ORIGINAL

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff,	)	Supreme Court No.'s 20010283 & 20010284
	)	
vs.	)	
	)	
John Lee Stewart,	)	District Court No.'s 00-K-373 & 00-K-374
	)	
Defendant.	)	

APPEAL FROM JUDGMENT OF CONVICTION
ENTERED UPON A JURY VERDICT OF THE DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

BRIEF OF APPELLEE

Asmunder Swain Benson (ID 03372)
616 Main Street
Bottineau, North Dakota 58318
(701) 228-3655

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules of Evidence

Statutes

I. STATEMENT OF CASE

Appellee is satisfied with the Statement of the Case as contained in Appellant's Brief.

II. STATEMENT OF FACTS

On the evening of October 10, 2000, John Stewart (hereinafter "defendant"), Mitch LaFramboise, the defendant's brother, and Michael Krogen were involved in a one vehicle crash on County Road 52 in Bottineau County. Appendix at 1-4 (Tr. at 266-269). Michael Krogen received severe injuries as a result of this crash, and died five days later. Appendix at 39 and 57 (Tr. at 481, 582). On the evening of the crash, Deputy Reid Greenwood of the Bottineau County Sheriff's Office investigated the crash, although he was unable to ascertain who the driver of the vehicle was that evening. Appendix at 8 (Tr. at 274). Deputy Greenwood also requested assistance from other Bottineau County Deputies that evening to determine who the driver was, to no avail. Appendix at 11 (Tr. at 295). Some days later, it was revealed that the defendant was driving the vehicle when the crash occurred. Appendix at 17 (Tr. at 306).

In the hours preceding the crash, the only people to observe and spend time with the defendant were the occupants of the vehicle and the defendant's step-father. Appendix at 45-46, 59 (Tr. at 540-541, 613). After the crash, however, numerous people had contact with the occupants of the vehicle in response to the crash. See Appellee's Brief, Section II. The people who had contact with the defendant after the accident all observed consistent characteristics regarding the defendant; the smell of

alcohol coming from the defendant, glassy eyes, loud, belligerent, uncooperative, and numerous admissions that the defendant made indicating that he could not have been the driver of the vehicle because he was too drunk to drive that night. Id.

After the Bottineau County Sheriff's Office determined that the defendant had been driving that evening, the defendant was charged with Driving Under the Influence in violation of North Dakota Century Code § 39-08-01, and Aggravated Reckless Driving in violation of North Dakota Century Code § 39-08-03. Appellant's Index #5, #6. A jury trial was conducted on October 29, 2001 and the jury returned guilty verdicts on both charges.

III. ISSUES

I. WAS THE INTRODUCTION OF THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS UNDER RULE 609 OF THE NORTH DAKOTA RULES OF EVIDENCE PROPER?

II. WAS THERE SUFFICIENT EVIDENCE THAT DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL WHEN HE WAS DRIVING?

IV. LAW AND ARGUMENT

I. THE INTRODUCTION OF THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS UNDER RULE 609 OF THE NORTH DAKOTA RULES OF EVIDENCE WAS PROPER.

Rule 609 of the North Dakota Rules of Evidence governs the admissibility of evidence of prior convictions for impeachment purposes. See State v. Bohe, 447 N.W.2d 277 (N.D. 1989). Rule 609(a) provides as follows:

> "[F]or the purpose of attacking the credibility of a witness, (i) evidence that a witness other than the accused has been has been convicted of a crime must be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one

> year under the law which the witness was convicted, and evidence that an accused has been convicted of such a crime must be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused; and (ii) evidence that any witness has been convicted of a crime must be admitted if it involved dishonesty or false statement, regardless of the punishment."

Subsection (b) of Rule 609 goes on to give a time limit of 10 years for admissibility purposes from the later of the date of conviction or the date of release from confinement.

It is well settled law in cases applying Rule 690(a)(i) that some common factors to be considered when a trial court determines admissibility of prior felony convictions are (a) the impeachment value of the prior crime; (b) the point in time of the conviction and the witness' subsequent history; (c) the similarity between the past crime and the charged crime; (d) the importance of the defendant's testimony; and (e) the centrality of the credibility issue. See State v. Murchison, 541 N.W.2d 435 (N.D. 1995); State v. Eugene, 536 N.W.2d 692 (N.D. 1995); State v. Gefroh, 495 N.W.2d 651 (N.D. 1993); State v. Bohe , 447 N.W.2d 277 (N.D. 1989); State v. Fuller, 379 N.W.2d 289 (N.D. 1985); State v. Eugene, 340 N.W.2d 18 (N.D. 1983). This list does not exhaust the range of possible factors that a trial judge may consider, but it does outline the more basic concerns relevant to balancing under Rule 609. Eugene, 340 N.W.2d at 34. Additionally, the standard to be applied when looking at the trial court's ruling is the abuse of discretion standard, and a trial court abuses discretion if the record does not "show that the trial court meaningfully or appropriately considered the relevant factors" when it weighed the prior conviction's probative

value and prejudicial effect. Murchison, 541 N.W.2d at 442.

In Eugene, 340 N.W.2d at 34, the court indicated that while the trial court was not as explicit as it could have been in identifying and weighing the relevant indicia of probative value and prejudice. they could not say, in view of the record, that the trial court failed to meaningfully exercise the discretion given it by Rule 609(a)(1). The trial court's ruling in Eugene permitting the admission of evidence based "[i]n light of the entire Rule 609(a)" indicates implicitly that, in line with the rule, it weighed the probative value of the evidence against the prejudicial effect to Eugene. Id.

Presently, a review of the record demonstrates that the trial court was aware of the relevant factors to be weighed when applying the balancing test under Rule 609(a)(i). Id. Contrary to defendant's assertions, in argument held outside of the presence of the jury to decide the admissibility of the defendant's prior convictions, the State's Attorney informed the trial court of the factors to balance. Appendix at 62,63,67,68 (Tr. at 667-668, 672-673); Murchison, 541 N.W.2d at 442. Moreover. the defendant also set forth the factors that the court should weigh under prior case law in its argument to keep the State from introducing prior convictions for the purpose of impeaching the defendant's testimony. Appendix at 64-67 (Tr. at 669-672). It can thus be fairly stated that the trial court was aware of the factors and the balancing test to be applied, and the court in fact informed the parties in its decision that the issues were made clear by the attorneys' arguments, and the court's research of the law. Appendix at 69-70 (Tr. at 674-675); Fuller, 379 N.W.2d at 290.

As the court in Murchison stated, "Although we prefer a trial court to articulate expressly how it balanced the relevant factors, it is often enough for the

court to hold a brief hearing and to make an explicit finding on the record that demonstrates the trial court did not just apply NDREv 609(a)(i) mechanically. 541 N.W.2d at 442. (Citing State v. Bohe, 447 N.W.2d 277, 281, wherein the court indicated that the trial court's ruling was made pursuant to a hearing on the record and out of the jury's presence, and after hearing the defendant's testimony as to the time, seriousness, and similarity of the prior convictions, the trial court specifically determined that the probative value of admitting the prior convictions outweighed their prejudicial effect to the defendant, and in so doing the trial court demonstrated its awareness of the rule and carefully complied with it.).

Also, along the same lines, the court in Fuller stated that "in both Anderson and Eugene we noted that while we would have preferred a more explicit statement of balancing process, we could not say, in view of the entire record, that the court "failed to meaningfully exercise the discretion given it by Rule 609(a)(1)." 379 N.W.2d at 290 (referencing both State v. Anderson, 336 N.W.2d 123 (N.D. 1983) and State v. Eugene, 340 N.W.2d 18 (N.D. 1983)). The North Dakota Supreme Court's expressed preference regarding articulation is not an absolute requirement, where there was a hearing on the record and an explicit finding which demonstrates that the trial court was not responding mechanically. Fuller, 379 N.W.2d at 290. Thus, it appears that the trial court, while not being as explicit as it could have been identifying and weighing the relevant factors, did not, pursuant to an abuse of discretion standard of review, fail to meaningfully exercise it's discretion pursuant to Rule 609(a), N.D.R.Ev. Id. Accordingly, when reviewing the transcript in the present case, while the trial court may not have specifically articulated its rationale, it was aware of and

meaningfully exercised its discretion in its ruling pursuant to Rule 609(a). Id.

Contrary to the defendant's argument, the defendant's credibility was directly at issue in this case when he decided to take the stand and testify in his defense. While it is true that the crimes the defendant was charged with do not involve elements of dishonesty or false statements, his credibility is put into issue when he testifies regarding his activities on the night in question and the amount of alcohol consumed prior to the accident. In the Appellant's Brief, in the statement of facts section, he sets forth the salient facts, as he believes them to be, directly from the defendant's testimony at trial, and the testimony of the defendant's brother, Mitch LaFramboise. Appellant's Brief at 1-4. They indicate the events which had unfolded before the accident, including residences visited, and amounts of alcohol consumed that evening, and by whom. Id. It becomes starkly apparent that the credibility of the defendant is squarely at issue when he decided to take the stand in his defense, and advance his version of the events of that evening. Id. Furthermore, as the trial court pointed out, the defendant also advanced a mechanical defect defense, which also triggers questions about the defendant's credibility. Appendix at 69 (Tr. at 674).

Prior convictions are not inadmissible per se on the issue of credibility merely because the offense involved is identical to that for which the defendant is on trial, but it does require particularly careful consideration by the trial judge. Eugene, 340 N.W.2d at 35. However, the three prior convictions used to impeach the defendant are not identical to the charged crimes, and are not even similar. Appellant's assertion that Reckless Endangerment and Unauthorized Use of a Vehicle are similar to the charged crimes of Driving Under the Influence and Aggravated Reckless Driving is terribly misplaced, when a closer inspection of the crimes reveals that they

are not similar whatsoever.

To prove an individual is guilty of the crime Reckless Endangerment, the state must show that the individual created a substantial risk of serious bodily injury or death to another. See N.D.C.C. § 12.1-17-03. Further, the offense is a C Felony if the circumstances manifest extreme indifference to the value of human life. Id. Inspection of the elements needed to prove Reckless Endangerment make it starkly obvious that nowhere does the crime include the use of a motor vehicle. Id. Whether the facts surrounding the defendant's past conviction of Reckless Endangerment involved the use of a vehicle are unknown to the State, and were also not known by the jury, as a review of the transcript will confirm. Appendix at 59-61, 71-73 (Tr. at 664-666, 677-679). In any event, the crime of Reckless Endangerment is in no way similar to Driving Under the Influence and Aggravated Reckless Driving. See N.D.C.C. § 12.1-17-03, § 39-08-01, § 39-08-03.

Likewise, to prove an individual is guilty of the crime Unauthorized Use of a Vehicle, the state must show that an individual, knowing that he does not have the consent of the owner, takes, operates or exercises control of an automobile, train, aircraft, motorcycle, motorboat, or other motor propelled vehicle of another. See N.D.C.C. § 12.1-23-06. The offense is a C Felony if the vehicle is an aircraft or if the value of the use of the vehicle and the cost of retrieval and restoration exceeds five hundred dollars. Id. Any argument that the elements needed to prove Unauthorized Use of a Vehicle are identical or similar to the elements of Driving Under the Influence and Aggravated Reckless Driving can only be described as tenuous at best.

The only possible similarity is that the crimes involve an automobile. However, Unauthorized Use of a Vehicle is not limited solely to automobiles, but

includes many other types of vehicles. Id. Again, whether the facts surrounding the defendant's past conviction of Unauthorized Use of a Vehicle involved the use of an automobile, as compared to another type of vehicle, are unknown to the State, and were also not known by the jury, as a review of the transcript will confirm. Appendix at 59-61, 71-73 (Tr. at 664-666, 677-679). In any event, while the crimes of Driving Under the Influence and Aggravated Reckless Driving involve the manner in which a vehicle is operated, the crime of Unauthorized Use of a Vehicle is a theft offense, and does not focus on the manner of operation of whatever type vehicle was stolen. See N.D.C.C. § 12.1-17-03, § 39-08-01, § 39-08-03. Ultimately, the crime of Unauthorized Use of a Vehicle is not identical or similar to Driving Under the Influence and Aggravated Reckless Driving, and does not trigger the more careful scrutiny by the judge in determining admissibility. Id.; Eugene, 340 N.W.2d at 35.

Moreover, as the crime of Unauthorized Use of a Vehicle is a theft offense, it certainly reflects adversely in a general sense on the Defendant's honesty and integrity. Bohe, 477 N.W.2d 277. The court in Bohe indicated that the crime of burglary reflects adversely in a general sense on the Defendant's honesty and integrity. 477 N.W.2d 277 (Citing to State v. Eugene, 340 N.W.2d at 34). The court went on to state that Bohe's prior burglaries would seem to involve a high degree of impeachment value, and applied this factor to the balancing test of probative value *vis a vis* the prejudicial effect. Id. at 281. Likewise, in the present case, as one of the defendant's prior convictions was for Unauthorized Use of a Vehicle, which by its nature is similar to the charge of burglary, it would accordingly involve a higher degree of impeachment value. Id.

Also, as argued above, the defendant's credibility is at issue, in that he testified as to the events preceding the accident and amount of alcohol he ingested prior to the accident. This testimony is certainly relevant to the issue of whether he lacked sufficient clearness of intellect and control that he would otherwise have when he operated a vehicle upon a public highway while under the influence of an intoxicating liquor. State v. Pollack, 462 N.W.2d 119, 122 (N.D. 1990). It is settled law in North Dakota that a conviction for Driving Under the Influence does not have to include results of an intoxilyzer test. Id. It is then left to the jury to view all of the evidence to determine whether the defendant lacked sufficient clearness of intellect and control that he would otherwise have, including the testimony of the defendant. Id. It necessarily follows that the credibility of the defendant in proffering this testimony is extremely relevant, and is subject to impeachment. N.D.R. Ev. 609(a)(i).

Alternatively, even if it is decided that the trial court improperly admitted the evidence of the defendant's prior convictions for impeachment purposes, this error is harmless error under Rule 52(a) of the North Dakota Rules of Criminal Procedure and not ground for reversal. This court's objective in reviewing non-constitutional trial error is to "determine whether the error was so prejudicial that substantial injury occurred and a different decision would have resulted without the error. Murchison, 541 N.W.2d at 443 If not, it is "harmless error" under NDRCrimP 52(a) and is not ground for reversal.

Suffice it to say, the error in admitting defendant's prior convictions, if any at all, is harmless as there was extensive other evidence from which the jury could base its decisions. In the interest of brevity for the discussion of this issue, Appellee would direct the court to Section II of this brief, where the sufficiency of the evidence to

sustain the Driving Under the Influence is discussed, and the factual evidence presented to the jury is detailed. In line with Bohe, the State referenced the defendant's convictions during cross examination, at which time there was a hearing outside the presence of the jury to determine admissibility. Appendix at 61-69 (Tr. At 666-674); 447 N.W.2d at 281. Then, after the trial court ruled on admissibility, the state referenced the convictions and offered them into evidence, and no further mention was made of the convictions, either on examination or arguments. When looking at the whole of the evidence presented to the jury, if this court determines that the trial court was in error by admitting the prior convictions, such error did not prejudice the substantial rights of the defendant, and was in effect harmless error.

The trial court properly applied the balancing test of North Dakota Rule of Evidence 609(a)(i), and gave due consideration to the appropriate factors in arriving at its decision. Even if the trial court was not specific enough or did not properly articulate its consideration of the appropriate factors, any error was harmless under North Dakota Rules of Criminal Procedure 52(a).

II. THERE WAS SUFFICIENT EVIDENCE INTRODUCED THAT DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL WHEN HE WAS DRIVING.

A review of the trial transcript clearly shows that there was sufficient evidence presented to support the jury's decision. The standard of review for testing the sufficiency of the evidence requires the court to draw all inferences in favor of the verdict. State v. Gefroh, 495 N.W.2d 651, 655 (N.D. 1993). As the court in Gefroh stated:

> "To successfully challenge the sufficiency of the evidence on appeal, a defendant must convince us that the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. State v. Raulston, 475 N.W.2d 127, 128 (N.D. 1991). The tasks of weighing the evidence and judging the credibility of witnesses belong to the jury. State v. Lovejoy, 464 N.W.2d 386, 388 (N.D. 1990). On appeal, this court must assume that the jury believed the evidence which supports the verdict and disbelieved any contrary evidence. State v. Manke, 328 N.W.2d 799, 806 (N.D. 1982).

495 N.W.2d at 655.

Further, a verdict for conviction "rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt" after drawing all inferences in favor of the verdict and viewing all evidence in a light most favorable to the prosecution. Id. (citing to State v. Schill, 406 N.W.2d 660 (N.D. 1987)).

Looking at all of the evidence presented to the jury, and applying the appropriate standard leads one to the conclusion that there was certainly sufficient evidence upon which the jury could find that the defendant was guilty of Driving Under the Influence, in violation of North Dakota Century Code § 39-08-01.

Initially, there were the defendant's own admissions and physical appearance that evening as witnessed by numerous people in many different capacities. When Deputy Reid Greenwood of the Bottineau County Sheriff's Office, the investigating officer at the crash scene arrived on scene, he testified that the defendant had a very strong odor of alcohol on him, he was agitated and uncooperative, and the defendant made an admission that it couldn't have been him [the defendant] driving the vehicle, because he [the defendant] was too drunk to drive. Appendix at 5-7, 9-10 (Tr. at 271-273, 275-276). Further, Deputy Greenwood indicated that the night of the crash, he

was unable to ascertain who the driver of the vehicle was, though further investigation revealed that it was the defendant. Appendix at 15-18 (Tr. at 304-307). Deputy Greenwood also opined that on the evening of the crash, based upon Deputy Greenwood's experience and observations, the defendant was under the influence of an intoxicating beverage. Appendix at 13-14 (Tr. at 300-301). Deputy Greenwood's observations of the defendant continued later that evening in St. Andrews Hospital in Bottineau, where he testified that the defendant still smelled of alcohol, was uncooperative, and at times was hard to understand. Appendix at 12 (Tr. at 299).

Penny Bierman, a dispatcher with the Bottineau Sheriff's Office, and an emergency medical technician with the Bottineau Ambulance Squad, testified next regarding her observations on the evening in question. Appendix at 19 (Tr. at 343). She was the EMT who took charge of the medical attention given to the defendant at the scene of the crash, and prepared a report in that capacity. Appendix at 20-21 (Tr. at 345-346). Ms. Bierman testified that in her attempt to administer medical care to the defendant, she was of the opinion that he was intensely intoxicated, with the strong odor of alcohol and glassy eyes, which opinion was also documented in her ambulance report. Appendix at 22- 23 (Tr. at 348, 353).

Also offered into evidence was the testimony of Deputy Darren Henry, a deputy employed with the Bottineau Sheriff's Office, who was called to assist with the investigation at St. Andrew's Hospital that evening in an attempt to establish who was driving the vehicle . Appendix at 24-25 (Tr. at 405-406). While at the hospital, Deputy Henry interviewed both the defendant and Mr. LaFramboise, two of the three occupants of the car, and the only two who were conscious that evening after the crash. Appendix at 26 (Tr. at 407).

When Deputy Henry asked the defendant who was driving the vehicle, the following exchange took place:

> A. . . . First of all. I talked to Mr. Stewart (the defendant), asked him who was driving. Mr. Stewart told me word for word, said: I was driving earlier in a place that I shouldn't have been."
>
> So I went on to say: So you were driving?
>
> John (the defendant) responded: What do you think I'm fucking stupid? I'll never tell who was driving.

Appendix at 26 (Tr. at 407). After that exchange, both the defendant and Mr. LaFramboise refused to cooperate or indicate who was driving the vehicle. Appendix at 26-27 (Tr. at 407-408). Deputy Henry also testified that at the hospital, the defendant's attitude was belligerent, loud, argumentative and uncooperative in general, so much so that Dr. Patrick Evans, the primary physician on call that evening asked Deputy Henry to remove the defendant from the emergency room. Appendix at 28-29 (Tr. at 409-410). Finally, Deputy Henry testified that he could detect a very strong odor of alcohol coming from the defendant at the hospital that evening, that the defendant had bloodshot eyes, and that in Deputy Henry's opinion, the defendant had consumed alcohol earlier in the evening and was under the influence of alcohol. Appendix at 29-31 (Tr. at 410-412).

Dr. Patrick Evans was the primary physician on call the evening of the crash, and was responsible for administering the medical care given to the occupants of the vehicle. Appendix at 38 (Tr. at 468). Dr. Evans' background includes an undergraduate and a masters degree in biochemistry, employment with the State of Louisiana as a chemist, and a medical degree in 1989, during which time he has been

actively engaged in the practice of medicine. Appendix at 32-34 (Tr. at 458-460). Dr. Evans' education and experience demonstrates that he is eminently qualified and familiar with the effects and presence of alcohol in the human body. Appendix at 35-37 (Tr. at 465-467).

When attempting to treat the defendant, Dr. Evans noted that the defendant smelled of alcohol, became belligerent, made threatening gestures and actually threatened Dr. Evans and some other individuals in the hospital with violence. Appendix at 40-42 (Tr. at 488-490). Moreover, the defendant told Dr. Evans that earlier that evening, the defendant drank a lot of beer and whiskey, but no drugs, which was also noted by Dr. Evans in his report. Appendix at 41-42 (Tr. at 489-490). Dr. Evans opined that, based upon his background, training and physical observations of the defendant that evening, the defendant was intoxicated with alcohol. Appendix at 43 (Tr. at 494).

Testimony was also offered by Mitch LaFramboise, who is a brother to the defendant, and among other information offered, Mr. LaFramboise testified that the defendant was driving the vehicle immediately before the crash. Appendix at 44, 47 (Tr. at 539, 545). Steve Watson, Sheriff of Bottineau County, was also present at the hospital that evening. Appendix at 51 (Tr. at 572). Sheriff Watson's testimony regarding the defendant's appearance and conduct that evening is also consistent with the testimony of the prior witnesses. When at the hospital Sheriff Watson asked the defendant if he had been driving, the defendant's response was: "Fuck no. I'm too fucking drunk to drive." Appendix at 52 (Tr. at 573). Sheriff Watson also testified that the defendant was loud and uncooperative, that he had the odor of alcohol about him, and that in his opinion, the defendant was under the influence of alcohol that

night. Appendix at 52-56 (Tr. at 573-577).

The Appellant has argued that when looking at the testimony of the defendant and his brother, Mr. LaFramboise, there is no evidence that the defendant was intoxicated at the time he was driving. Appellant's Brief at 12. Certainly the jury heard this testimony offered, and used their judgment as to the credibility of the witnesses, as well as judging the credibility of all of the other witnesses at the trial. As outlined above, there was extensive evidence offered regarding the physical appearance and demeanor of the defendant after the accident, with conclusions drawn by numerous people that the defendant was under the influence of alcohol that evening.

It is incongruous for the defendant to advance the argument that there is no evidence that the defendant was under the influence at the time of driving, when there was no evidence intervening drinking after the crash, and the testimony and timeline offered by Mr. LaFramboise, who admittedly was with the defendant all evening, precludes the possibility that the defendant had opportunity to consume any alcohol from some point immediately after the accident, but before people started arriving on scene to assist with the crash. Appellant's Brief at 13, Appendix at 48-50 (Tr. at 563-565). There was certainly enough evidence regarding the defendant that evening for the jury to arrive at the conclusion that the defendant was guilty of Driving Under the Influence, in violation of N.D.C.C. 39-08-01, as well as Aggravated Reckless Driving, in violation of N.D.C.C. 39-08-03. Gefroh, 495 N.W.2d at 655.

Finally, defendant's reliance on the Pavek v. Moore case is completely misplaced, as that case revolved around administrative action by the North Dakota Department of Transportation, which action was reversed by the district court.

1997 ND 77, 562 N.W.2d 574 (N.D. 1997). Moreover, Pavek involved an issue regarding the per se violation, in which the two hour time limit for purposes of the administration of the chemical test is scrutinized, which issue is not in the present case. Id. Most importantly, the scope of the hearing in Pavek was governed by North Dakota Century Code § 39-06.2-10.6, which directs that the person charged is afforded a hearing under North Dakota Century Code § 39-20. Id. It is well settled law in North Dakota that proceedings under North Dakota Century Code § 39-20 are civil in nature, separate and distinct from the criminal proceedings which may ensue from an arrest. Williams v. North Dakota State Highway Commissioner, 417 N.W.2d 359, 360 (N.D. 1987). As the present case did not involve a chemical test or the per se violation, and is an appeal from a criminal violation and not the civil administrative violation, any reliance on Pavek is misplaced.

As such, there was sufficient evidence presented from which the jury could arrive at its determination that the defendant was guilty of Driving Under the Influence under North Dakota Century Code § 39-08-01(b).

V. CONCLUSION

The trial court properly applied the balancing test of North Dakota Rule of Evidence 609(a)(i), and gave due consideration to the appropriate factors in arriving at its decision. Even if the trial court was not specific enough or did not properly articulate its consideration of the appropriate factors, any error was harmless under North Dakota Rules of Criminal Procedure 52(a). Finally, there was sufficient evidence from which the jury could arrive at its determination that the defendant was

guilty of Driving Under the Influence under North Dakota Century Code § 39-08-01(b).

Accordingly, the State requests that the Court affirm the judgments of conviction.

Respectfully submitted this 5th day of March, 2002.

Swain Benson (Bar # 03372)
BENSON LAW OFFICE
616 Main Street
Bottineau, ND 58318
(701) 228-3655 fax (701) 228-3656
Attorney for State - Appellee