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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No. 20140459
vs.	)	District Ct. No. 09-2013-CR-04118
	)	
Steven James Montplaisir,	)	
	)	
Defendant and Appellant.	)	

Appeal from the Verdict of Guilty and the Criminal Judgment of the District Court
Entered on December 1, 2014
East Central Judicial District
The Honorable John C. Irby, Presiding

APPELLEE'S BRIEF

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[¶11] **STATEMENT OF CASE**

[¶12] The Defendant was charged with criminal vehicular injury after an incident on September 20, 2013, in which he drove a motor vehicle while under the influence of alcohol and then crashed into a motorcyclist named Jeffrey Eisert. The Defendant appeals from his conviction following a jury trial held on November 4-6, 2014. The Defendant raises a number of issues on appeal. He challenges the specificity of the charging language in the Information, arguing that it only asserts legal conclusions and fails to describe the nature of Eisert's injuries. (Appellant's Br. at ¶ 45.) The State argues that the Defendant could have requested a bill of particulars, and his failure to do so resulted in a waiver of the specificity issue.

[¶13] Next, the Defendant contends that the district court erred in finding probable cause to support the charge. (Appellant's Br. at ¶ 46.) Emphasizing the required element of substantial or serious bodily injury, the Defendant contends that there was insufficient evidence to allow the matter to proceed to trial. (Appellant's Br. at ¶ 46.) The State argues that the severity of injury was an issue of fact that was properly submitted to the jury.

[¶14] Further, the Defendant argues that the court should have granted his motion to dismiss because N.D.C.C. § 39-08-01.2(2) is unconstitutionally vague and overbroad. (Appellant's Br. at ¶ 49.) However, the Defendant has not demonstrated that the statute fails to provide ascertainable standards of guilt or that it prohibits constitutionally protected activity.

[¶15] The Defendant contends that he should have been allowed to call the prosecutors as witnesses because Eisert used the term "extreme pain" in his testimony at the preliminary hearing. (Appellant's Br. at ¶¶ 66-67.) The State asserts that it was within the court's discretion to deny the request, noting that the practice of calling prosecutors as witnesses is generally disfavored.

[¶16] The Defendant argues that the district court erred in denying his motion for a judgment of acquittal under N.D.R.Crim.P. 29. (Appellant's Br. at ¶ 75.) The State submits that it would have been inappropriate to grant the motion because the evidence is to be viewed in the light most favorable to the prosecution, and the jury could have reasonably found substantial or serious bodily injury based on the testimony of the witnesses and the medical records submitted.

[¶17] With respect to the jury instructions, the Defendant asserts that the court should have provided his requested definitions of the terms "substantial bodily injury" and "serious bodily injury," rather than using the definitions found in N.D.C.C. § 12.1-01-04. (Appellant's Br. at ¶ 79.) The State argues that it was reasonable for the court to incorporate the commonly-used Title 12.1 definitions. The Defendant also claims the district court erred in failing to include a culpability requirement of "willfully." (Appellant's Br. at ¶ 80.) Because N.D.C.C. § 39-08-01.2(2) does not specify a culpability level, the court correctly declined to read into the statute a requirement of willful conduct.

[¶18] Lastly, the Defendant contends that the district court erred in sentencing him to the mandatory minimum one year of imprisonment because the

court should have exercised its discretion to find a manifest injustice. (Appellant's Br. at ¶¶ 86-90.) The State submits that the sentencing decision was based on permissible factors and was within the bounds of the court's discretion.

[¶19] **STATEMENT OF FACTS**

[¶20] On September 20, 2013, Jeffrey Eisert was sitting at a stoplight on his motorcycle at the intersection of 32nd Avenue South and University Drive in Fargo. (Trial Transcript "Tr." 114:11-19.) There were two vehicles ahead of Eisert: Beau Billadeau was in the vehicle directly in front of Eisert, and Officer Jeremiah Ferris of the Fargo Police Department was in a squad car in front of Billadeau. (Tr. 235:7-8; 267:24.) Suddenly, a pickup truck crashed into Eisert's motorcycle, causing Eisert to fly through the air and land on the pavement. (Tr. 119:5-9.) Eisert lay on the ground for several seconds and then got up, checking himself for injuries. (Tr. 120:9-20.) He noticed blood soaking through his jeans. (Tr. 120:18-19.) Eisert had "so much pain and adrenaline" and felt that he was in "survival mode." (Tr. 120:23-24.)

[¶21] The collision caused a chain reaction at the intersection, and Billadeau and Ferris also felt the impact. (Tr. 267:19-20; 235:20-23.) The motorcycle ended up underneath the front end of the pickup. (Tr. 236:10-11.) Billadeau and Ferris both exited their vehicles and saw Eisert jumping around and screaming, saying that his leg hurt. (Tr. 236:12-17; 270:2-3.) Officer Ferris approached Eisert after calling dispatch to request assistance. (Tr. 269:1-2; 270:8.) Eisert was "screaming uncontrollably" and appeared to be in pain. (Tr. 270:9.) An ambulance arrived and transported Eisert to Essentia hospital. (Tr. 124:1-7.)

[¶22] Officer Ferris identified the Defendant as the driver of the pickup. (Tr. 270:20.) Officer Ferris noticed that the Defendant had the strong odor of an intoxicating beverage and slurred speech. (Tr. at 271:5-7.) Officer Bridgitte Larson was called to the scene to conduct an investigation for driving under the influence ("DUI"). (Tr. 247:22-25; 248:1.) Officer Larson noted that the Defendant had slurred speech, glassy eyes, and poor balance. (Tr. at 248:17-24.) The Defendant failed field sobriety tests. (Tr. 253:18; 256:7.) Lab results showed that the Defendant had a blood alcohol concentration ("BAC") of 0.217. (Tr. 258:10; 259:25.)

[¶23] Eisert was treated for his injuries in the emergency department ("ER") at Essentia. (App. at 210.) Eisert had pain in his leg and ankles. (App. at 206.) Eisert had a laceration on his left lower leg that required five sutures. (App. at 210.) In the days following the crash, Eisert made multiple return visits to the ER because of "continued reportedly severe pain." (App. at 19.) Dr. Jason Schenck treated Eisert in the ER on September 28, 2013 and October 2, 2013. (App. at 19, 25.) Dr. Schenck testified at trial that Eisert "was having ongoing trouble with pain in his left leg at the area of his worst injuries that he sustained." (Tr. 35:6-7.) One of Eisert's leg wounds became infected and "continued to cause him significant discomfort." (Tr. at 37:13-16.) Dr. Schenck treated Eisert with an intravenous antibiotic and prescribed pain medication because Eisert "was continuing to have pain." (Tr. 38:11-15.) Dr. Schenck testified that Eisert reported his pain as being "severe." (Tr. 39:17.) During the second visit with

Eisert, Dr. Schenck noted that Eisert's pain had improved, but Eisert complained of mild neck and back discomfort. (Tr. 43:8-9; 57:22.) Dr. Schenck testified that neck and back injuries can be delayed, and soft tissue injuries can develop over time. (Tr. 64:15-16; 65:4-5.)

[¶24] Dr. Phil Johnson, an orthopedic surgeon, saw Eisert for knee pain and ankle soreness. (Tr. 72:1-2.) Dr. Johnson first saw Eisert on October 21, 2013 for complaints of pain resulting from injuries sustained in the crash. (Tr. 71:6-7; 73:10-16.) Dr. Johnson concluded that Eisert had "myofascial pain," causing "trigger points," which are "little areas where nerve endings attach into the muscles." (Tr. 74:21-25; 75:1-9.) Dr. Johnson explained that these areas can become sensitive, causing ongoing spasms, tightness, and pain. (Tr. 75:9-12.) Dr. Johnson saw Eisert again on November 3, 2014. (Tr. 76:4.) Dr. Johnson concluded that Eisert still had myofascial pain. (Trial Tr. at 76, l. 9.) Dr. Johnson said the condition was regularly bothering Eisert and "keeping him from doing some of the normal activities that he would like to do." (Tr. 79:11-12.)

[¶25] At trial, Eisert testified that he had a scar on his left leg as a result of the injury from the crash. (Tr. 138:12-22.) Eisert showed the jury his scar. (Tr. 139:3-4.) Eisert indicated that he continued to suffer from pain in his leg and back, and he participated in physical therapy. (Tr. 140:15-25; 142:18.)

[¶26] On November 20, 2013, the State charged the Defendant with criminal vehicular injury under N.D.C.C. § 39-08-01.2(2). (App. at 5.) A preliminary hearing was held on June 18, 2014. (Tr. of Prelim. Hr'g 2:16.)

Officer Bridgitte Larson and Jeffrey Eisert testified. (Tr. of Prelim. Hr.'g 5:20; 13:6.) The district court found probable cause for the charge. (Tr. of Prelim. Hr'g 37:4-7.) On September 25, 2014, the Defendant filed a motion to dismiss the charge as a matter of law. (App. at 59.) The Defendant also moved to dismiss based upon vagueness and overbreadth of the statute. (App. at 59.) In addition, the Defendant provided notice of his intent to call the prosecutors as witnesses. (App. at 59.) The State filed a brief in opposition to these requests. (App. at 90.) A motion hearing was held on October 16, 2014. (Tr. of Mot. Hr'g 2:3.) After hearing the arguments of counsel, the district court denied the Defendant's motions to dismiss and the request to call the prosecutors as witnesses. (App. at 98.)

[¶27] The case was tried before a jury on November 4-6, 2014. (Tr. 5:2; 183:2; 347:2.) The jury returned a verdict of guilty. (Tr. 348:1-2.) The district court sentenced the Defendant to thirty months in the custody of the Department of Corrections and Rehabilitation, first to serve one year, with the balance suspended for a period of eighteen months of supervised probation. (Tr. of Sentencing 9:5-8.) The Defendant appeals from his conviction and also contends that there were errors in the preliminary proceedings. (Appellant's Br. at ¶ 11.)

[¶28] LAW AND ARGUMENT

[¶29] I. The Defendant is precluded from challenging the specificity of the charging document on appeal because he failed to move for a bill of particulars.

[¶30] Rule 7(c)(1), N.D.R.Crim.P., provides that an information must contain "a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged." An information provides adequate notice if it is "sufficiently specific to provide the defendant with notice of the pending charges to enable the defendant to prepare a defense." State v. Bertram, 2006 ND 10, ¶ 23, 708 N.W.2d 913.

[¶31] The rules provide a method by which a defendant may challenge the sufficiency of the charging document. Namely, a defendant can move for a bill of particulars. N.D.R.Crim.P. 7(f). The motion "must be in writing and must specify the particulars sought by the defendant." Id. The court must grant the motion if a bill of particulars is necessary to enable the defendant to prepare for trial. Id. Defendants are not obligated to make such a request. See State v. Mora, 2000 ND 179, ¶¶ 12-14, 617 N.W.2d 478 (finding that although the charging document was inadequate, the defendant had actual knowledge that the State intended to seek the minimum mandatory sentence). Indeed, as this Court has observed, "[i]f the defendant and his counsel know the factual basis for the allegations of the information, there is no reason for them to demand further particulars." State v. Motsko, 261 N.W.2d 860, 864 (N.D. 1977).

[¶32] Although defendants are not required to move for a bill of particulars, failure to do so waives the defendant's ability to later challenge the specificity of the charging language. See United States v. Rawle, 845 F.2d 1244, 1249 (4th Cir. 1988) (concluding that if a defendant has not moved for a bill of particulars, he is precluded from challenging the particularity of an indictment that "sets out in general language all the essential elements of the offense charged"); United States v. Keine, 424 F.2d 39, 40 (10th Cir. 1970) (noting that "[i]f [defendant] desired additional specificity in order to prepare his defense, he could have moved for a bill of particulars," and failure to do so waived that issue); Kroska v. United States, 51 F.2d 330, 331 (8th Cir. 1931) (concluding that "if defendant felt any uncertainty as to what was intended thereby, or feared that he might be taken by surprise by the production of evidence for which he was unprepared, he should have applied for a bill of particulars"); State v. Wright, 911 P.2d 166, 176 (Kan. 1996) (holding that "where a defendant has not requested a bill of particulars, an indictment by a grand jury, drawn in the language of the statute, shall be deemed sufficient."); cf. State v. Bornhoeft, 2009 ND 138, ¶ 12, 770 N.W.2d 270 (affirming the denial of a motion to dismiss, noting that if the defendant "was uncertain as to the particular facts upon which the State relied to allege the offense, he could have requested a bill of particulars").

[¶33] The Defendant knew Eisert's injuries would be a significant issue in the case. Even prior to the preliminary hearing, the Defendant submitted a brief in which he argued the State could not prove the requisite level of injury. (App. at

11-12.) The Defendant now asserts that the charging document was insufficient because it failed to describe the nature of Eisert's injury. (Appellant's Br. at ¶ 45.) However, the Defendant never requested a bill of particulars. For this reason, the Defendant has waived the opportunity to seek clarification of the charging language.

[¶34] **II. The district court properly concluded that probable cause existed for the charge of criminal vehicular injury.**

[¶35] The issue of whether the district court properly found probable cause at a preliminary hearing is a question of law that is reviewable on appeal. State v. Midell, 2011 ND 114, ¶ 10, 798 N.W.2d 645. This Court will not reverse the district court's preliminary findings of fact "if, after resolving conflicts in the evidence in favor of affirmance, sufficient competent evidence exists that is fairly capable of supporting the court's findings and the decision is not contrary to the manifest weight of the evidence." State v. Blunt, 2008 ND 135, ¶ 14, 751 N.W.2d 692. The State must "produce sufficient evidence to satisfy the court that a crime has been committed and the accused is probably guilty." State v. Smith, 2010 ND 89, ¶ 8, 781 N.W.2d 650. However, the preliminary hearing is not the time for determining the defendant's guilt or innocence. Id.

[¶36] The preliminary hearing has a limited scope and purpose. Blunt, 2008 ND 135, ¶¶ 15-18, 751 N.W.2d 692. It is not meant to be a mini-trial. Id. at ¶ 17. Thus, the district court has limited authority to weigh evidence and judge the credibility of witnesses. Midell, 2011 ND 114, ¶ 12, 798 N.W.2d 645. The

district court may weigh witness credibility only when, '"as a matter of law, the testimony is implausible or incredible.'" Id. at ¶ 12 (quoting Blunt, 2008 ND 135, ¶ 17, 751 N.W.2d 692). It is not appropriate at preliminary hearing for the court to dismiss on the basis of '"a mere conflict in testimony,' for example, a case of 'he said, she said.'" Blunt, 2008 ND 135, ¶ 20, 751 N.W.2d 692.

[¶37] A preliminary hearing was held in this case on June 18, 2014. (Tr. of Prelim. Hr'g 2:16.) In a brief filed prior to the hearing, the Defendant argued that he should not be bound over on the charge because he did not cause substantial or serious bodily injury to Eisert. (App. at 12.) At the hearing, the court heard testimony from Eisert and Officer Larson. (Tr. of Prelim. Hr'g 3.) The court also received Eisert's medical records. (Tr. of Prelim. Hr'g 21:8-10.) The court concluded that probable cause existed for the charge. (Tr. of Prelim. Hr'g 37:1-7.)

[¶38] Eisert testified that as a result of the crash, he was "under so much pain." (Tr. of Prelim. Hr'g 29:23.) Officer Larson testified that according to the report of Officer Jeremiah Ferris, who was on scene at the time of the crash, Eisert was limping around and screaming. (Tr. of Prelim. Hr'g 11:16.) Eisert stated that he suffered lacerations on his leg that required stitches. (Tr. of Prelim. Hr'g 16:19-20.) Eisert testified that he had severe pain in the area of the injury. (Tr. of Prelim. Hr'g 14:22-25.)

[¶39] The medical records from Essentia documented a laceration and abrasion to Eisert's left shin, a hematoma to his left lower extremity, and minor abrasions on Eisert's right leg. (App. at 19, 22.) On September 28, 2013, Dr.

Jason Schenck noted that Eisert "has had continued pain despite being on the Keflex and oral Percocet." (App. at 22.) Eisert's wound became infected, and it was treated with antibiotics. (App. at 21-22.) On October 2, 2013, Dr. Schenck noted that Eisert had "continued reportedly severe pain with multiple visits since that time." (App. at 19.)

[¶40] Although the Defendant raised an issue regarding Eisert's credibility, this issue was not one the district court could determine in the context of a preliminary hearing. Instead, it was a question of fact for the jury. Cf. United States v. Two Eagle, 318 F.3d 785, 791 (8th Cir. 2003) ("Whether an injury is serious presents a question of fact for the jury."); Richards v. State, 476 S.E.2d 598, 601 (Ga. Ct. App. 1996) (rejecting the defendant's argument that insufficient evidence existed to convict him of battery, concluding that "[t]he question of whether substantial bodily injury occurred is instead a question of fact for the jury to decide").

[¶41] Based on the medical records and the testimony of Larson and Eisert, the court properly determined that probable cause existed to believe Eisert had suffered serious or substantial bodily injury. It would have been improper for the court to weigh Eisert's credibility as a witness.

[¶42] **III. The district court properly denied the Defendant's motion to dismiss.**

[¶43] The Defendant moved to dismiss the charge, arguing, in pertinent part, that the criminal vehicular injury statute is unconstitutionally vague and

overbroad, Eisert's injury was not serious or substantial, and the injury was to Eisert's extremity, not to his body. (App. at 59-88.) The district court denied the motion, concluding that "N.D.C.C. § 39-08-01.2 is neither vague nor overbroad." (App. at 95.) Regarding the Defendant's argument that the definition of "body" excludes the extremities, the court stated that it "does not follow common sense and logic and if followed would have absurd consequences." (App. at 96.) Given the nature of the prohibited conduct, the State submits that the statute is neither vague nor overbroad, and the district court's ruling was correct. Moreover, the court "does not have authority to grant a pretrial motion to dismiss based on a defense 'which raises factual questions embraced in the general issue.'" State v. Perreault, 2002 ND 14, ¶ 11, 638 N.W.2d 541 (citing State v. Kolobakken, 347 N.W.2d 569, 570 (N.D. 1984)). Therefore, the Defendant's request for dismissal based on insufficient evidence of substantial or serious bodily injury was appropriately denied.

[¶44] A. **The Defendant has not met the heavy burden required for demonstrating the unconstitutionality of a statute.**

[¶45] The Defendant challenges the portion of N.D.C.C. § 39-08-01.2(2) referring to "serious bodily injury or substantial bodily injury." (Appellant's Br. at ¶¶ 47-64.) The party challenging the constitutionality of a statute bears the burden of establishing its constitutional infirmity. Simons v. State, Dep't of Human Servs., 2011 ND 190, ¶ 23, 803 N.W.2d 587. Statutes "carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute

clearly demonstrates that it contravenes the state or federal constitution." Id. If there is any doubt about a statute's constitutionality, it "must, when possible, be resolved in favor of its validity." Id. In fact, the "presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt." Id. Therefore, "a party raising a constitutional challenge should bring up his 'heavy artillery' or forego the attack entirely." State v. Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147.

[¶46] **1. The statute is not void for vagueness.**

[¶47] The Defendant contends that the statute is unconstitutionally vague. However, his argument fails under the principles of the vagueness doctrine. The doctrine provides that a law is void "if it lacks 'ascertainable standards of guilt' such that it either forbids or requires 'the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" State v. Tibor, 373 N.W.2d 877, 880 (N.D. 1985) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). Vague laws violate due process because they lack the components of fair warning and nondiscriminatory enforcement. Id.

[¶48] The vagueness doctrine requires statutes to (1) "provide adequate warning as to the conduct proscribed," and (2) "establish minimal guidelines to govern law enforcement." State v. Johnson, 417 N.W.2d 365, 368 (N.D. 1987). In evaluating whether a statute gives adequate warning of the prohibited conduct, "the court should view the statute from the standpoint of the reasonable man who

might be subject to its terms." State v. Woodworth, 234 N.W.2d 243, 245 (N.D. 1975). The Court is to construe statutes "practically, construing words in their ordinary sense and determining legislative intent from the statute as a whole," and "[i]f there are two possible constructions to a statute, we choose the one which, without doing violence to the statute, will render it valid." State v. Hanson, 256 N.W.2d 364, 366 (N.D. 1977).

[¶49] Although the terms "serious bodily injury" and "substantial bodily injury" are not defined in Title 39, the district court properly looked to Title 12.1 for definitions of the terms. A previous version of N.D.C.C. § 39-08-01.2(2) included a reference to the definition of "serious bodily injury" found in N.D.C.C. § 12.1-01-04. However, this language was deleted from the statute when it was amended in 2013, and the term "substantial bodily injury" was added. 2013 N.D. Sess. Laws Ch. 301, § 8. The amended version did not include a reference to the definitions in § 12.1-01-04. Section 1-01-09, N.D.C.C., provides that "[w]henever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears." See Johnson, 417 N.W.2d at 369 (explaining that "[w]ords and phrases used in any statute are to be understood in their ordinary sense, but any words or phrases explained or defined by statute must be construed as thus explained or defined"). The Court has applied Title 12.1 definitions to terms in other parts of the Century Code. See e.g. State v. Trevino, 2011 ND 232, ¶ 33, 807 N.W.2d 211

(holding that "N.D.C.C. § 39–08–03(1) requires the State prove the defendant drove 'recklessly' and incorporates the definition of 'recklessly' from N.D.C.C. § 12.1–02–02(1)(c) as an element of the offense"); State v. Skarsgard, 2007 ND 159, ¶ 6, 740 N.W.2d 64 (noting that "Title 12.1 is an appropriate source to look to in determining definitions used elsewhere in the Code"); Johnson, 417 N.W.2d at 369 (applying the definition of "explosives" in Title 12.1 to ascertain the meaning of the term in Title 62.1); State v. Benson, 376 N.W.2d 36, 41 (N.D. 1985) (upholding the trial court's decision to use the Title 12.1 definition of "intent" in the jury instructions for an offense charged under N.D.C.C. § 57-38-45). Thus, it is reasonable to apply the Title 12.1 definitions to N.D.C.C. § 39-08-01.2(2).

[¶50] Moreover, the Title 12.1 definitions of the terms "serious bodily injury" and "substantial bodily injury" provide sufficient guidance to law enforcement and the public. These terms are commonly used in assault and other personal crimes cases. See e.g. N.D.C.C. § 12.1-17-01.1 (defining the offense of assault); § 12.1-17-02 (defining the offense of aggravated assault); § 12.1-17-05 (defining the offense of menacing). Section 12.1-01-04(29), N.D.C.C., defines "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs." The term "substantial bodily injury" is defined as "a substantial temporary

disfigurement, loss, or impairment of the function of any bodily member or organ." N.D.C.C. § 12.1-01-04(31).

[¶51] Although Title 12.1 does not define "extreme pain" or "disfigurement," courts have recognized that the definitions of some legal terms are difficult to articulate. See e.g. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to further define the kinds of materials that fall within the category of "obscene," simply stating, "I know it when I see it"); Panther v. State, 780 P.2d 386, 391 (Alaska Ct. App. 1989) (holding that "[a]lthough difficult to define concretely, the statutory requirement of a 'gross deviation' from the standard of care that a reasonable person would observe is readily comprehensible"); State v. Amato, 343 So.2d 698, 703 (La. 1977) (rejecting a vagueness challenge to Louisiana's obscenity statute, noting that "the legislature has called upon the collective wisdom of the jury to determine" whether the materials at issue are obscene); City of Belfield v. Kilkenny, 2007 ND 44, ¶ 18, 729 N.W.2d 120 (concluding that the Court "certainly will not require [police officers] to scientifically test the loudness of a yip, yowl or bark" in a barking dog case, noting that "[t]he reasonable police officer will 'know it when [he hears] it'"). Ultimately, the severity of the injury is a factual issue that the jury must determine after evaluating the evidence in the case. See United States v. Fitzgerald, 882 F.2d 397, 399 n.2 (9th Cir. 1989) (noting that "[w]hether there were serious bodily injuries is a question left for the jury").

[¶52] Courts in other jurisdictions have rejected defendants' claims that the term "serious bodily injury" is unconstitutionally vague. See Id. at 398 (holding that the severity of the victim's injuries, resulting from gunshot wounds, were sufficient to notify the defendant that his conduct was prohibited); Vaillancourt v. State, 695 N.E.2d 606, 610 (Ind. Ct. App. 1998) (holding that "the term 'extreme pain' is not one which persons of average intelligence cannot understand"); Brewster v. Virginia, 477 S.E.2d 288, 289 (Va. Ct. App. 1996) (holding that the term "serious bodily injury" is not unconstitutionally vague, recognizing that the phrase "has been used in other Virginia statutes and case law"). In the absence of definitions in N.D.C.C. § 39-08-01.2(2), it is reasonable to adopt the definitions found in N.D.C.C. § 12.1-01-04. These definitions are frequently used in North Dakota criminal law, and they provide adequate guidance to law enforcement and members of the public.

[¶53] The critical question with respect to a vagueness challenge is whether the statute provides ascertainable standards of guilt. Section § 39-08-01.2(2) is easily understood; the ordinary person can comprehend the grave consequences that may result from driving under the influence. Certainly, the dangers of impaired driving are well known. See e.g. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (noting that "[m]edia reports of alcohol-related death and mutilation on the Nation's roads are legion"). Although the Defendant challenges the meaning of "substantial bodily injury" and "serious bodily injury," the potential exists for argument and debate regarding the precise meaning or

definition of many legal terms. It would be difficult, if not impossible, for the legislature to create universally-applicable definitions of what it means to suffer "disfigurement" or "extreme pain." Such concepts may be difficult to precisely articulate, but they are nevertheless comprehensible for jurors, who can consider all of the evidence at trial and draw on their own common sense and life experience.

[¶54] **2. The statute is not overbroad.**

[¶55] Similarly, the Defendant has failed to establish that the statute is unconstitutionally overbroad. The doctrine of overbreadth prohibits the criminalization of constitutionally protected activity. Tibor, 373 N.W.2d at 880. The first question when considering an overbreadth claim is "whether the statute infringes upon a 'substantial amount of constitutionally protected conduct.'" City of Fargo v. Stensland, 492 N.W.2d 591, 593 (N.D. 1992) (quoting Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494 (1982)).

[¶56] Quite simply, the Defendant's conduct was not constitutionally protected. Driving is a privilege, not a right. State v. Birchfield, 2015 ND 6, ¶ 6, 858 N.W.2d 302. There is no constitutional right to drive under the influence of alcohol. See Sitz, 496 U.S. at 451 ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); Fuenning v. Super. Ct. In & For Maricopa County, 680 P.2d 121, 128 (Ariz. 1983) ("We know of no constitutional right to drink *and* drive; we recognize no right to ingest a substantial amount of alcohol and then drive."); State v. Chirpich, 392 N.W.2d

34, 37 (Minn. Ct. App. 1986) (recognizing the State's "legitimate interest in enacting DWI laws," and observing that no court has ever found driving while under the influence to be constitutionally protected conduct); Beylund v. Levi, 2015 ND 18, ¶ 27, 859 N.W.2d 403 (upholding North Dakota's implied consent law, acknowledging the "compelling state interest in regulating intoxicated drivers"); Stensland, 492 N.W.2d at 593 (denying defendants' claim that N.D.C.C. § 39-08-01 is unconstitutionally overbroad, noting that no court has recognized the existence of a right to drink and drive as long as a person's BAC is under the legal limit).

[¶57] Given that the Defendant has no constitutional right to drive under the influence, it logically follows that he has no right to do so and then injure another person. Cf. State v. Holbach, 2009 ND 37, ¶ 16, 763 N.W.2d 761 (concluding that "violence or other activities that harm another person are not constitutionally protected"). Consequently, the Defendant's overbreadth argument must fail.

[¶58] **B. The district court properly denied the Defendant's claim that there was no "bodily" injury.**

[¶59] The Defendant claims that the district court should have dismissed the charge because the injury was to Eisert's leg, which is only an extremity and not part of the body. This argument is without merit. The Court construes statutes to "avoid absurd and ludicrous results." State v. Wetzel, 2008 ND 186, ¶ 4, 756 N.W.2d 775. If the Defendant's interpretation were adopted, Eisert would not have suffered substantial or serious bodily injury even if one of his limbs had been

severed as a result of the collision. The district court appropriately rejected this argument.

[¶60] **IV. The district court properly denied the Defendant's request to call the prosecutors as witnesses.**

[¶61] The Defendant filed a notice of intent to call the prosecutors and their staff as witnesses at trial. (App. at 59.) The Defendant argued that he was entitled to inferences of coaching because Eisert used the word "extreme" at the preliminary hearing to describe the level of pain he experienced following the crash in this case. (App. at 73, 76.) The court denied the Defendant's request, finding it to be a "blank assertion with no supporting evidence." (App. at 98.)

[¶62] It is within the discretion of the trial court to determine whether a defense attorney or prosecutor may be called as witness in a case he or she is trying. United States v. Watson, 952 F.2d 982, 986 (8th Cir. 1991). These requests are disfavored. Id.; see also United States v. Tamura, 694 F.2d 591, 601 (9th Cir. 1982) (noting that "federal courts have universally condemned the practice of a government prosecutor's testifying at a trial in which he is participating"). Therefore, "[t]he party seeking such testimony must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from another source creates a compelling need for the testimony." Watson, 952 F.2d at 986. The district court's decision on this matter will not be reversed unless there was a "clear and prejudicial abuse of discretion." Id.

[¶63] Many well-founded reasons support the general disinclination of the courts to allow prosecutors to be called as witnesses in criminal proceedings. See e.g. United States v. Wooten, 377 F.3d 1134, 1142 (10th Cir. 2004) (recognizing that "[t]he government has a substantial interest in not allowing its prosecutors to testify because doing so generally requires disqualification of the prosecutor"); United States v. Schwartzbaum, 527 F.2d 249, 253 (2d Cir. 1975) (opining that the defendant may only call the prosecutor if there is a "compelling and legitimate need" because it "inevitably confus[es] the distinctions between advocate and witness, argument and testimony"); People v. Langdon, 415 N.E.2d 578, 583 (Ill. App. Ct. 1980) (noting that "[t]he justified reluctance of courts to permit the prosecutor to become a witness in the case reflects the belief that the jury will accord far greater weight to his testimony than to that of an ordinary witness"); Chatman v. State, 334 N.E.2d 673, 682 (Ind. 1975) (finding the defendant's "attempt to put the prosecutor upon the witness stand" an "ill-concealed effort to turn the proceedings into a trial of the prosecutor and thus divert attention from the real issues of the case"); People v. Ditucci, 916 N.Y.S.2d 424, 425 (N.Y. App. Div. 2011) (denying the defendant's request to call the prosecutor to testify on the issue of her "alleged influence over the victim" where "[d]efense counsel was free to cross-examine the victim on that issue, and in fact did so").

[¶64] The fact that the prosecution met with the victim in this case is hardly unusual and does not necessitate an inference of coaching. United States v.

Rivera-Hernandez, 497 F.3d 71, 80 (1st Cir. 2007) (acknowledging that "[p]rosecutors and defense attorneys alike are entitled to prepare their witnesses"); United States v. Nambo-Barajas, 338 F.3d 956, 963 (8th Cir. 2003) (finding the mere fact that the prosecution has met with a witness before trial is not, by itself, evidence of impropriety); DeVoss v. State, 648 N.W.2d 56, 64 (Iowa 2002) (rejecting a claim that the prosecutor coached a witness, concluding that attorneys have the right to prepare their witnesses, and "[i]t would be foolhardy not to"). In fact, North Dakota law requires prosecutors to communicate with victims. See N.D.C.C. § 12.1-34-02(3) (providing that the prosecuting attorney must inform victims of any criminal charges filed, "the pretrial status of each person arrested," and give "a brief statement in nontechnical language of the procedural steps involved in the processing of a criminal case").

[¶65] The Defendant had the opportunity to cross examine Eisert at the preliminary hearing and trial. Claims of coaching have been denied when there is no evidence of impropriety, and the defendant had the chance to cross examine the witness. See e.g. State v. Higgins, 836 P.2d 536, 543 (Idaho 1992) (finding the defendant had presented no evidence to support his claim that the prosecutor improperly influenced the alleged victim's testimony, and the defendant "had an ample opportunity to cross-examine and impeach the alleged victim regarding her different accounts of his conduct"); State v. Osborn, 490 N.W.2d 160, 166 (Neb. 1992) (rejecting a claim that the prosecutor coached a child witness, concluding that the defendant had the "opportunity to cross-examine [the child] as to the

nature of the talk she had with the prosecutor during the recess); Lynch v. State, 13 A.3d 603, 606 (R.I. 2011) (calling witness preparation "an acceptable practice that often is used by both parties," and holding that even if the victim's testimony was practiced with prosecutors, "such a circumstance would not have amounted to prosecutorial misconduct unless she was coached to testify untruthfully").

[¶66] The district court was within its discretion to deny the Defendant's request to call the prosecution as witnesses at trial. The Defendant was not entitled to an inference of coaching simply because Eisert used the word "extreme" to describe his level of pain. Notably, medical records showed that Eisert had complained of "severe pain" in the days following the crash. (App. at 19.) Whether Eisert described his pain as "extreme" or "severe," his message was consistent—Eisert experienced a high level of pain with his leg injury. The jury was appropriately tasked with deciding whether the State proved the requisite level of injury.

[¶67] **V. The district court properly denied the Defendant's motion for judgment of acquittal.**

[¶68] The Defendant argues that the district court erred in denying his motion under N.D.R.Crim.P. 29. The court must grant such a motion when there is insufficient evidence to sustain a conviction for the charged offense. N.D.R.Crim.P. 29. The court reviews the "evidence most favorable to the prosecution," and it "must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." State v.

Steinbach, 1998 ND 18, ¶ 16, 575 N.W.2d 193. To successfully challenge a verdict based on sufficiency of the evidence, "a defendant must show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt." Id. When considering a sufficiency challenge, this Court will not resolve conflicts in the evidence or weigh the credibility of witnesses. Id. at ¶ 17. The only determination is "whether there is competent evidence that allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." Id. The jury "may find the defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty." State v. Hatch, 346 N.W.2d 268, 277 (N.D. 1984).

[¶69] To prove criminal vehicular injury, the State was required to establish that the Defendant violated N.D.C.C. § 39-08-01 and as a result caused substantial or serious bodily injury to another. N.D.C.C. § 39-08-01.2. Therefore, the first issue is whether the Defendant committed a violation of N.D.C.C. § 39-08-01. There was ample evidence to support this element at trial. Officer Ferris identified the Defendant as the driver of the pickup involved in the crash, and he noticed that the Defendant had the strong odor of an intoxicating beverage and slurred speech. (Tr. 270:20; 271:5-7.) Officer Larson noted that the Defendant had slurred speech, glassy eyes, and poor balance, and he failed field sobriety testing. (Tr. 248:17-24; 253:18; 256:1.) Lab results showed that the Defendant had a BAC of 0.217. (Tr. 258:10; 259:25.) With clear evidence that the Defendant crashed his

pickup, displayed signs of impairment, and had a high BAC, it was reasonable for the jury to conclude that the Defendant committed a DUI offense.

[¶70] The second issue is whether there was sufficient evidence that the Defendant caused Eisert to suffer substantial or serious bodily injury. Officer Ferris and Beau Billadeau testified that Eisert was screaming in pain following the crash. (Tr. 236:12-17; 270:2-9.) Eisert, Dr. Schenck, and Dr. Johnson testified regarding Eisert's injuries. Eisert also showed the jury his scar. (Tr. 139:3-4.) Additionally, Eisert's medical records were admitted. (Tr. 4:14-16; 4:19.) Considering this evidence, the jury could reasonably conclude that Eisert had disfigurement or extreme pain.

[¶71] **VI. The district court properly instructed the jury.**

[¶72] The Defendant contends that the district court provided incorrect definitions of "substantial bodily injury" and "serious bodily injury" in the jury instructions. (Appellant's Br. at ¶ 79.) The Defendant also takes exception to the lack of a culpability instruction. (Appellant's Br. at ¶ 80.) The Court reviews jury instructions "as a whole and consider[s] whether they correctly and adequately advised the jury of the law." State v. His Chase, 531 N.W.2d 271, 274 (N.D. 1995). If the instructions correctly advise the jury on the law, "they are sufficient, even though part of the instructions standing alone, may be insufficient or erroneous." City of Minot v. Rubbelke, 456 N.W.2d 511, 513 (N.D. 1990). The court "is not required to submit instructions in the specific language requested by the defendant." Id.

[¶73] The Defendant argued that the instructions should include his definitions of "substantial bodily injury" and "serious bodily injury," rather than using the definitions of the terms found in N.D.C.C. § 12.1-01-04. (App. at 113; Tr. 295:4-14.) Citing dictionary definitions of the terms, the Defendant requested an instruction that would have defined "serious bodily injury" as one pertaining "to the body, or trunk," and the term "extreme pain" would have been excluded. (App. at 66, 113.) His definition of "substantial bodily injury" included permanent, rather than substantial temporary, disfigurement. (App. at 113.)

[¶74] Because limiting the definition of "body" to the trunk would lead to an absurd interpretation of the law, there was no basis for including such language in the jury instructions. Admittedly, the reference to N.D.C.C. § 12.1-01-04 was amended out of N.D.C.C. § 39-08-01.2(2). 2013 N.D. Sess. Laws Ch. 301, § 8. Without specific guidance in the statute, the district court was left with the task of finding appropriate definitions. It was reasonable for the court to rely on the N.D.C.C. § 12.1-01-04 definitions, which are well known in criminal law.

[¶75] The Defendant requested, but did not receive, an instruction that criminal vehicular injury requires proof of "willful" conduct as defined in N.D.C.C. § 12.1-02-02. The term "willfully" is not included in N.D.C.C. § 39-08-01.2(2). However, the Defendant argues that because the court used the injury definitions from Title 12.1, then it should have relied on Title 12.1 for a culpability requirement. (Appellant's Br. at ¶ 80.) Under N.D.C.C. § 12.1-02-02, if a statute does not specify a culpability level, "and does not provide explicitly

that a person may be guilty without culpability, the culpability that is required is willfully."

[¶76] Criminal vehicular injury requires proof of the same conduct as a DUI (a violation of N.D.C.C. § 39-08-01); only the result of the DUI violation (substantial or serious bodily injury) is added. In State v. Glass, the Court held that "[t]he absence of culpability in the essential elements of the offense establishes that DUI is a strict liability offense." 2000 ND 212, ¶ 21, 620 N.W.2d 146. Further, the Court concluded that "the willful culpability requirement of N.D.C.C. § 12.1-02-02(2) does not apply and therefore the district court had no obligation to instruct the jury as to any level of culpability." Id. at ¶ 23. Likewise, driving under suspension is a strict liability offense, and "past decisions of our court have restricted the application of § 12.1-02-02(2), N.D.C.C., to offenses defined in Title 12.1, N.D.C.C., alone." State v. Fridley, 335 N.W.2d 785, 788 (N.D. 1983); see e.g. State v. Holte, 2001 ND 133, ¶ 8, 631 N.W.2d 595 (explaining that N.D.C.C. § 14–07.1–06 is a strict liability offense because it does not specify a culpability level). The "willful culpability level will not be read into other chapters unless the Legislature has specifically so stated." Holte, 2001 ND 133, ¶ 8, 631 N.W.2d 595. Because N.D.C.C. § 39-08-01.2(2) does not provide a culpability requirement, the district court properly denied the Defendant's requested instruction.

[¶77] The Defendant cites State v. Olson, 356 N.W.2d 110, 113 (N.D. 1984), for the notion that "involuntary acts are not criminal." However, this

concept is inapplicable here. There was no evidence that the Defendant became intoxicated involuntarily, that he was unconscious, or that someone forced him to get behind the wheel and drive.

[¶78] **VII. The district court's sentencing decision was within the limits of the court's discretion.**

[¶79] The Defendant contends that the court erred when it sentenced him to serve one year of imprisonment. (Appellant's Br. at ¶ 89.) Although N.D.C.C. § 39-08-01.2 provides for a minimum sentence of one year, it allows for suspension of the sentence if "the court finds that manifest injustice would result from the imposition of the sentence." Claiming that manifest injustice exists in this case, the Defendant again alleges insufficient evidence of substantial or serious bodily injury. (Appellant's Br. at ¶ 89.)

[¶80] The district court has wide discretion in sentencing; a sentencing decision will be vacated "only if the court acted outside the limits prescribed by statute or substantially relied on an impermissible factor in determining the severity of the sentence." State v. Henes, 2009 ND 42, ¶ 6, 763 N.W.2d 502. Here, the court's sentence was plainly within the bounds of the statute. At the sentencing hearing, the court stated that it had considered the sentencing factors in N.D.C.C. § 12.1-32-04 and the steps that the Defendant had taken following the incident. (Sentencing Tr. 8:12-14; 8:22-23.) However, the court determined that "the type of conduct and what happened is exactly the thing that the Legislature was trying to prevent through their change." (Sentencing Tr. 8:24-25; 9:1.) Thus,

although the court considered the Defendant's arguments, the court concluded that a sentence of one year was warranted. Because the court relied on permissible factors, the Defendant's sentence should be upheld.

[¶81] **CONCLUSION**

[¶82] The Defendant does not have the opportunity at this point to challenge the specificity of the charging document. The Defendant has failed to show that N.D.C.C. § 39-08-01.2 is unconstitutionally vague or overbroad. Sufficient evidence supported the district court's finding of probable cause and the jury's verdict of guilty. The district court properly instructed the jury and imposed an appropriate sentence that was within the court's discretion. The State requests that this Court affirm the decisions of the district court.

Respectfully submitted this 22nd day of April, 2015.

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[¶83] **CERTIFICATE OF SERVICE**

[¶84] A true and correct copy of the foregoing document was sent by e-mail on the 22nd day of April, 2015, to: Jonathan T. Garaas at garaaslawfirm@ideaone.net.

Renata J. Olafson Selzer