DATE FILED: December 5, 2014 11:27 AM

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Conejos District Court Honorable Pattie Pratt Swift, Robert W. Ogburn Case Number 10CR72	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. NATHAN VIGIL Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson Colorado State Public Defender RACHEL C. FUNEZ, #41716 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA15

REPLY BRIEF OF DEFENDANT-APPELLANT

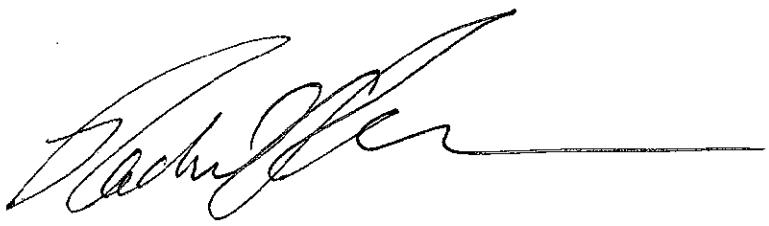
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g) because:

It contains 5,698 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

Statement of Facts

The State alleges that the pickup truck and motorcycle were stolen on November 27, 2010. (AB,p.1) In fact, they could have been stolen any time between November 25, 2010 (when Caldon last checked his farm) and November 27, 2010. (*See* R.Tr.(10/5/11),p.229-30,239-41,245,253,294-95) Further, Caldon did not discover that his pickup truck was missing until November 30, 2010. (AB,p.2) (*See* R.Tr.(10/5/11),p.248,252-53,265,268,278-82,289; (10/6/11),p.7)

I. VIGIL'S RIGHTS TO NOTICE, DUE PROCESS, AND A UNANIMOUS VERDICT WERE VIOLATED.

A. Standard of Review

The State acknowledges that Vigil filed a motion for bill of particulars, raised that issue on the first day of trial, and objected to the prosecutor's closing regarding burglary of the lean-to. (AB,p.7) However, the State faults Vigil for failing to object "during the direct examination of [Caldon] where the prosecution elicited specific testimony regarding the burglary of the lean-to." (AB,p.7,9-10,16-17,18)

Contrary to the State's argument, there was no reason for Vigil to object because he justifiably relied on the oral bill of particulars stating that the burglary charges related solely to the theft of the DVD player and TV from the camper trailer, the radio from the tractor, and the motorbike from the shop.

On the first day of trial, the State submitted an amendment to Count 1 (first-degree motor vehicle theft), which alleged theft of a motor vehicle, and its use in the commission of another theft. (R.CF,p.9-11) The amendment submitted by the State clarified that Count 1 referred to the theft of the pickup, not the motorbike. (R.Tr.(10/5/11),p.13-14)[1] The State alleged the pickup "was used to carry off multiple items, including the motorcycle." (R.Tr.(10/5/11),p.14)

Vigil objected to this amendment because he never got a bill of particulars, but acknowledged that the proposed amendment made more sense. (R.Tr.(10/5/11),p.14-16) The court allowed the amendment, then continued to address the bill of particulars. (R.Tr.(10/5/11),p.16)

As to count 2 (theft), the parties agreed that count related solely to the alleged theft of the "2004 Honda Motorbike, television, am/fm tractor radio, [and] DVD player," and the court ruled that the evidence would be limited to those four items. (R.CF,p.33; R.Tr.(10/5/11),p.16-18)

[1] The State had previously submitted an amendment to count 1 that erroneously listed the motorbike as the vehicle allegedly stolen. (R.CF,p.71; R.Tr.(10/5/11),p.14)

Then Vigil raised the bill of particulars as to count 3 (burglary with intent to commit theft therein). (R.CF,p.33; R.Tr.(10/5/11),p.18) Vigil asked the State to clarify "which actual structure…we're talking about," and the court asked if there was more than one building on the property. (R.Tr.(10/5/11),p.18) The prosecutor responded:

> There are multiple buildings at that address, Your Honor. And the DVD player and the TV in question, the allegation is that they were taken from a mobile home that is parked at that residence; and the tractor radio, the allegation…is that that was taken from the tractor. …and as far as where the motorbike was taken from, it was also taken from one of the buildings at that property.

(R.Tr.(10/5/11),p.18-19) The court asked, "Which building?" (R.Tr.(10/5/11),p.19) The prosecutor responded, "A shop directly next to the camper trailer. The Honda motorcycle was parked inside that shop. That shop door is identified by having one large door attached for large vehicles to park inside. …And it also has an entrance door for people to go through." (R.Tr.(10/5/11),p.19)

The court responded, "Okay," and asked if that gave Vigil what he needed. (R.Tr.(10/5/11),p.19) Defense counsel clarified that the "mobile home" was the camper trailer, which the prosecutor confirmed. (R.Tr.(10/5/11),p.19-20) They then repeated that the "DVD and TV came from the fifth-wheel camper trailer," the motorbike from the shop, and the tractor radio from the tractor.

(R.Tr.(10/5/11),p.20) The court noted these elections on the amended complaint, and stated, "I think we've resolved the bill of particulars." (R.CF,p.33; R.Tr.(10/5/11),p.21)

Thus, the State specifically elected to proceed on the burglary count regarding the theft of four items (not including the pickup truck) from three buildings (not including the lean-to), leaving Vigil with no reason to suspect that the questions about the lean-to related to the burglary charge. Vigil was entitled to rely on the bill of particulars provided earlier that morning. *See People v. District Court*, 603 P.2d 127, 128 (Colo. 1979) (bill of particulars limits State's proof to those areas described); *cf. People v. Renfro*, 117 P.3d 43, 47 (Colo. App. 2004) (no objection required where court has already made "a definitive ruling admitting or excluding evidence").

Further, since Vigil was separately charged with the aggravated motor vehicle theft of the pickup truck, he had no basis to object to the admission of evidence related to the lean-to where the truck had been parked.[2] Vigil disagrees with the State's characterization of Caldon's testimony as "regarding the *burglary* of the lean-to." (AB,p.7,9-10,16-18 (emphasis added)) To the contrary, there was no indication during the examination of Caldon that these questions related to the burglary charge, and Vigil had every reason to believe (given the bill of particulars) that they related

[2] (R.Tr. (10/5/11),p.252-53)

solely to the motor vehicle theft charge. The same is true of the officer's testimony that the pickup had been parked beneath the lean-to. (AB,p.11,17)

The first time Vigil had any reason to believe the State was arguing that the entry into the lean-to constituted a burglary was during closing argument. After hearing this argument, Vigil objected and asked the court to instruct the jury that the lean-to was not one of the buildings alleged to have been burglarized. (R.Tr.(10/6/11),p.162-66,169-70,172) Therefore, this issue is fully preserved.

The State's assertions as to the standard of review for the denial of a bill of particulars are inapplicable. (AB,p.7,17) The court granted Vigil's bill of particulars, and he does not challenge that ruling on appeal. Rather, Vigil argues that the State's proof was limited to those areas described in the oral bill of particulars,[3] and that it unconstitutionally expanded the burglary charge by arguing it encompassed the theft of the pickup from the lean-to. (OB,p.7,9-10)

B. Law and Analysis

As an initial matter, the State has conceded that the prosecutor argued the jury could convict of burglary of the lean-to with intent to steal the pickup. (AB,p.11) The State also concedes that the jury likely convicted Vigil of burglarizing the lean-to; in fact, it argues that Vigil was properly convicted on that basis. (AB,p.16,19)

[3] *District Court*, 603 P.2d at 128.

The State acknowledges the oral bill of particulars given by the prosecutor, and concedes that the prosecutor "did not specifically mention the 'lean-to' shed." (AB,p.16) However, the State appears to argue that the lean-to was included within the bill of particulars because it was "attached to the shop." (AB,p.16) The State's argument fails for two reasons.

First, the oral bill of particulars specified not only the buildings alleged to have been burglarized, but also the items alleged to have been stolen from them as part of the predicate intent to commit theft.[4] (*See* R.CF,p.33 (amended complaint charging the predicate crime for burglary as theft, and court's notes narrowing charge to "DVD & TV from camper trailer[,] tractor radio from tractor[, and] motorbike from shop"); R.Tr.(10/5/11),p.18-19,20(oral bill of particulars)) The State informed Vigil that one of the buildings alleged to have been burglarized was "the shop," described it in detail, and alleged, as the predicate crime, that the motorbike was stolen from inside. (R.Tr.(10/5/11),p.18-19) Thus, the bill of particulars did not encompass theft of the pickup from a lean-to, even if it was attached to the shop.

Second, the lean-to was attached to a different shop, not the one mentioned in the bill of particulars. In the bill of particulars, the prosecutor described "[a] shop directly next to the camper trailer" with "one large door…for large vehicles" and "an

[4] *See* §18-4-203(1), C.R.S. (burglary involves an unlawful entry "with intent to commit therein a crime").

entrance door for people." (R.Tr.(10/5/11),p.19) During his testimony, Caldon identified that shop as the one in the bottom right picture of Exhibit 2 (with the page oriented so the exhibit sticker is at the top right). (R.Tr.(10/5/11),p.249,251-52; R.CF,p.143,P.Exh.2) The shop is "just south" of the camper trailer. (R.Tr.(10/15/11),p.249; R.CF,p.143,P.Exh.2)

When asked where his pickup was stolen from, Caldon indicated the top right picture on Exhibit 2 and stated, "there's a shop…on the south side of this picture; and there's a lean-to…up against the shop, and that pickup was located in the third bay…of this lean-to." (R.Tr.(10/15/12),p.252-53; R.CF,p.143,P.Exh.2) The shop with the motorbike, which was specified in the bill of particulars, is visible in the same picture, to the north of the shop with the lean-to. (R.CF,p.143,P.Exh.2; *see also* R.CF,p.147,P.Exh.6 (close-ups of lean-to)) Caldon later described the lean-to as being against his "south shop." (R.Tr.(10/5/11),p.268)[5]

Thus, it is clear that the lean-to was not attached to the shop from which the motorbike was stolen, and which was the subject of the bill of particulars. (AB,p.16)

The State argues that the prosecution presented "specific and extensive testimony regarding the lean-to" and that the prosecutor's closing argument

[5] Further, Caldon described the soft dirt under the lean-to as different from the other ground on his property, and Exhibit 3 shows the ground next to the shop with the motorbike, which was covered in grass. (R.Tr.(10/5/11),p.257,266,277-78; R.CF,p.144,P.Exh.3; R.CF,p.150,P.Exh.9)

encouraging the jury to convict Vigil of burglarizing the lean-to was therefore a legitimate argument based on the "evidence properly admitted at trial." (AB,p.11,16) However, as explained above, the evidence about the lean-to was properly admitted only in relation to the motor vehicle theft, not the burglary. The State's proof as to the burglary was limited to those areas described in the oral bill of particulars. *District Court*, 603 P.2d at 128; *see also People v. Williams*, 984 P.2d 56, 63 (Colo. 1999) (purpose of bill of particulars is to enable the defendant to prepare a defense).

Vigil's rights to due process, notice, and a fair opportunity to prepare a defense, precluded the State from using the evidence at trial to expand the charges beyond what Vigil was given notice of prior to trial. *See People v. Rice*, 198 P.3d 1241, 1245 (Colo. App. 2008) (variance occurs "when the charged elements are unchanged, but the evidence proves facts materially different from those alleged in the [complaint]"). (OB,p.7,9-10) As such, the State's argument that the evidence itself gave Vigil sufficient notice necessarily fails. (AB,p.17)

The State argues that a unanimity instruction was not required because the burglary encompassed incidents occurring in a single transaction, citing *Melina v. People*, 161 P.3d 635, 636 (Colo. 2007), and *People v. Torres*, 224 P.3d 268, 278 (Colo. App. 2009). (AB,p.14,19) Those cases are distinguishable because they involved a continuing transaction to accomplish a single end. *See Melina*, 161 P.3d at 636

(defendant contacted multiple people in attempt to solicit someone to murder the victim); *Torres*, 224 P.3d at 271-72, 278 (defendant committed single attempted extreme indifference murder by eluding police and leading them on a chase, endangering several bystanders). Here, in contrast, the State alleged four potential burglaries of separate buildings with the distinct objective to steal a different item from each.

The State's argument that the jury convicted Vigil of burglarizing only the lean-to and acquitted him of burglarizing the other buildings only highlights the fact that these acts were distinct. (AB,p.19-20)

Further, that argument highlights the prejudice from the variance, since Vigil was apparently successful in defending against the burglary charges of which he was given notice (the camper trailer, shop, and tractor). (AB,p.18,19-20; *see* OB,p.10-13) *Cf. Rice*, 198 P.3d at 1245-47 (reversing where variance undermined primary defense). Indeed, the State essentially concedes that the jury would not have convicted him of burglary absent this variance. (AB,p.19-20 ("[T]he evidence proved only the burglary of the lean-to."))

II. THE COURT REVERSIBLY ERRED IN ALLOWING OFFICER CROWN TO TESTIFY THAT THE SHOEPRINTS MATCHED.

The State accurately sets forth Officer Crown's testimony about his investigation, but minimizes his testimony that the prints "matched." (AB,,p.22)

Crown repeatedly expressed his opinion, based on the photographs he had taken,[6] that the "soles of [Vigil's] shoes visually matched…the prints that were out on the scene."

Crown testified on direct that the photographs of the shoeprints showed their size as well as details in the shoe pattern, including a "Skechers" imprint. (R.Tr.(10/6/11),p.27-28,30-35) Vigil then learned about the discovery violation, objected, and that issue was addressed outside the jury's presence. (R.Tr.(10/6/11),p.50-65) (*See* OB,Section III). The direct examination resumed, and Crown testified that he submitted Vigil's shoes and the photographs of the shoeprints to the crime lab for comparison, but the results "came back inconclusive." (R.Tr.(10/6/11),p.66)

Vigil's shoes were admitted into evidence, and the prosecutor asked if Crown had the opportunity to compare them to the footprints. (R.Tr.(10/6/11),p.66-71) The officer answered, "Yes, by visually inspecting the shoes and visually inspecting the photographs of the prints left on scene." (R.Tr.(10/6/11),p.71)

The prosecutor then referenced Exhibits 8 (photographs of the shoeprints) and 14 (photographs of Vigil's shoes). (R.CF,p.149,P.Exh.8; R.CF,p.154,P.Exh.14; R.Tr.(10/6/11),p.71-73) He asked Crown to arrange the scales next to Vigil's right

[6] (R.Tr.(10/6/11),p.32-33,37,41,43,46)

shoe as they appeared in Exhibit 14's top right photograph, and Crown testified that it appeared to be the same shoe with the same measurements. (R.Tr.(10/6/11),p.73) The prosecutor confirmed that the scales next to the shoeprints in Exhibit 8 were the same. (R.Tr.(10/6/11),p.74)

> Prosecutor: So as you look at…[Exhibit] 8…[with] the scales…, does it appear that that footprint…is of similar size to the shoe?
>
> …
>
> Officer: Yes, it does.
>
> Prosecutor: And does it appear from your comparison of the shoes to People's Exhibit 8 in that footprint – do you see any similar characteristics between the shoe and the photograph?
>
> Officer: Yes, there is.

(R.Tr.(10/6/11),p.74) The prosecutor then pointed out Exhibit 14's bottom right photograph (a close-up of the sole of Vigil's shoe), and Crown testified that the emblem in the center of the sole reads "Skechers," and to the left of that is a "No.12 inside of a circle." (R.Tr.(10/6/11),p.74-75) This is not visible in the record photograph; the light is reflecting off the bottom of the shoe, which appears worn. (R.CF,p.154,P.Exh.14) The officer again visually compared Vigil's shoes to the photograph of the shoes, and determined they matched. (R.Tr.(10/6/11),p.75-76)

The prosecutor then asked how Crown had previously compared the shoes to the footprints. (R.Tr.(10/6/11),p.76) The officer answered, by "reviewing the photographs of the prints that were on the scene with and without the scale and then reviewing the shoes with and without the scale, and it appears to visually be a match." (R.Tr.(10/6/11),p.76)

In cross-examination, Vigil elicited testimony that it is common practice to send items to the crime lab for testing because they have "specialized technicians" and equipment available there. (R.Tr.(10/6/11),p.89) He also elicited testimony that the CBI report was inconclusive and the prints could not be scientifically matched "beyond a reasonable doubt." (R.Tr.(10/6/11),p.89-90)

On redirect, the prosecutor pointed out that the CBI report said, "An examination of the photograph…disclosed very limited impressions that were determined to be insufficient for examination. The examination was limited due to the non-examination quality of the photograph (regular light photo, no scale, no side lighting) and no cast." (R.Tr.(10/6/11),p.90-91)

The prosecutor later elicited testimony about Crown's 11 years of experience, and asked:

> When you were speaking earlier this morning, you were talking about how you took the – how you did a comparison of the shoes to the photos that you had taken with the scales. And obviously, we have not admitted you

> as an expert; but in your experience and training as a police officer only and not as someone who's been admitted as an expert witness, did you come to any conclusions when you compared the shoes to the footprint photographs?

(R.Tr.(10/6/11),p.99-100) Vigil objected again and the court stated, in front of the jury, "The objection is sustained. *Without belaboring the point, he's made his comparison and said they visually matched*." (R.Tr.(10/6/11),p.100 (emphasis added))

Thus Crown's testimony juxtaposed his own comparison with CBI's. The jury was told CBI was unable to match Vigil's shoes with the photographs of the shoeprints because the impressions were "very limited" and of "insufficient quality for examination." Yet the officer offered his own contradictory expert opinion, based on his specialized experience and training as a police officer, that the shoeprint photographs were sufficient for comparison and showed "pretty good detail" with "distinguishing marks,"[7] and that they matched Vigil's shoes. The jury was likely to give more weight to the officer's opinion given his status as an officer and the fact that he testified in person and extensively demonstrated the basis for his conclusion. (*See* OB,p.33) And Vigil was precluded from rebutting this evidence due to the lack of notice that the officer would be testifying as an expert, in combination with the discovery violation discussed in Section III. (*See* OB,p.22-23) Thus, contrary to the

[7] (R.Tr. (10/6/11),p.33-34)

State's arguments, the fact that the jury heard about the CBI's failure to make a positive match did not make this error harmless. (AB,p.25-26)

The State argues that the officer's opinion was based on a "visual comparison of the shoeprints *left under the lean-to* and defendant's shoes," which did not require specialized knowledge. (AB,p.23-24,25 (emphasis added)) To the contrary, the officer had already cleared the scene by the time he obtained Vigil's shoes, and his conclusion was based on a comparison of *the photographs* of the shoeprints with Vigil's shoes. (R.Tr.(10/6/11),p.32-33,37,41,43,46,71)

The comparison of the shoes with the *photographs* required expertise, not only to determine whether they matched, but to evaluate whether they were of sufficient quality to enable a comparison. This is evidenced by the fact that the CBI experts concluded the impressions left in the dirt were "very limited" and "insufficient for examination," and that the photographs were not of examination quality. (R.Tr.(10/6/11),p.90-91) *Cf. People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007) (scientific evidence is only admissible if the comparison methods used are reliable and the expert is qualified to opine); *United States v. Baines*, 573 F.3d 979, 989 (10th Cir. 2009) (court must decide whether expert witness "employ[ed]…the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").

People v. Lucero, 75 Cal.Rptr.2d 806 (Cal. App. 1998), cited by the State, is distinguishable. (AB,p.24) There, the officer testified that he had compared the defendant's shoes to the shoeprint at the scene and they appeared to be the same. Id. at 1110-11. No crime lab had analyzed the evidence or determined it insufficient for comparison. Further, contrary to the State's representation, *Lucero* did not hold that the officer's testimony was admissible lay testimony. *Id.* at 1111 (noting that no California case had addressed the issue but some states had found such testimony admissible, and concluding that any error was harmless). Finally, the California Rules of Evidence allow lay testimony that is "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony." *Id.* at 1110-11 (quoting California Evidence Code §800).[8]

In contrast, Colorado Rule of Evidence 701 provides the additional requirement that lay opinion testimony may not be "based on scientific, technical, or other specialized knowledge." CRE 701; *People v. Rincon*, 140 P.3d 976 (Colo. App. 2005) (critical inquiry is whether testimony is based on "specialized knowledge"). Colorado courts have interpreted "specialized knowledge" to include law enforcement

[8] The other states cited by *Lucero* have similar rules. *See Moore v. State*, 915 S.W.2d 284, 295 (Ark. 1996) (quoting Arkansas Rule of Evidence 701); *State v. Jeter*, 609 So.2d 1019, 1022-23 (La. App. 1992); Louisiana Code of Evidence 701; *State v. Johnson*, 576 A.2d 834, 850 (N.J. 1990); New Jersey Rule of Evidence 56(1); *Halbig v. State*, 525 N.E.2d 288, 291 (Ind. 1988); Indiana Rule of Evidence 701.

training and experience. *See People v. Stewart*, 55 P.3d 107, 123 (Colo. 2002). Further, as noted in the Opening Brief, the prosecutor argued that Crown had specialized training qualifying him to offer his opinion that the shoeprints matched Vigil's shoes. (OB,p.19-21)

Smith v. State, 725 So.2d 922, 925 (Miss. 1998), cited by the State, supports Vigil's argument on appeal. (AB,p.24) There, the officer testified only that the shoeprint found at the scene had the "same pattern" as defendant's shoe. *Id.*; *cf. also Trice v. State*, 853 P.2d 203, 214 (Okla. App. 1993) (where officer testified only that the prints were "consistent"). The *Smith* court concluded that if the officer had testified the shoeprint "was actually made by [defendant's] shoes," that conclusion "most certainly would have required specialized knowledge, i.e., an expert opinion." *Smith*, 725 So.2d at 925. Here, the officer repeatedly testified that the shoeprints "matched" Vigil's shoes, which is equivalent to testifying that the prints were "actually made by [Vigil's] shoes." (OB,p.19)

The State argues that any error was harmless because, "as defendant acknowledges, the jury was able to make its own comparison and reach its own conclusion." (AB,p.25) Vigil's primary contention is that neither the officer nor the jury could determine whether the shoeprints matched Vigil's shoes because they were not experts. However, if this Court decides the comparison *is* one a lay witness can

make, Officer Crown was in no better position than the jury to do so. (OB,p.21-22) Contrary to the State's argument, this would not make any error harmless. Given Crown's experience and status as an officer, the jurors were likely to give great weight to his testimony and substitute his judgment for their own. *See Veren*, 140 P.3d at 140 ("[B]ecause the public holds…officers in great trust, there can be potential harm where [an officer] gives expert testimony without first being qualified as such.") (citation omitted). (OB,p.19-21,25-26)

In response to the State's other arguments in this section, Vigil relies on the arguments and authorities cited in the Opening Brief.

III. THE COURT ERRED IN DENYING VIGIL'S MOTION TO SUPPRESS THE SHOEPRINT EVIDENCE.

The State argues that there was no discovery violation because the "prosecution disclosed the CBI report to defense counsel, and defense counsel acknowledged this at trial." (AB,p.30,32) As argued in the Opening Brief, it is not sufficient that a different prosecutor included the report in the discovery for an unrelated case. (OB,p.30) Crim.P.16 requires disclosure "in connection with the particular case."

Defense counsel had specifically requested the CBI report more than once, with no response from the prosecutor. (R.Tr.(10/6/11),p.52) The prosecutor acknowledged that he had never seen the report, (R.Tr.(10/6/11),p.62), which means

he made no efforts to contact CBI for the results despite the specific requests from defense counsel. Further, the officer knew of the report by October 4, 2011, and the prosecutor still failed to disclose it at that time. (R.Tr.(10/6/11),p.53-54) Contrary to the State's argument (AB,p.30), the prosecutor's lack of actual knowledge about the report does not excuse the discovery violation. As noted in the Opening Brief, the prosecutor's obligations under Rule 16 extend to materials that are "in the possession or control of members of his…staff[, etc.]," and the prosecutor has a continuing obligation to use diligent good faith efforts to obtain that information and make it available to the defense. Crim.P.16(I)(a)(3); *District Court*, 793 P.2d at 166-67. (OB,p.31) Further, here defense counsel's requests for the report put the prosecutor on notice of the need to obtain that information and disclose it, which indicates that the prosecutor's continued failure to do so was willful. (OB,p.34)

Moreover, defense counsel had only represented Vigil in the Alamosa County case for about a month, while he was preparing for the trial in this case, and the Alamosa case was unrelated to this case. (R.Tr.(10/6/11),p.61-63) The CBI report was one page, and was apparently stapled beneath an unrelated CBI report about a tire print comparison from the Alamosa case. (R.Tr.(10/6/11),p.59-60,92) The report indicated it was submitted by the Alamosa County Sheriff's Office, and had nothing to alert defense counsel that it was actually related to this case.

(R.Tr.(10/6/11),p.60-62) Under these circumstances, defense counsel had no reason to think he should search the 400 plus pages of discovery in the Alamosa case to check for information relevant to this case. Thus, even if this Court were to find that the disclosure in the Alamosa case complied with Rule 16 (contrary to Vigil's argument on appeal), it would not comply with the due process requirements of notice and a fair trial and would still violate *Brady*. (*See* OB,p.29-30,35-36)

The State argues that any "technical" noncompliance was harmless because of defense counsel's knowledge that the shoeprint evidence had been submitted for testing. (AB,p.30) However, the State fails to explain how knowledge that evidence may have been tested could ever substitute for knowledge of an exculpatory test result finding that the prints were of insufficient quality to determine a match.

As to the State's other arguments in this section, particularly those related to prejudice, Vigil relies on the arguments and authorities cited in the Opening Brief.

IV. CUMULATIVE ERROR.

In response to the State's arguments in this section, Vigil relies on the arguments and authorities in the Opening Brief.

V. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE VEHICLE WAS WORTH OVER $1000.

In response to the State's arguments in this section, Vigil relies on the arguments and authorities in the Opening Brief.

VI. THE COURT REVERSIBLY ERRED IN DENYING VIGIL'S CHALLENGE FOR CAUSE OF JUROR ATENCIO AND GRANTING THE PROSECUTOR'S CHALLENGE FOR CAUSE OF JUROR KEZERLE.

A. Juror Atencio

The State acknowledges that reversal is required if the court abused its discretion in denying the challenge for cause of Juror Atencio. (AB,p.39)

The State also acknowledges that this Court must review jurors' statements as a whole. (AB,p.40) Yet the State gives an incomplete summary of Juror Atencio's statements. (AB,p.40-41,44) Juror Atencio spontaneously raised the issue of his own bias when defense counsel asked if anyone had anything they wanted to bring up. (R.Tr.(10/5/11),p.94) This indicates that Juror Atencio viewed the issue as significant. Juror Atencio described his long-time relationship with the Caldon family, and stated in light of that that he was unsure whether he would be able to render a fair verdict. (R.Tr.(10/5/11),p.94-95) "It's something that sits there. I know the people. I really do. I don't know the defendant there." (R.Tr.(10/5/11),p.95) Juror Atencio also acknowledged the potential for future business ventures and personal contacts with the family. (R.Tr.(10/5/11),p.95) As acknowledged in the Answer Brief, the court questioned Juror Atencio only about whether he could evaluate Caldon's testimony like that of any other witness. (R.Tr.(10/5/11),p.96) In response, Juror Atencio stated only that he *thought* he could. (R.Tr.(10/5/11),p.96)

The State argues that Juror Atencio indicated only a source of "potential bias" and did not articulate "a clear expression of bias" in favor of the victim. (AB,p.42,44) However, the trial court was required to excuse Juror Atencio if his impartiality was even in doubt. (OB,p.47) *See People v. Maestas*, 2014 COA 139, ¶19 (juror's statement that she was "not sure" she could follow the court's instructions and "might" hold the defendant's silence against him required dismissal of that juror for cause absent rehabilitation).

Juror Atencio's statements about his long term relationship with the family and his expressions of doubt about whether he could render an impartial verdict were more than sufficient to justify his excusal absent sufficient rehabilitation.

Carrillo v. People, 974 P.2d 478 (Colo. 1999), cited by the State (AB,p.43), is distinguishable. There, the court identified three separate areas of concern with the potential juror: (1) his preconceived opinions about the case based on his prior knowledge of some of the facts; (2) his statements that if he were the defendant, he would not want himself on the jury; and (3) his comments about his relationship with the victim's father. *Id.* at 487. Regarding the outside information, the juror was ultimately rehabilitated and unequivocally said that he could listen to the evidence and decide the case based on the evidence. *Id.* at 482, 487. Regarding his statements that he would not want himself on the jury, the court said this bare assertion did not

constitute a bias since there are many different reasons a person might not be a good juror that do not involve bias against the defendant. *Id.* at 487. To the extent this statement related to his previously expressed knowledge of outside information, the court found that he had been sufficiently rehabilitated on that issue, as described above. *Id.*

Regarding the potential juror's relationship with the victim's father, the juror simply said he felt for the man and thought he would take the loss of his son hard and would want something done about it. *Id.* The Colorado Supreme Court recognized a preference for the dismissal of potential jurors "who have a personal or social relationship with a witness because such jurors 'may be biased, or give the appearance of bias.'" *Id.* (citing *ABA Criminal Justice Trial By Jury Standards* §15-2.5 commentary at 161 (3d ed. 1996)). However, noting that the juror's relationship with the victim's father did not give rise to a statutory challenge for cause, the court declined to hold that the nature of the relationship "in and of itself" required the juror's dismissal. *Id.* The court concluded that the juror's answers about his relationship with the victim's father were "ambiguous" and did not indicate bias. *Id.* The court gave an example of a response that would indicate bias – "I don't think I could be fair." *Id.*

Here, in contrast to *Carrillo*, Juror Atencio described his long-time relationship with the Caldon family and stated in light of that relationship that he was unsure

whether he would be able to render a fair verdict. (R.Tr. (10/5/11),p.94-95) He also indicated that it was something that "sits there" with him. This was more akin to the statement the Colorado Supreme Court in *Carrillo* held would indicate a bias. Thus, unlike in *Carrillo*, the challenge for cause here was not based on the relationship "in and of itself," but on a statement of actual bias.

The State also argues that Juror Atencio's response to the court "indicated that he could be fair and equally weigh all the witnesses' testimony." (AB,p.42) Vigil relies on the arguments in the Opening Brief that this rehabilitation went to Juror Atencio's ability to judge the credibility of the witnesses, not to his ability to render a fair and impartial verdict, and therefore was insufficient to address Juror Atencio's stated bias. (OB,p.47-48) Juror Atencio never expressly stated that he could be fair and impartial to both parties. *Cf. People v. Roldan*, __ P.3d __, __ (Colo. App. 2011), 2011WL174248 *3, *rev'd on other grounds*.

Moreover, even if the court's rehabilitation did address Juror Atencio's stated doubt, his statement, "I think I could" in response to the court's rehabilitation was insufficient to establish that he could set aside his bias.[9] (AB,p.44-46) *See Roldan*, 2011WL at *3-4 (holding that court abused its discretion where juror had a close relationship with law enforcement officers, expressed a bias in favor of the police, and

[9] Contrary to the State's characterization, this response did not "unhesitantly answer [that] he could do it." (AB,p.44)

stated when rehabilitated only that she could "probably" be fair and impartial, which "did not qualify as an unequivocal, rehabilitating statement"); *cf. People v. Wilson*, 2014 COA 114 ¶17 (distinguishing *Roldan* where the source of the juror's bias in *Wilson* was not of "as intimately a person nature," her responses did not indicate as strong a doubt about her ability to be fair, and she repeatedly stated that she believed in the presumption of innocence and the burden of proof).

B. Juror Kezerle

Regarding preservation and the merits of this claim (AB,p.47-48), Vigil relies on the arguments and authorities cited in the Opening Brief.

Vigil acknowledges that, under *People v. Novotny*, 320 P.3d 1194 (Colo. 2014), this error is not structural. However, reversal is still required if Vigil was prejudiced. *Novotny*, 320 P.3d at 1202 ("we do not imply…that every violation of our statutes and rules prescribing the use of peremptory challenges must be disregarded as harmless," and remanding companion case, *Vigil*, involving improper grant of prosecutor's challenge for cause, for consideration of whether the error was harmless under the "proper outcome-determinative test.").

Here, both parties had already used all of their peremptory challenges at the time Juror Kezerle was called. (R. Tr. (10/5/11),p.182 (prosecutor exercising final peremptory challenge on juror York), (10/5/11),p.190 (defendant exercising final

peremptory challenge on juror Jackson); (10/5/11),p.198 (Juror Kezerle called up); (10/5/11),p.205 (Kezerle erroneously excused for cause); (10/5/11),p.206-10 (the next juror, Culler, being passed for cause by both parties, which concluded jury selection)) Thus, if the court had not erroneously granted the prosecutor's challenge for cause of Juror Kezerle, he would have served on Vigil's jury. This error was not harmless.

The dismissal of Juror Kezerle benefitted the prosecution's case. *See Griego v. People*, 19 P.3d 1, 9 (Colo. 2001) (factor when determining harm is whether error benefitted the prosecution). It gave the prosecutor an unfair tactical advantage in shaping the jury. It also removed a juror who might have acquitted Vigil of all the charges and swayed the other jurors to do so, especially given the fact that this was a close case. Juror Kezerle expressed a strong belief in the presumption of innocence and indicated that he would hold the prosecution to its burden.

In the alternative, Vigil argues that the *Novotny* decision should not be given retroactive effect in his case because it creates a new rule of law and overrules "clear past precedent" upon which the parties relied below, and its retroactive application would violate Vigil's due process rights under the United States and Colorado Constitutions. *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 113 (Colo. 1992); *Solem v. Stumes*, 465 U.S. 638 (1984); *but see*, *e.g.*, *People v. Wise*, 2014 COA 83.

CONCLUSION

Based on the arguments and authorities in Sections I–III, and V of the Opening Brief, together with this Reply Brief, Vigil respectfully asks this Court to reverse and remand for a new trial. Alternatively, based on the arguments and authorities in Section IV of the Opening Brief, Vigil respectfully asks this Court to vacate his conviction for felony motor vehicle theft, enter a conviction for misdemeanor vehicle theft, and remand for resentencing.

DOUGLAS K. WILSON
Colorado State Public Defender

RACHEL C. FUNEZ, #41716
Deputy State Public Defender
Attorneys for Nathan Vigil
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on December 5, 2014, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Carmen Moraleda of the Attorney General's office.