IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 20130121
	)	
vs.	)	
	)	
Gaylord Gene Evans,	)	District Court No. 51-2011-CR-01998
	)	
Defendant/Appellant.	)	

BRIEF OF PLAINTIFF AND APPELLEE STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT OF WARD COUNTY
NORTHWEST JUDICIAL DISTRICT
DISTRICT COURT NOS. 51-2011-CR-01998
THE HONORABLE DOUGLAS L. MATTSON
APPELLEE'S BRIEF

Sean B. Kasson, ND Bar ID# 06649
Assistant State's Attorney
Ward County State's Attorney's Office
315 3rd St SE
Minot, ND 58701

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

United States Supreme Court Cases

North Dakota Cases

North Dakota Statutes

North Dakota Rules of Criminal Procedure

North Dakota Rules of Evidence

STATEMENT OF ISSUES

I. When viewing the evidence most favorable to the verdict and all reasonable inferences drawn from the evidence, is Appellant able to show evidence that there is no reasonable inference of guilt?

II. Did the District Court act in an arbitrary, unreasonable or unconscionable manner by allowing Sergeant Kevin Huston to give rebuttal testimony?

III. Did the District Court err in finding that no prosecutorial misconduct had occurred so as to deprive Appellant a fair trial?

STATEMENT OF THE CASE

On November 1, 2012, a jury found Appellant guilty of Negligent Homicide in violation of N.D.C.C. § 12.1-16-03. The basis of the charge arose from a fatal collision occurring on July 12, 2011, involving Appellant towing a trailer on a highway where the trailer became detached, crossed the center line, and collided head on with an oncoming motor vehicle, causing the death of the driver, Denise Hoffert. It was alleged and proved beyond a reasonable doubt that Appellant engaged in gross deviation from acceptable standards of conduct causing the death of Denise Hoffert.

Appellant submitted a written motion and moved for Judgment of Acquittal, or In the Alternative, a New Trial. (Appellant App. 232-233.) On February 27, 2013, the District Court denied Appellant's written motion. (Appellant App. 234-243.)

STATEMENT OF FACTS

On September 6, 2011, Appellant was charged with Negligent Homicide in violation of N.D.C.C. § 12.1-16-03. (Appellant App. 7.) On December 11, 2011, a preliminary hearing was held, probable cause was found and Information was filed. (Appellant App. 10.) On October 29 through November 1, 2012, a jury trial was held where Appellant was found guilty of Negligent Homicide. (Appellant App. 231.)

The State's case-in-chief included the following witnesses: Lieutenant Robert Roed of the Ward County Sheriff's Office (WCSO); Troy Walters of ServPro (appeared by Interactive Video Network (IVN)); Trooper Michael Roark of the North Dakota State Highway Patrol (NDSHP); Trooper Ryan Hoffner of the NDSHP; Sergeant Steven Fischer of the NDSHP; Sergeant Kevin Huston of the NDSHP and; Phyllis "Toni" Evans. Some of the testimony presented is as follows:

Lt. Robert Roed testified that he had taken initial photographs of the scene. (Tr. of Jury Trial 199.)

Troy Walters testified that he believed Appellant had dropped off the generators in the morning. (Tr. of Jury Trial 234.) Mr. Walters testified that he heard the metal sound of chains as Defendant drove away. (Tr. of Jury Trial 239.) Mr. Walters testified that he saw Defendant five (5) or six (6) times a day the entire time he was [in Minot.] (Tr. of Jury Trial 240.) Mr. Walters also testified that Appellant offered him housing should he be present to testify at trial. (Tr. of Jury Trial 240.)

Trooper Michael Roark testified that he took photographs of the scene. (Tr. of Jury Trial 262.) He testified that the locking mechanism of the trailer was down [in the locked position] and no cotter key or pin present [to keep trailer locked on to ball.] ((Tr.

of Jury Trial 213.) He testified to the abnormality to the underside of the coupler where there was discoloration as if a ball would be on the hitch, the area [discoloration] would be free of rust and look the same. (Tr. of Jury Trial 215.) He testified that he identified markings in front of the pin which appeared to have been caused by the trailer/locking mechanism (coupler) striking the receiver hitch. (Tr. of Jury Trial 216.) He testified that based on his observations, the "s" hooks were not stretched or damaged in any way. (Tr. of Jury Trial 262.) He testified that the holes where safety chains or "s" hooks attach did not display any fresh markings or grooves. (Tr. of Jury Trial 263.) He testified that Appellant had three (3) interchangeable balls in his back seat that are used for pulling trailers; the sizes of the three (3) balls were 1-7/8", 2" and 2-5/16". (Tr. of Jury Trial 264.) He testified that items in the bed of the truck were not pushed to one side or another. (Tr. of Jury Trial 265.) He testified that there was a cotter key found lying on Appellant's bumper when he arrived. (Tr. of Jury Trial 265.) He testified to the purpose of a cotter key--to lock a trailer in place when attached to a ball. (Tr. of Jury Trial 266.) He testified that he spoke with Appellant at the scene, asked him why the ball was removed and Appellant responded that he didn't want to lose the ball, and that Appellant told him to "build your own case." (Tr. of Jury Trial 268.)

Trooper Ryan Hoffner testified that the place of the collision (Ward County Road 10A) had a posted speed limit of sixty-five (65) mph. (Tr. of Jury Trial 275.) He testified that it was his understanding that the trailer became detached from Appellant's vehicle while traveling eastbound, entered the westbound lane and struck Ms. Hoffert's vehicle. (Tr. of Jury Trial 276.) He testified that he made contact with Appellant, Appellant did not want to give a written statement, but did speak with Appellant. (Tr. of

Jury Trial 277.) He testified that Appellant told him that he (Appellant) felt that somebody had to have rear-ended him to cause the trailer to come off or detach from his vehicle. (Tr. of Jury Trial 278.) He testified that upon inspection of the trailer, there was no rear damage. (Tr. of Jury Trial 279.) He testified that Phyllis "Toni" Evans commented that the ball was removed after they got out of their vehicle because the ball might come off if the trailer is not attached and they (balls) are expensive. (Tr. of Jury Trial 280-81.) He testified that Appellant did not give a description of the vehicle that allegedly had struck him from behind. (Tr. of Jury Trial 285.) Finally, he testified that neither Appellant nor his wife ever stated that they felt being pushed forward from a vehicle striking from behind. (Tr. of Jury Trial 286.)

Sgt. Steven Fischer testified to the safe keeping procedures of evidence. (Tr. of Jury Trial 295.)

Sgt. Kevin Huston testified that he is an auto crash reconstructionist, has had additional training to do so, not ever patrolman goes through such training and there are a total of three (3) auto reconstructionists with the highway patrol. (Tr. of Jury Trial 304-306.) He testified that he has previously testified in court as an auto reconstruction analyst. (Tr. of Jury Trial 306-307.) He testified that he personally observed all areas involving the trailer hook-up and vehicles involved. (Tr. of Jury Trial 399-400.) He testified that as to the area where the safety chains latch, the area did not appear to be compromised. (Tr. of Jury Trial 401.) He testified that he made an inspection on State's Exhibit 35 (receiver hitch) and made reference to three (3) observations: first, that it had been used; second, there was no ball on the pin and; third, there was a horizontal gouge directly behind the pin. (Tr. of Jury Trial 403.) He testified that he inspected the

underside of the coupler and noted there was a fresh gouge; the underside was covered in rust except for the area that appeared like something had scraped away the rust (sharp gauge.) (Tr. of Jury Trial 406.) He testified that the safety chains were rust covered, intact, no links were broken, no stretching or didn't appear to have any stress induced. (Tr. of Jury Trial 407.) He testified that there was no contact damage with the rear end of the trailer. (Tr. of Jury Trial 409-410.) He also explained the purpose of safety chains. (Tr. of Jury Trial 411.)

Phyllis "Toni" Evans testified that she was present when Appellant removed the ball from the hitch. (Tr. of Jury Trial 330.) When pressed about whether or not she knew for a fact a two (2) inch ball was used, she admitted that she did not know for sure if a two (2) inch ball was used. (Tr. of Jury Trial 330.) She testified that she took eight (8) or nine (9) pictures [of the trailer on the day in question.] (Tr. of Jury Trial 333.) She testified that she takes a lot of pictures. (Tr. of Jury Trial 333.) She testified that she takes pictures of everything and has 109 pictures albums. (Tr. of Jury Trial 333.) She testified that traffic was travelling at a fast rate considering the collision that had just occurred. (Tr. of Jury Trial 334.) She testified that she didn't feel any impact of a collision. (Tr. of Jury Trial 334.) She testified that she recalled the collision occurring between 5:30 and 6 o'clock [p.m.] ((Tr. of Jury Trial 337.) She testified that she believed that law enforcement would be arriving at the scene, but did not think that law enforcement would investigate how the collision occurred. (Tr. of Jury Trial 340.) She testified that she took the picture [of the trailer properly hooked up] at 4:16 [p.m.] (Tr. of Jury Trial 348.) Finally, she testified that the photograph was taken with a digital camera, that she has never changed the date, and although she took a rather mundane

photograph of the trailer, she would have no reason to take a picture of the generators being delivered at Servpro. (Tr. of Jury Trial 353-354.) However, Defendant testified that the pin (used to secure the ball to the receiver) was hard to push out and needed a hairpin. (Trial Tr. 470.)

Appellant also took the stand. He testified that he went through a meticulous routine of inspecting the trailer prior to departure. (Tr. of Jury Trial 461.) He testified that he did not recall seeing the gouge marks behind the receiver hitch pin prior to the collision. (Tr. of Jury Trial 488.) He testified that the "s" hooks were attached, however were placed to the side of the receiver as they did not fit straight on. (Tr. of Jury Trial 491.) He testified that he removed the ball from the receiver hitch following the collision. (Tr. of Jury Trial 502.) He testified that upon seeing Ms. Hoffert, he didn't call 9-1-1, didn't call any of his family members, but called State Farm Insurance because "it is the law." (Tr. of Jury Trial 504.) He testified that he had his wife take a picture of the trailer while waiting. (Tr. of Jury Trial 506.) He claimed he thought he was struck from behind. (Tr. of Jury Trial 508.) He testified that he was "disgusted" by Trooper Ryan Hoffner when asked about how his universal receiver hitch works. (Tr. of Jury Trial 513.) Appellant testified that they were travelling fifty miles per hour. (Tr. of Jury Trial 508.) He further testified that the "s" hooks were attached, however were placed to the side of the receiver as they did not fit straight on. (Tr. of Jury Trial 508.) Further, he testified that he was disgusted by the trooper asking what a conversion kit is as it is something that is learned in the third grade. (Tr. of Jury Trial 488.)

The following exhibits were introduced into evidence from the State:

- State's Exhibit 1: Photo-Vehicle in ditch/trailer

- State's Exhibit 2: Photo vehicle in ditch/trailer
- State's Exhibit 3: Photo trailer- tongue/car
- State's Exhibit 4: Statement of Phyllis Evans
- State's Exhibit 5: Photo-Evans rear of vehicle
- State's Exhibit 6: Photo Evans rear of vehicle
- State's Exhibit 7: Photo-Evan's truck hitch
- State's Exhibit 8: Photo Evan's vehicle front
- State's Exhibit 9: Photo-trailer
- State's Exhibit 10: Photo-trailer (rear)
- State's Exhibit 11: Photo-front trailer locking hitch mechanism
- State's Exhibit 12: Photo front hitch and locking mechanism (below)
- State's Exhibit 13: Photo-roadway (gouges in asphalt)
- State's Exhibit 14: Photo rear of trailer
- State's Exhibit 15: Photo front trailer axle
- State's Exhibit 16: Photo trailer hitch and locking mechanism (below)
- State's Exhibit 17: Photo hitch receiver on Evan's truck
- State's Exhibit 18: Photo "S" hook on safety chain from trailer
- State's Exhibit 19: Photo "S" hook
- State's Exhibit 20: Photo "S" hook
- State's Exhibit 21: Photo receiver hitch
- State's Exhibit 22: Photo receiver hitch
- State's Exhibit 23: Photo receiver hitch (bottom)

- State's Exhibit 24: Photo three balls that interchange on hitch found under back truck seat
- State's Exhibit 25: Photo contents of Evan's pickup bed
- State's Exhibit 26: Photo cotter key on bumper
- State's Exhibit 27: Photo cotter key on bar on ramp
- State's Exhibit 28: Photo cotter key on bar on ramp
- State's Exhibit 29: Photo rear trailer
- State's Exhibit 30: Statement of Troy Walters
- State's Exhibit 31: Evidence Log/Custody receipt
- State's Exhibit 32: Evidence Log (temporary locker to evidence vault)
- State's Exhibit 33: Cell phone log-Gene Evans
- State's Exhibit 34: Narrative of Mrs. Evans
- State's Exhibit 35: Receiver hitch-Evan's vehicle
- State's Exhibit 36: Set of hitch balls
- State's Exhibit 37: Sign D'zyn invoice

Defendant submitted the following exhibits:

- Defendant's Exhibit A: large photo of trailer/generators
- Defendant's Exhibit F: large photo of rear Evan's vehicle.

LAW AND ARGUMENT

I. When Viewing the Evidence Most Favorable to the Verdict, and all Reasonable Inferences Drawn from the Evidence, Appellant is Unable to Show Evidence that there was No Reasonable Inference of Guilt

Under N.D.R.Crim.P. 29(a), a trial court must order entry of judgment of acquittal after the State closes its evidence or after the close of all the evidence if the evidence is insufficient to sustain a conviction. State v. Kinsella, 2011 ND 88, ¶ 7, 796 N.W.2d 678. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilty when viewed in the light most favorable to the verdict[, and further] a jury may find a defendant guilty even though evidence exists which, if believed, could leave to a verdict of not guilty. State v. Wanner, 2010 ND 121, ¶ 9, 784 N.W.2d 143. See also Dunn v. United States, 284 U.S. 390, 393-94, 52 S.Ct. 189 (1932) (concluding jury verdicts will not be upset by speculation). "A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts." State v. Bertram, 2006 ND 10, ¶ 5, 708 N.W.2d 913.

As recited above, there was a vast amount of evidence which supported the jury's verdict. Both direct and circumstantial evidence was offered through witnesses, exhibits and even Appellant. Evidence was presented showing how this fatal collision was preventable and far more than "just an accident." Specifically, the jury was presented with "hard evidence" including the underside scoring of the coupler (signifying smaller improper size ball or no ball attached to receiver hitch pin); marring to the lower portion of receiver hitch (signifying forward movement and impact from the trailer) (Tr. of Jury Trial 216); intact "s" hooks or safety chains (showing lack of stress, fatigue or any wear and tear, thereby supporting "s" hooks were not engaged) (Tr. of Jury Trial 216); lack of

damage to where "s" hooks attach to hook up (again, supporting that "s" hooks were not engaged); lack of any showing of rear impact to trailer (as claimed by Appellant that another motorist struck trailer from rear) and; no cotter pin was present in the locking mechanism of the trailer (Tr. of Jury Trial 213.) Further, testimony was received that Appellant failed to give a description of the alleged vehicle that struck him from behind, nor did he feel any impact from a motor vehicle striking from behind. It is likely that testimony presented through Appellant's case-in-chief was greatly discredited as the photograph entered into evidence by Appellant, in which Appellant's wife used a digital camera and claimed it was taken (coincidently) just minutes before the collision and had a near perfect perspective to show the trailer was hooked up properly; however, Sgt. Huston pointed out that the photograph was in military time (24 hour clock), and therefore the picture actually indicated the time was four (4) in the morning, not in the afternoon as Appellant claimed. (Tr. of Jury Trial 578.)

It is the State's position that the strength of the case only increased after Appellant testified where he provided concrete support for the State's underlying theory of motive for his actions subsequent to the fatal collision: fearing the loss of his wealth. Defendant testified that he had a successful business and sold it for the right price. He testified that one of the first acts he did following his caused fatality was to remove the ball from the receiver hitch, call his insurance company as well as photograph the trailer. He testified that his family refers to him as "Donald Trump." (Tr. of Jury Trial 520.) He testified that he felt as though law enforcement was treating him like a criminal from the start, however, stated that it was purely an accident, that somebody struck him from behind, but yet told law enforcement to "build their own case." All of these facts are highly

probative of why Defendant took the suspicious actions he did and ultimately on whether or not this was an accident or as it was proved, that he failed to properly hook up his trailer while he was traveling on Ward County Road 10A, a road that has a speed limit of 65 miles per hour. Not only did he fail to properly hook up his trailer, but the evidence supports that his lack of care was such a gross deviation of acceptable standards that there existed a substantial likelihood of risk that the trailer would come off and cause harm. The fact that Defendant testified to how meticulous he is with inspections prior to departure, yet failed to recall seeing the horizontal gouge marks behind the receiver hitch pin, supports the fact as Sgt. Huston testified, that no ball was present on the receiver hitch (or at least a smaller improper sized ball).

Naturally, if no ball or smaller size ball was present, then a trailer is able to move forward upon any type of deceleration, rather than remaining in a fixed position as intended. Therefore, if the trailer is able to move forward (which it should not be able to do if properly hooked up) the "s" hooks or safety chains, should they have been attached (as Appellant claimed), could have "popped" off since when not engaged for their intended purpose (to provide tension and pull a disconnected trailer), they hang loosely and will not create tension if trailer moves forward; safety chains are only suppose to provide tension (when trailer separates and distance increases between trailer and towing vehicle.) By the trailer impacting the receiver hitch (momentum from braking), the trailer's forward movement colliding with the receiver hitch could have easily caused the loosely attached "s" hooks to pop off. The scenario of braking is to give Appellant the benefit of the doubt that the "s" hooks or safety chains were in fact attached to his motor vehicle, as he claimed.

Based upon the facts presented at trial and summarized above, sufficient evidence was presented to the jury to support a guilty verdict. A trailer does not just magically become detached when properly hooked up. The jury was presented with sharp gouging under the coupler, a gouge on the receiver hitch behind the pin (where the ball is to be set) which could not occur if a two (2) inch ball was present, no stress to the safety chains, no showing of wear to the area where the safety chains are to connect, and no evidence of rear impact to the trailer. The State proved its case beyond a reasonable doubt. Defendant bears a heavy burden now trying to take away the guilty verdict to claim there was "no reasonable inference of guilty when viewed in the light most favorable to the verdict." Wanner, 2010 ND 121, ¶ 9. The Court's order denying Defendant's Rule 29 motion was appropriate, and the State respectfully requests that the jury's guilty verdict not be disturbed.

II. The District Court did not act in an Arbitrary, Unreasonable or Unconscionable Manner by allowing Sgt. Kevin Huston to Testify to his Personal Observations and Areas of Common Sense

Whether or not to allow opinion testimony from either a lay witness or an expert witness is "within the district court's sound discretion and will not be reversed unless the court has abused its discretion." State v. Saulter, 2009 ND 78, ¶ 9, 764 N.W.2d 430. " 'A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to reasoned determination, or when it misinterprets or misapplies the law.' " Id. "Rule 702, N.D.R.Ev., envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify." State v. Hernandez, 2005 ND 214, ¶ 8, 707 N.W.2d 449. "If a witness is not testifying as

an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." N.D.R.Ev. 701.

In this case, the State did not offer Sgt. Huston as an expert. In fact, defense counsel even agreed that the line of questioning to be posed to Sgt. Huston was not expert opinion. (Tr. of Jury Trial 392.) Sgt. Huston spoke of his training and education. He also testified that he made his own personal observations and inspections of the trailer. It appears the only area in which Appellant contends that expert testimony was given is when Sgt. Huston testified on rebuttal. Specifically, Appellant claims, "[o]ver [Appellant's] objection, [Sgt.] Huston was allowed to give opinion testimony 1) concerning the affects of having a too-small ball connected to the trailer's coupler; 2) the affects of braking when using a too-small ball connected to the trailer's coupler; 3) how safety chains would be affected by using a too-small ball; 4) the affects of braking if no ball was used to connect the hitch to the trailer's coupler; and 5) whether the markings on the hitch could have been caused by the trailer's coupler "lunging" forward. (Appellant Br. ¶ 51.)

No expert testimony was given. Sgt. Huston testified to his personal observations and drew conclusions upon those observations. His testimony was rationally based on his perception and life experiences in order to help the jury's determination of fact. The questions posed and answered received were commonsensical. (Tr. of Jury Trial 573-574.) Sgt. Huston's testimony, and it appears that Appellant is focusing only on Sgt. Huston's rebuttal testimony, was only that of which he personally viewed and inspected

regarding the trailer. Questions posed regarding if one were to apply braking is common sense. It is common sense to know that a smaller ball (or no ball) present on the receiver pin will allow movement of the trailer. To say that his testimony was of an expert opinion, and that only an expert would be capable of coming to such conclusions, is to insult the intelligence of all.

The District Court did not abuse its discretion in allowing Sgt. Huston to testify.

III. No Prosecutorial Misconduct was Committed and Appellant's Assertion of Such is Without Merit

The only reference of misconduct argued by Appellant appears in ¶56, where he states, "[t]he Prosecutor falsely claimed that Gene had testified that immediately prior to the accident he had suddenly applied the brakes . . . ." (Appellant Br. ¶56.) However, Appellant does not cite where the State allegedly made this comment. The reason that no citation appears is because the State never made that comment. The State commented that it did not believe it had stated that Appellant testified to braking. (Tr. of Jury Trial 572.) Upon full review of the transcript, the State never made claim that Appellant had testified to braking.

The State counts a total of eight (8) references of a vehicle braking when pulling a trailer. (Tr. of Jury Trial 555-564.) Not once did defense counsel object, and failure to object is a waiver upon appeal of complaint against the admission. State v. Tresenriter, 2012 ND 240, ¶ 9, 823 N.W.2d 774. It was not until the Court requested counsel to approach did defense counsel hesitantly bring up the comment of Appellant not testifying to braking. (Tr. of Jury Trial 567.) The Court then asks the State why it didn't bring up the issue of braking in direct, to which the State replied that it had expected defense to call an expert witness and that it wasn't until Defendant and his wife testified that a

vehicle struck them from behind did Sgt. Huston's rebuttal become pertinent. (Tr. of Jury Trial 569.) The State clarified that it was rebutting the reasons given by Appellant [for causation of the trailer becoming detached.] (Tr. of Jury Trial 570.) The District Court mistakenly accused the State of posing a question to Sgt. Huston which referenced that Appellant testified that he braked. (Tr. of Jury Trial 572.) The State clarified to the Court that it did not remember making that comment (as to Appellant testifying that he braked), but did not second guess the Court's recall of the testimony. (Tr. of Jury Trial 572.) The District Court then again, accused the State of posing the improper question and tainting the jury. (Tr. of Jury Trial 572.) The District Court then asked defense counsel if the Court understood his objection, and defense counsel requested a curative instruction. (Tr. of Jury Trial 572.) The District Court noted that it would direct the jury to strike the question that they had received regarding the Appellant testified he was braking when the incident occurred. (Tr. of Jury Trial 573.) Finally, the District Court stated that it would allow questions of general nature if one brakes or slows down. (Tr. of Jury Trial 573.)

After a review of the transcript, the State did not once pose a question to Sgt. Huston claiming that Appellant had testified to braking. The State posed the question to Sgt. Huston, "do you know what would happen if you were to hit the brakes or brake suddenly without a ball on there while towing a trailer?" (Tr. of Jury Trial 575.) Defense counsel did not object to this question. The State asked Sgt. Huston what would happen if one were to stop suddenly. (Tr. of Jury Trial 575.) At this time, defense counsel objected, claiming it was an area that had just been dealt with. The District Court stated

there had been no evidence and no testimony of stopping suddenly, told counsel that he kept going back to that, and told counsel to approach. (Tr. of Jury Trial 576.)

The State never posed the question to Sgt. Huston asserting that Appellant testified to braking. Eight (8) times braking was referenced on rebuttal by the State without defense counsel making one objection. The District Court commented it would allow questions of a general nature if one brakes or slows down. (Tr. of Jury Trial 573.) It is the State's position that it kept its questioning limited to rebuttal evidence and in line with the Court's order to general nature of braking; Appellant's case in chief hinged on the notion that the cause of the trailer detachment was due to a vehicle striking from behind, and the State rebutted Appellant's causation by showing that forward motion of the trailer can be caused by braking. Again, causation was the issue of the entire trial, and the State sought to rebut Appellant's testimony of causation being that of a vehicle striking him from behind. Furthermore, the gouge to the receiver where the trailer had lunged forward and made impact was significant; an individual stopping suddenly (braking) would cause the momentum of the trailer to continue to travel forward where a smaller ball for that designated coupler (or no ball) was used to tow the trailer.

The remainder of Appellant's argument, that the State presented a new theory and did not disclose the theory to Appellant, holds no weight. Causation was the whole premise of the case. Appellant claimed that he must have been struck from behind, thereby disconnecting the trailer and setting it in motion. The State rebutted (on rebuttal) the argument by showing force can either be applied by rear impact (as Appellant claimed but no physical evidence) or by deceleration (braking), thereby causing the trailer to surge forward due to momentum. Appellant provides no support for his

argument that a prosecutor commits prosecutorial misconduct by having an undisclosed theory of a case, a theory that was posed upon rebuttal.

CONCLUSION

When viewing the evidence most favorable to the verdict and all reasonable inferences drawn from the evidence, Appellant has failed to show evidence that there is no reasonable inference of guilt. A vast amount of evidence was presented to the jury showing the unreasonable disregard Appellant had taken by operating the trailer in an unsafe manner, ultimately causing the death of Ms. Denise Hoffert. Appellant has failed to show that the District Court acted in an arbitrary, unreasonable or unconscionable manner by allowing Sgt. Huston to testify to his personal observations and has failed to show that such testimony extends to the realm of expertise. Appellant has failed to show that any prosecutorial misconduct occurred, let alone so much as to rise to the level of due process violation. Based upon the foregoing, the State respectfully requests that this Court affirm the District Court's orders and finding of guilt.

Dated this 23rd day of July, 2013.

Sean B. Kasson ID# 06649
Assistant State's Attorney
Ward County State's Attorney's Office
Minot, ND 58701

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 20130121
Plaintiff/Appellee,	)	
	)	
v.	)	District Court No. 51-2011-CR-01998
	)	
Gaylord Gene Evans,	)	
	)	
Defendant/Appellant,	)	

AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 24 day of July, 2013, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

BRIEF OF APPELLEE

That said envelope was addressed to the following person at his address as follows:

Monte Lane Rogneby
Vogel Law Firm
U.S. Bank Bldg.
200 N. 3rd St., Ste. 201
P.O. Box 2097
Bismarck, ND 58502-2097

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

LeAnn Westereng

Subscribed and sworn before me this 24 day of July, 2013 by LeAnn Westereng.

Notary Public

LYNNAE RUDLAND
Notary Public
State of North Dakota
My Commission Expires Feb. 5, 2016