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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Gaylord Gene Evans, Defendant/Appellant.	**SUPREME COURT NO. 20130121** Civil No. 51-2011-CR-01998

ON APPEAL FROM JUDGMENT ENTERED MARCH 25, 2013
AND AMENDED JUDGMENT ENTERED MAY 15, 2013
STATE OF NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

APPELLANT'S REPLY BRIEF

Monte L. Rogneby (#05029)
mrogneby@vogellaw.com
VOGEL LAW FIRM
Attorneys for Defendant/Appellant
US Bank Building
200 North 3rd Street, Suite 201
Bismarck, ND 58502-2097
Telephone: 701.258.7899

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STATEMENT OF THE FACTS

[¶1] The State incorrectly summarizes the evidence as to when Gene Evans delivered the generators to ServePro. The State contends, based on the testimony of Troy Walters, the delivery occurred in the morning. Walters, however, testified he did not remember the time of day that the generators were delivered and then added, "It was morning, I believe." (Transcript of Jury Trial (T) at 234.) All of the other evidence presented at trial establishes the generators were delivered immediately prior to the accident, which occurred at approximately 5:48 p.m. (Appendix (A) at 8.) The time of delivery is significant as it relates to the State's attempt to discredit the multiple pictures taken by Toni Evans with her camera and cell phone immediately prior to delivering the generators.

[¶2] The State also incorrectly summarizes Walters' testimony as to the chains. Walters testified he heard the sound chains make "when they are hooked to the truck." (T at 248.)

[¶3] The State misleadingly summarizes the testimony of the investigating Troopers. The State summarizes the evidence as if all of the evidence supports both of its causation theories. In fact, however, the evidence presented by the State is not consistent with its causation theories.

[¶4] When this case started the State's theory of causation was based on Gene failing to use a ball on the hitch. The State contended Gene set the trailer on the pin on the hitch. (A at 8-9.) To establish this theory the State offered the Troopers' observations as to markings on the underside of the coupler.

[¶5] Trooper Michael Roark, who was not qualified as an expert testified as to his observations of the trailer and hitch at the accident scene. (T at 216-228.) Roark's observations occurred after the trailer had been involved in a head-on collision at highway speeds. No testimony was introduced to establish that the accident did not affect the trailer.

[¶6] Roark testified the underside of the coupler had wear markings that Roark believed were caused by the coupler being placed on the ball-less receiver pin. (T at 215.)

[¶7] Similarly, the State's accident reconstruction witness, Sergeant Kevin Huston, opined in his expert report: "[t]he inside of the hitch tongue where it would sit on top of a hitch ball had sharp gouges in it. This would be impossible if it were attached to a bumper using a ball." (A at 14.) Huston confirmed this opinion at trial and indicated the marks could not have been caused by the use of a smaller ball. (A at 425.) Huston testified the coupler required a two-inch ball. (A at 155.) He indicated a larger-sized ball could not be used with the coupler. (A at 156.) He opined that if a smaller ball (1 and 7/8^{ths}) had been used, the trailer would be "sloppy" on the hitch and that "it would easily pop off." (A at 157.)

[¶8] Huston also established it would not be possible for Gene to have driven the distance he did, cross the rough ground at the ServPro site, and have men climb on and off the trailer unloading generators, if the trailer was attached to the receiver without a ball. (A at 152-153.) The record does not indicate whether Huston had an opinion as to whether the same was true if a 1 and 7/8ths-inch ball was used to attached the trailer. The only evidence the State introduced as to this possibility came from Toni Evans. Toni

indicated: "The trailer wouldn't have stayed on the 1 7/8, I don't think. I don't know. . ." (T at 330.)

[¶9] Finally, the State misstates the testimony of Toni concerning the pictures she took of the loaded trailer on the day of the accident. Toni testified that on the day of the accident she took approximately eight photos with her camera and one with her cell phone (so she could text the picture to one of her children). (T at 333.) The cell phone picture was taken at 4:23. (T at 341.)

[¶10] The State does not dispute the photos taken by Toni clearly shows the trailer is properly hooked to Gene's truck. (Exhibit A, T at 349.) The State, however, attacks the accuracy of the digital time-stamp of the picture. Toni, however, established when the picture was taken based on the digital photo taken with her cell phone. (T at 333; 528; 535; 540.) The State did not introduce any testimony to rebut the authenticity of Toni's pictures.

ARGUMENT AND LAW

I. The Court Erred When It Denied Gene's Rule 29 Motions For Acquittal Because There Was Insufficient Evidence To Establish Guilt Beyond A Reasonable Doubt.

[¶11] In summarizing why it believes Gene is guilty of Negligent Homicide, the State candidly reveals why Gene's conviction must be overturned by this Court. The State writes: "A trailer does not just magically become detached when properly hooked up." (Brief of Appellee at p 13.) Based on this premise, the State concludes Gene must have acted in a criminally negligent manner otherwise the accident would not have occurred. But Res Ipsa Loquitur has no application in a criminal case.

[¶12] When this case started the State's theory of Gene's criminal negligence was based on the allegation Gene failed to place a ball on the pin of the receiver hitch. The

Affidavit attached to the Complaint specifically indicates that no ball was attached to the receiver hitch. (A at 8-9.) The only theory presented at the preliminary hearing was that there was no ball on the pin on the receiver hitch. (Transcript of Preliminary Hearing at 21-22.) The only disclosed expert report included only one theory: "Evans did not have a ball attached to the hitch pin . . ." (A at 16.) The only explanation for the accident offered during the State's case was that there was no ball. (A at 151.)

[¶13] The State's so-called "hard-evidence" is based on its unsupported conclusions that various wear marks observed by Huston support the State's theory of the trailer's coupler being placed directly on a ball-less receiver pin. That testimony, however, is not consistent with the State's second theory, that Gene used a too-small ball to connect the trailer to the receiver hitch. The second theory was offered to avoid a judgment of acquittal.

[¶14] The State's two theories of causation are mutually exclusive. Only one can be true. The "gouges" on the underside of the coupler were either caused by the receiver pin; or they are not at all relevant to the case. If they are not at all relevant to the case, then much of the State's "evidence" introduced through the Troopers' observations is not reliable.

[¶15] The State's theory there was no ball on the receiver pin cannot support a conviction and any reference to it on appeal is an argument designed to confuse.

[¶16] The testimony of every witness, even one qualified as an expert, must have a factual basis to be admissible. Perius v. Nodak Mut. Ins. Co., 2010 ND 80, ¶ 23, 782 N.W.2d 355. There was not a sufficient factual basis for Huston's opinion testimony that Gene connected the coupler to the receiver pin without a ball. (A at 151.) Huston

testified under cross-examination this theory was not valid because it was not possible for the trailer to travel the distance it traveled without sooner becoming unattached from the hitch pin. Huston did not know until the day of trial how far Gene traveled or the circumstances of the trip. The State recognized this theory could not support a conviction when it told the Court: "the State is not adopting in full Sergeant Huston's, Sergeant Huston, I believe, just testified that that's what he thinks happened. But the State does not 100 percent fall upon Sergeant Huston's assessment that no ball was present." (A at 170-171.)

[¶17] The Court should have limited the State to this theory of criminal negligence and granted Gene's motion for judgment of acquittal. This discredited theory, on appeal, cannot be used to establish Gene's guilt.

[¶18] The State's second theory is equally defective. There is no evidence that Gene attached a 1 and 7/8ths-inch ball to the hitch instead of using a two-inch ball. The evidence from both Huston and Toni establishes it is more probable than not that the trailer would quickly become disconnected if the smaller ball had been used.

[¶19] Further, the State's causation theory involving a smaller ball is premised on Gene suddenly applying the brakes. There is no evidence that any sudden braking occurred. Finally, this theory is based on the opinion testimony of Huston. Huston's opinion as to this theory of causation was never disclosed and, more importantly, Huston is not qualified to testify as to these matters. This second theory cannot be used to establish Gene's guilt.

[¶20] It is significant that multiple causation theories are supported by the circumstantial evidence. In Investors Real Estate Trust Props., Inc. v. Terra Pacific

Midwest, Inc., 2004 ND 167, ¶ 9, 686 N.W.2d 140, this Court explained if circumstantial evidence of negligence is going to be used to establish a defendant caused an injury, the proponent must introduce 1) affirmative evidence from which the jury may infer the injury resulted from a cause for which the defendant was responsible, and 2) evidence which excludes other possible causes.

[¶21] This same requirement applies to the admissibility of expert opinion testimony concerning the cause of an accident. An expert is not allowed to base his opinion on "mere possibilities." See Nelson v. Trinity Medical Center, 419 N.W.2d 886, 892 (N.D. 1988) (superseded on other grounds). An expert's opinion must be based on "definite probabilities, and not involve, to an excessive degree, the element of speculation or conjecture." Nelson, 419 N.W.2d at 892.

[¶22] The State failed to 1) present a coherent theory of causation that explains the circumstantial evidence, and 2) failed to support its theory of causation with competent opinion evidence. It was the State's burden to present a qualified expert who could prove Gene's criminal negligence caused the accident. Because the State was relying on circumstantial evidence, the State was required to call an expert who, through a "differential analysis" or an "analysis of inference to the best explanation," was able to provide the jury with both affirmative evidence as to what caused the accident and negative evidence eliminating alternative causes. "Unlike a logical inference made by deduction where one proposition can be logically inferred from other known propositions, and unlike induction where a generalized conclusion can be inferred from a range of known particulars, inference to the best explanation- or 'abductive inferences' - are drawn about a particular proposition or event by a process of eliminating all other

possible conclusions to arrive at the most likely one, the one that best explains the available data." Bitler v. A.O. Smith Corp., 391 F3d 1114, 1125, FN5 (10th Cir. 2004.)

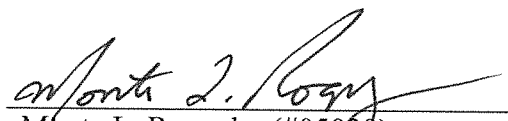
[¶23] The State concedes it did not have a qualified causation expert. The causation issues are not issues of "common sense" such that an expert was not required.

[¶24] The State also did not meet its burden of showing that its two theories of causation were more probable then other theories. The State should not have been allowed to present multiple inconsistent theories. The Jury was required to reach a unanimous verdict – yet because two competing theories of liability were presented, it is impossible to determine whether the Jury was unanimous in their conclusion

[¶25] The State case amounted to conjecture and speculation. The Court should have granted the motion for judgment of acquittal. This Court should reverse.

Dated the 7th day of August.

VOGEL LAW FIRM

By: 

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AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Susan Hartley, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on August 7, 2013, the Appellant's Reply Brief was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

Sean B. Kasson
Assistant State's Attorney
51wardsa@wardnd.com

Susan Hartley
Susan Hartley

Subscribed and sworn to before me this 7th day of August, 2013.

DEBRA FORSBERG
Notary Public
State of North Dakota
My Commission Expires Oct. 04, 2018

(SEAL)

Debra Forsberg
Notary Public
\Burleigh County, North Dakota

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