STATE OF MINNESOTA DISTRICT COURT

COUNTY OF COOK SIXTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Maranda Marie Weber,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM

File No. 16-CR-08-169

The above entitled matter came before the Honorable Kenneth A. Sandvik, Judge of District Court, on May 5, 2009, at the Cook County Courthouse, Grand Marais, Minnesota for the purpose of a hearing on Defendant's motion to dismiss an indictment. Defendant Maranda Marie Weber appeared personally and with counsel, Paul W. Rogosheske, St. Paul, Minnesota. Timothy C. Scannell, Cook County Attorney, appeared on behalf of the State.

The Defendant has been indicted by a Minnesota State Grand Jury on one count of careless driving under Minnesota Statute §169.13, subd. 2 and on one count of failing to drive with due care under Minnesota Statute §169.14, subd. 1. The issues before the Court are: 1) whether the evidence before the Grand Jury was sufficient to establish the offenses as charged; 2) whether the indictment substantially complies with the requirements proscribed by law and; 3) whether there exists adequate probable cause to allow the matter to proceed to trial.

The Court, having taken this matter under advisement, makes the following:

FINDINGS OF FACT:

For purposes of this Order, the Court finds the following facts to be true:

1. Defendant is employed as a federal agent and patrol officer by the United States Department of Homeland Security, specifically assigned to the United States Border Patrol division, and whose duties include investigating crimes along the border between the United States and Canada (Def. Notice of Removal, April 30, 2008, pg. 1, ¶ 1.)
2. On October 31, 2007, Defendant was patrolling the Gunflint Trail in Cook County Minnesota and between 6:22 p.m. and 6:53 p.m., Defendant assisted a Cook County deputy sheriff in removing a fallen tree from the road (Supplemental Report, Nov. 2, 2007, Cook County Sheriff's Deputy Julie Collman, pg. 2; Grand Jury Tr. pg. 33.) There is no evidence that Defendant and the Cook County officer complied with work zone safety when removing the tree.
3. Later that same evening, Dr. Kenneth Millard Peterson and Susan Scherer were traveling northbound on the Gunflint Trail, in separate vehicles, when they came upon a different downed tree obstructing the road. Both Peterson and Scherer resided up the Gunflint Trail and were returning home following community choir practice (Grand Jury Tr. pg. 152.) Peterson stopped his vehicle in the northbound lane and angled the front of it towards the center line, in an attempt to illuminate the area of the downed tree. He then began working to clear the roadway (Grand Jury Tr. pg. 122.)
4. Peterson left his vehicle parked in the northbound lane, with the high beam lights and hazards both on. He worked with a chainsaw and wore ear protection and began to clear the tree from the road with the assistance of Scherer, whose vehicle was parked behind

Peterson's. Peterson cut sections of the downed tree and Scherer would carry them into the ditch (Grand Jury Tr. pg. 113,154.)

5. Sometime around 9:00 p.m., the Defendant was traveling southbound on the Gunflint Trail towards where Peterson and Scherer were attempting to clear the tree from the road. Scherer saw the Defendant's vehicle approaching and yelled to Peterson to get his attention, but Peterson did not hear her (Grand Jury Tr. pg. 154-155.)
6. The Defendant's vehicle struck Peterson at about 50 miles per hour, the impact of which knocked Peterson into his own vehicle. He died as a result of his injuries (Grand Jury Tr. pg. 16.)
7. The Defendant submitted to a blood test at the North Shore Hospital at 11:36 p.m. that same evening. Neither alcohol nor drugs were found (Grand Jury Tr. pg. 94.)
8. Minnesota State Trooper Jason Hanson, a crash reconstruction and forensic mapping specialist with the Minnesota State Patrol, prepared a fatality report (Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
9. Technical Sergeant Brent Richter, Coordinator for the Statewide Reconstruction Program of the Investigative Services Section of the Minnesota State Patrol, prepared a supplemental report, which provided downloaded data from the Defendant's vehicle's sensing diagnostic module (Supplemental Report, Nov. 2, 2007, Sgt. Bret R. Richter, pg. 1.)
10. The Defendant's vehicle is equipped with a sensing diagnostic module capable of providing up to five seconds of pre-crash data relating to vehicle speed and engine RPM. During the five seconds before impact, Defendant's vehicle was traveling 49 miles per hour, then 50, 50, 50 and 51 mph (Grand Jury Tr. pg. 128; Supplemental Report, Nov. 2,

2007, Sgt. Bret R. Richter, pg. 2.) The speed limit on the stretch of the Gunflint Trial where Defendant was driving is 50 mph.

11. The module also indicated Defendant's vehicle did not swerve prior to impact (Grand Jury Tr. pg. 112.)
12. As part of the crash reconstruction, Trooper Hanson concluded that Defendant would have been able to see Peterson's headlights 923 feet before impact. He also concluded the hazards on the Peterson vehicle would have been visible at 315 feet before impact (Grand Jury Tr. 116-117; Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
13. A time-distance study was included in the fatality report in which Trooper Hanson determined that at a speed of 50 mph, it would have taken 12.5 seconds for the Defendant to travel 923 feet. It would have taken 4.2 seconds for the Defendant to travel the 315 feet from the point the hazards could be seen to the location of the fallen spruce tree (Grand Jury Tr. pg.118, 129; Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
14. The report concludes that had the Defendant noted something wrong at the point that Peterson's hazards became visible, and using a two second reaction time, she would have had a little over two seconds to react. During that two seconds the Defendant would have traveled another 146 feet (a speed of 50 mph correlates to 73 feet per second), placing her about 169 feet from impact. It would take approximately 119 feet for Defendant's vehicle to stop at a speed of 50 mph with emergency brake application on a dry, level surface (Grand Jury Tr. pg.119; Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
15. Trooper Hanson opined in his report that "a reasonable and prudent driver should have noted something was amiss and at least begun to do something over the course of the 12+

seconds the Hyundai (Peterson's car) was visible" (Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)

16. Trooper Hanson opined in his report that had the Defendant recognized something was awry in the roadway when Peterson's hazards became visible the "crash could have been avoidable (Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
17. The fatality report also indicated that Peterson's headlights presented a "visual obstruction" as a result of the positioning of his vehicle. In a series of reconstruction tests, Deputy Hanson found that the southbound view toward the tree was obstructed due to the glare of the headlights (Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
18. Trooper Hanson and Cook County Deputy John W. Hughes attempted to replicate the view that Defendant had at the time of the crash and as Deputy Hughes drove southbound toward the scene at 50 mph he was unable to see the tree blocking the southbound lane because he was blinded by the headlights (Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.)
19. A Grand Jury was convened at the Cook County Courthouse, Grand Marais, Minnesota, on April 22, 2008.
20. The Cook County Attorney asked the Grand Jury to consider the charges of felony level criminal vehicular homicide pursuant to Minn. Stat §609.21, careless driving pursuant to Minn. Stat. §169.13, subd. 2 and failing to drive with due care pursuant to Minn. Stat. §169.14, subd. 1.
21. At the Grand Jury proceeding, the State presented testimony from investigating officers, the fatality report by State Patrol accident reconstruction officer Trooper Hanson and

testimony from eyewitness Susan Scherer (Grand Jury Tr. pg. 25; State Br., March 13, 2009, pg. 2.)

22. Jurors questioned the prosecutor about why there were no witnesses from the Border Patrol or Department of Homeland Security testifying at the proceeding and the prosecutor explained that the Defendant was exercising her Fifth Amendment rights and that no negative conclusions should be drawn from the exercising of that right (Grand Jury Tr. pg. 150.)
23. In instructing the jurors on the three charges before them, the prosecutor referred to the third charge as "inattentive driving" (Grand Jury Tr. pg. 216.) The third charge actually falls within the duty to drive with due care subdivision of the general speed limit statute.
24. On two occasions during the Grand Jury proceedings, the prosecutor referred to the criminal vehicular operation crime as a felony (Grand Jury Tr. pg. 28,226.) There was no reference to possible punishment beyond that.
25. Based upon the information provided to it, the Grand Jury indicted the Defendant for one count of careless driving and one count of failing to drive with due care. The Grand Jury declined to indict the Defendant for criminal vehicular homicide (Grand Jury Indictment, April 22, 2008.)
26. Both parties filed briefs with the Court and a hearing was held on May 5, 2009, at the Cook County Courthouse, Grand Marais, Minnesota.
27. At the hearing, the Defendant called as a witness David Daubert, a civil engineer who specializes in accident reconstruction. Daubert presented his analysis of the accident based upon his experience and upon his independent review of portions of the evidence considered by the Grand Jury.

a. Daubert concluded that the Defendant would not have been able to see the downed tree and Peterson in the road because she would have been blinded by the headlights on Peterson's car (Daubert Test., May 5, 2009 Hr'g.)

b. Daubert concluded that the Defendant would not have been able to discern Peterson's stopped car from an on-coming vehicle traveling north and that she would not have recognized any reason to stop (Daubert Test., May 5, 2009 Hr'g.)

c. Daubert opined that even though Defendant would have seen Peterson's vehicle's headlights, she was not negligent in not stopping or slowing down because there was no recognizable hazard (Daubert Test., May 5, 2009 Hr'g.)

28. Daubert based his findings on the reports of investigating officers and the fatality report of Trooper Hanson. Daubert did not review the testimony of the eyewitness Susan Scherer when reaching his conclusions (Daubert Test., May 5, 2009 Hr'g.)

CONCLUSIONS OF LAW:

1. The Grand Jury had sufficient evidence to find that there was probable cause to believe that offenses had been committed and that the Defendant committed them, consistent with their indictment.
2. The indictment substantially complied with the requirements prescribed by law and did not prejudice the substantial rights of the Defendant.
3. Adequate probable cause exists to allow the matter to go to trial.
4. No other circumstances have been shown to exist which would make it unfair or unjust to require the Defendant to stand trial.

ORDER:

1. Defendant's motion to dismiss the indictment is hereby DENIED.
2. Defendant shall be required to stand trial for the two charges upon which she was indicted by the Grand Jury.
3. The matter of State of Minnesota v. Maranda Weber should be placed on the trial calendar consistent with the calendaring practices of the Court.
4. The attached memorandum is incorporated herein.

IT IS FURTHER ORDERED that copies of the Order and Memorandum should be directed by mail to counsel of record for the parties, as such are more fully identified in the files and records herein.

Dated this _____ day of June, 2009.

_____
Hon. Kenneth A. Sandvik
Judge of District Court

MEMORANDUM

A Grand Jury may indict if it finds, on all of the evidence, that there is probable cause to believe that an offense has been committed and that the Defendant committed it. *State v. Flicek*, 657 N.W.2d 592 (Minn.App.2003); Minn. R. Crim. P. 18.06, subd. 2. Probable cause to indict exists if evidence worthy of consideration brings the charge within a reasonable probability. *Id* at 596 (citing *State v. Steinbuch*, 514 N.W.2d 793, 798 (Minn.1994)). A presumption of regularity attaches to a Grand Jury indictment and only in a rare case will an indictment be invalidated. *State v. Plummer*, 511 N.W.2d 36 (Minn.App.1994) (citing *State v. Inthavong*, 402 N.W.2d 799, 801 (Minn.1987)); *see also Scruggs*, 421 N.W.2d at 717 ("a criminal defendant bears a heavy burden when seeking to overturn an indictment").

Defendant claims that the evidence before the Grand Jury was not sufficient to establish the offenses as charged (Def. Br., Feb. 13, 2009, pg. 1.) This Court disagrees. Defendant was indicted for one count of careless driving under Minn. Stat. §169.13, subd. 2, which provides that "[a]ny person who operates or halts any vehicle upon any street or highway carelessly or heedlessly in disregard of the rights of others, or in a manner that endangers or is likely to endanger any property or any person, including the driver or passengers of the vehicle, is guilty of a misdemeanor." Defendant was also indicated for one count of failing to drive with due care pursuant to Minn. Stat. §164.14, subd. 4. The statute provides:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions. Every driver is responsible for becoming and remaining aware of the actual and potential hazards then existing on the highway and must use due care in operating a vehicle. In every event speed shall be so restricted as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

The Grand Jury heard both inculpatory and exculpatory evidence and ultimately concluded that there was evidence sufficient to believe that the Defendant committed the crimes of careless driving and failure to drive with due care and that there was not sufficient evidence to believe that the Defendant committed criminal vehicular homicide.

Among other things, the jurors heard that the Defendant was not speeding at the time of the accident and that neither alcohol nor drugs were involved (Grand Jury Tr. pg. 94, 128.) They also heard that the Defendant would have seen Peterson's headlights 923 feet before the collision, giving her 12 seconds to react and she would have seen the hazard lights 315 feet before the collision, giving her 4 seconds to react (Grand Jury Tr. pg. 116-118, 129.)

The jurors heard an accident reconstruction specialist opine that if the Defendant had recognized and responded to the hazard lights she would have had enough time to brake and the crash would have been avoided (Grand Jury Tr. pg. 119; Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.) They also heard from the same specialist that the view of the downed tree and Peterson himself might have been obstructed due to the glare of the headlights from Peterson's vehicle but that the Defendant's attention was nonetheless "less than stellar" (Grand Jury Tr. pg. 65; Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.) While this Court declines to address whether the criticism of the Defendant's attention in the fatality report is sufficient for a finding of guilt beyond a reasonable doubt, it is more than sufficient for a probable cause finding that offenses were committed and that the Defendant committed them. The State provided evidence supporting the elements of the crimes and deference should be given to the Grand Jury's role as fact-finders.

The Grand Jury was in session for six and a half hours, with deliberation taking approximately an hour and eighteen minutes. Jurors heard testimony from two Cook County

Sheriff Deputies, the Minnesota State Trooper who prepared the fatality report, eyewitness Susan Scherer and Cook County Sheriff Mark Falk. The Court gave preliminary instructions and the Cook County Attorney instructed jurors throughout the proceeding. The evidence also included various exhibits, including photographs of the vehicles and the roadway and Minnesota Department of Public Safety reports. The matter was not taken lightly by the Grand Jury as evidenced by the time spent in session and deliberation, the amount of evidence presented and the inquires made by jurors to testifying witnesses and the Cook County Attorney.

Defendant also claims that the indictment does not substantially comply with the requirements prescribed by law to the prejudice of the substantial rights of the Defendant (Def. Br., Feb. 13, 2009, pg. 8.) Defendant argues that the prosecutor made improper comments on Defendant's Fifth Amendment right not to testify and cites *State v. Grose*, 387 N.W2d 182 (Minn.App. 1986) in support of its claim that the comments were error and substantial (Def. Br., Feb. 13, 2009, pg. 8-10.) In *Grose*, the Minnesota Court of Appeals agreed with the trial court's findings that "[t]he prosecutor repeatedly and needlessly stressed to the Grand Jury the fact that the defendant refused to testify…[and] [t]hese comments are improper and have a prejudicial impact upon any defendant…"

This Court finds, however, that the comments made by the prosecutor during the Grand Jury proceeding in this case do not rise to the level of substantiality found in *Grose* and did not prejudice the Defendant's Fifth Amendment rights. Here, the prosecutor's remarks concerning the Defendant's right not to testify came in response to an inquiry by a juror (Grand Jury Tr. pg. 150.) The remarks were not needless and they were not volunteered by the prosecutor; they were made answering an understandable question and were accompanied by a statement from the prosecutor that jurors should not draw a negative conclusion from the fact that Defendant was

exercising her Fifth Amendment rights (Grand Jury Tr. pg. 150.) The prosecutor's comments on Defendant's right to remain silent explained to the jurors, in a legal context, the Defendant's absence from the proceedings when a juror questioned why the Defendant was not present. His comments accurately stated the law and are consistent with the instructions trial courts routinely give to trial juries.

Defendant maintains that the State improperly instructed the Grand Jury when the State informed the jurors that the third charge was "inattentive driving" (Def. Br., Feb. 13, 2009, pg. 14.) Defendant correctly asserts that the crime under Minn. Stat. §169.14, subd. 1 is not inattentive driving but rather failure to drive with due care under a Minnesota speed limit statute. While the prosecutor did state "[i]nattentive driving is the third charge," he also stated that it was [f]ailure to drive with due care…Minnesota statutes 169.14 subdivision one, duty to drive with care" (Grand Jury Tr. pg. 216.) The correct statute was read to the Grand Jury and this Court finds that the substantial rights of the Defendant were not prejudiced by referring to the charge as inattentive driving. Defects of "form" that do not "tend to prejudice the substantial rights of the defendant" do not require dismissal. Minn. R. Crim. P. 17.06, subd. 1.

Defendant also argues that the indictment does not substantially comply with the requirements prescribed by law because on two occasions the prosecutor referred to criminal vehicular operation as a felony (Def. Br., Feb. 13, 2009, pg. 15.) The Court in *Grose, supra*, referred to the trial court's finding that reference to possible punishment "makes it easier for the Grand Jury to issue an indictment if there is legitimate concern about potential punishment…[and] such information is totally irrelevant to the issues of probable cause, and only serves to unduly prejudice the Grand Jury against the defendant." But the prosecutor in *Grose* went beyond merely mentioning the level of offenses involved in the proceeding; in that

case, the prosecutor advised the Grand Jury that the defendant would not likely receive a prison sentence if later convicted and when asked about this by a grand juror, the prosecutor discussed the fact that there are sentencing guidelines and that the presumptive sentence was a stay and that "it's not presumed that they go to prison or that kind of thing." Reference to a crime being a felony or misdemeanor is distinguishable from reference to possible punishment. Furthermore, the Defendant was not prejudiced by the prosecutor's reference as the Defendant was not indicted for the felony level criminal vehicular homicide or operation. The Grand Jury was asked to consider criminal vehicular homicide, a charge of careless driving and a failure to drive with due care charge. Jurors were instructed to contemplate each of the three charges separately and to decide whether to indict on that charge (Grand Jury Tr. pg. 225-228.)

Defendant also claims that disparaging remarks were made concerning the Border Patrol and that these remarks prejudiced the substantial rights of the Defendant (Def. Br., Feb. 13, 2009, pg. 15-16.) The State argues that the Cook County Sheriff truthfully relayed the fact that his office works hand in hand with the Border Patrol on many cases and that truthful commentary on training needed by various individuals in the law enforcement community does not disparage the Border Patrol in any way (State Br., March 13, 2009, pg. 6.) This Court agrees. Moreover, even assuming the statements made by the Sheriff would be inadmissible at trial, inadmissible comments by witnesses in response to questions by grand jurors do not require that an indictment be dismissed. *State v. Butzin*, 404 N.W.2d 819 (Minn. Ct. App. 1987).
In the Grand Jury proceeding in this case, it was a juror who asked the witness about the duties and the training of the Border Patrol (Grand Jury Tr. pg. 186.)

For the reasons stated above, the Court finds that the indictment substantially complies with the requirements prescribed by law and that the Defendant's substantial rights were not prejudiced during the Grand Jury proceeding.

Defendant lastly argues that she is entitled to a dismissal of the indictment for a lack of probable cause and that her motion is supported, in addition to the evidence before the Grand Jury, with the production of a witness, David Daubert, who was subject to cross examination and who, to a reasonable degree of scientific certainty, opined his belief that the Defendant was innocent (Def. Br., Feb. 13, 2009, pg. 16-22.) The State contends that Daubert's testimony does not reach a level of scientific certainty that cannot be challenged or rebutted, that it is not uncontroverted and that the State has provided the needed "rebuttal" in the form of Trooper Hanson's report and statements (State Br., March 13, 2009, pg. 8.) Daubert's opinion, and ultimately all other opinions, is entitled no more or less weight than any other evidence.

The Court finds it notable that while Daubert based his conclusions on the reports of investigating officers and the fatality report of Trooper Hanson, he did not review the testimony from the single eyewitness to the incident (Daubert Test., May 5, 2009 Hr'g.) Trooper Hanson informed the Grand Jury that the Defendant's attention was "less than stellar" and had she reacted to seeing the hazard lights, the accident could have been avoided (Grand Jury Tr. pg. 65, 119; Fatality Report, Oct. 31, 2007, Trooper Jason Hanson.) Daubert provided the Court with a different opinion. Regardless, the issue is a question of fact to be determined by a fact finding body.

Finally, Daubert's opinion is ultimately that of an opinion by an expert. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education, may testify thereto in the form of an opinion. Minn. R. Evid. 702. Expert opinions are not ordinarily conclusive or binding but rather constitute items of evidence to be considered along with the other evidence in the case. *LaValle v. Aqualand Pool Co., Inc.*, 257 N.W.2d 324 (Minn. 1977). Expert opinion testimony need not be given any more importance than other evidence.

This Court finds that the State has indicated the existence of evidence that, if offered at trial and if found credible by a jury, could support a finding that the Defendant committed the crimes of careless driving and failure to drive with due care. Furthermore, the Court does not believe that this matter fails into the category of rare cases where an indictment should be dismissed.

6/11/09

KAS/taw