77.

[¶61] Deputy Rakoczy and Corporal Inocencio placed Mr. Pena Garcia under arrest for Actual Physical Control at approximately 3:00 a.m. and transported him to the University of North Dakota Police Department to undergo a chemical test. Id. at 78; Appellant's App. at 4. Corporal Inocencio used the Intoxilyzer 8000 to administer the chemical test. Transcript of Jury Tr. at 77. Mr. Pena Garcia registered a blood alcohol level of .198% by weight at 4:13 a.m. Id. at 81.

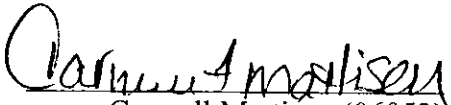
[¶62] "When [an] error occurs during a trial, our objective when reviewing its effect is to determine whether the error was so prejudicial that substantial injury occurred and a different decision would have resulted without the error." State v. Schimmel, 409 N.W.2d 335, 339 (N.D. 1987).

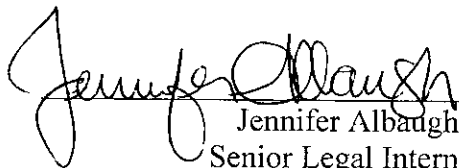
[¶63] In the present case, given the weight of this evidence, the defendant has failed to demonstrate that a different decision would have resulted without the error. Therefore, if there was error, the error was harmless. Thus, the Defendant's conviction should be affirmed.

CONCLUSION

[¶64] Therefore, the State respectfully requests this Court affirm the Defendant's conviction.

DATED this 12 day of July, 2011.

  
Carmell Mattison (06052)  
Assistant State's Attorney  
Grand Forks County

  
Jennifer Albaugh  
Senior Legal Intern