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IN THE OFFICE OF THE
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NOVEMBER 25, 2013
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. 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

PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

I. WAS THE ADMISSION OF HUSTON'S NEW, UNDISCLOSED OPINION HARMLESS ERROR?

PETITION FOR REHEARING

[¶1] Appellant Gene Evans petitions this Court for rehearing under Rule 40, N.D.R.App.P.

[¶2] On October 30, 2013, this Court issued its decision affirming Evans' conviction of negligent homicide. State v. Evans, 2013 ND 195. In denying Evans' appeal, this Court overlooked or misapprehended: 1) that the State's only pre-trial theory of Evans' liability was based its allegation Evans had placed the coupler of the trailer on the receiver hitch-pin without a ball; 2) that the State intended to rely on the expert testimony of Trooper Huston to establish Evans' failed to use a ball; 3) that the State, in response to Gene's discovery requests, intended to and did disclose Huston as an expert; 4) that the State at trial unfairly changed its theory of liability; 5) On rebuttal Huston was allowed, over Evans' objection, to testify as to opinions which had not been disclosed and which were not lay testimony; and as a result Evans was 6) denied a fair trial because he did not receive proper notice of the State's theory of liability and because the jury was allowed to convict him based on more than one theory of liability. Evans requests this Court grant his Petition, withdraw the Court's decision and reverse his conviction.

STATEMENT OF THE FACTS

[¶3] Up until the middle of the trial, the State's factual theory of Evans' liability was based solely on its allegation that Evans did not have a ball on his receiver. 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 to support probable cause was that there was no ball on the pin on the receiver hitch. (Transcript of Preliminary Hearing at 21-22.) The only disclosed report, the report of Huston, included only one theory that "Evans did not have a ball attached to the hitch pin . . .." (A at 16.)

[¶4] The State intended to prove its theory of liability by offering the testimony of Huston as an expert. On October 12, 2011, Evans served Rule 16 Requests for Discovery and Inspection. (Docket at 7.) Those requests included a request for information under Rule 16, which requires, among other things, disclosures related to expert witnesses. In response, the State disclosed Huston and his report. (Docket at 9.)

[¶5] The State intended that Huston would testify as an expert as to the contents of his report. The State indicated the same to the District Court. The State attempted to qualify Huston as an expert and the State acknowledged that it was offering him as an expert. (See T at 258, 304-312; 355-373; 392-394.) Because the State had failed to disclose Huston's qualification to testify as an expert, the Court postponed his testimony and required the State to disclose the qualifications. (T at 15.) Evans raised an additional objection to Huston's testimony – he not be allowed to testify as to scientific opinions beyond his training and experience. This objection was resolved through the questioning of Huston outside the presence of the jury. (T at 392-394.) The Court clearly intended to limit the scope of Huston's opinion testimony. (See T at 388.)

[¶6] Huston testified as an expert that a ball was not on the receiver. (T at 395-429.) Huston conceded, however, that a trailer hooked in this manner would be unstable and as a consequence would only be able to travel a short distance before it would come unhooked, and he conceded 19 miles (the distance traveled) was not a short distance. (A at 152; 218-219.) After Huston's candid testimony undermined the State's case, the State added a new undisclosed theory of liability – that a too small ball was attached to the receiver. The State then elicited undisclosed hypothetical opinion evidence from Huston as to this new theory.

[¶7] The jury was presented with two theories of liability and the jury was not required to find either theory by proof beyond a reasonable doubt.

LAW AND ARGUMENT

I. THE ADMISSION OF HUSTON'S NEW, UNDISCLOSED, OPINION WAS NOT HARMLESS ERROR.

[¶8] As part of its decision, this Court states:

> Prior to trial, Evans filed a request for discovery and inspection under N.D.R.Crim.P. 16. In its response, the State did not disclose any expert witnesses. At trial, North Dakota Highway Patrol Officer Huston, among others, testified for the State. Officer Huston, who was not qualified as an expert witness, testified he investigated the crash as an accident reconstructionist.

State v. Evans, 2013 ND at ¶3.

[¶9] This statement of the fact is not accurate. The State intended to disclose Huston as an expert and the State used Huston as an expert.

[¶10] In distinguishing the circumstances of this case from State v. Saulter, 2009 ND 79, 764 N.W.2d 430, this Court explains:

> Although Officer Huston did not witness the collision or serve as a first responder at the scene, he did generate a collision analysis report based on his own physical inspections of Evans's truck, trailer, receiver hitch, interchangeable hitch balls, safety chains, safety chains attachment plates, and Denise Hoffert's car. We are satisfied the opinion testimony elicited, based on the perceptions of his accident investigation, conforms to the limitations set by Rule 701 and that the district court did not abuse its discretion.

State v. Evans, 2013 ND at ¶23.

[¶11] This conclusion is not accurate. Huston's rebuttal testimony was not based on his perceptions or opinions from his review of the evidence or the observations of the other officers. Those items led Huston to opine there was not a ball on the hitch: "[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.) It is undisputed that the trailer did not "easily pop off."

[¶12] Not withstanding this Court's opinion, Huston was used as an undisclosed scientific expert to answer hypothetical questions as to what would happen if there were "sudden" breaking and a small ball on the receiver. His opinion was not based on his observations, the perceptions of any law enforcement officer, or any evidence in the record. (A at 195-199.)

[¶13] This Court concludes any error in allowing Huston to testify as an expert is harmless error in "light of the common sense nature of his testimony and other evidence in the case . . .." State v. Evans, at ¶24. A common sense argument exists that use of a too small ball could, combined with "sudden" breaking, cause a trailer to become uncoupled from a hitch. But the common sense nature of this argument vanishes when it is removed from a theoretical vacuum and is applied into this case. This trailer traveled a long distance and it traveled over rough ground. Heavy equipment was loaded and unloaded. These facts all affect the "common sense" nature of Huston's opinion testimony, which also included his admission that a trailer attached to a small ball would "easily pop off."

[¶14] Huston's competing theories of liability are not consistent and they are not based on common sense. Huston's first theory is not credible as a matter of law and his second was not disclosed and it is not supported by any qualifications. The admission of the second theory denied Evans a fair trial.

[¶15] The use of Huston's undisclosed opinion evidence also resulted in two different theories of liability being presented to the jury. This Court acknowledges as much as part of its opinion. In rejecting Evans' sufficiency of the evidence claim, this Court explains: "The record contains evidence from which the jury could conclude Evans failed to properly attach his trailer by not using a ball, improperly attaching the ball, or using an incorrectly sized ball, and by failing to use or incorrectly attaching the safety chains while towing his trailer on the highway." State v. Evans. at ¶14. Although it is fair to say that each of the listed alleged failures is a form of negligence, it is not fair to say that all negligence is gross negligence justifying a felony criminal

conviction. There is a difference between failing to use a ball and using an incorrectly sized ball. There is a difference between failing to use safety chains or incorrectly attaching safety chains. Criminal negligence requires a "gross deviation from acceptable standards of conduct." N.D.C.C. § 12.1-02-02(1)(d). The bare neglect of a legal duty is not a crime. See State v. Anderson, 480 N.W.2d 727, 731-32 (N.D. 1992).

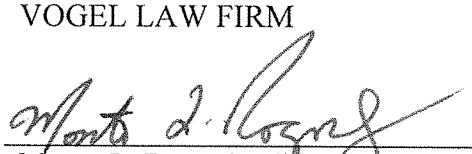
[¶16] The District Court abused its discretion in allowing Huston to testify because Huston was allowed to give an undisclosed opinion concerning matters outside of his qualifications and outside of his personal experience, and perception. This testimony allowed the jury to convict Evans based on two different theories of liability, without reaching a unanimous verdict as to any single theory.

CONCLUSION

[¶17] The Petition should be granted and the Judgment reversed.

Dated this 25th day of November 2013.

VOGEL LAW FIRM

By: 

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NORTHWEST JUDICIAL DISTRICT

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 November 25, 2013, the Appellant's Petition for Rehearing 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:

Jeremy A. Ensrud
Assistant State's Attorney
jeremy.ensrud@co.ward.nd.us

Susan Hartley
Susan Hartley

Subscribed and sworn to before me this 25th day of November, 2013.

LINDA ROEDER
[SEAL]
Notary Public
State of North Dakota
My Commission Expires March 05, 2019

Notary Public
\Burleigh County, North Dakota

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