IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

ROBERT NATHANIEL BROWN,
Defendant-Appellant,

v.

CASE NO: 1D15-4031
L.T. No.: 16-2014-CF-122

STATE OF FLORIDA,
Respondent-Appellee.
_____/

On Appeal to the First District Court Of Appeal from the Circuit Court of the Fourth Judicial Circuit In and for Duval County, Florida

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APPELLANT'S AMENDED/SUPPLEMENTAL INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, ROBERT NATHANIEL BROWN, will be referred to as "Mr. Brown." Appellee, State of Florida, will be referred to as the "State." The Honorable Marianne Aho, Circuit Court Judge, who presided over the trial proceedings, post-verdict motions, and sentencing, will be referred to as the "Trial Court." Mr. Brown was represented at trial by Fred C. Gazaleh, Esq., and shall be referred to as "Trial Counsel." References to the Record on Appeal shall be as follows: ROA followed X:Y where "X" is the volume number and "Y" is the page number.

JURISDICTIONAL STATEMENT

Jurisdiction lies with this Court pursuant to Florida Rules of Appellate Procedure 9.030(b) and 9.141(b). Venue is proper in this Court pursuant to section 35.043 of the Florida Statutes because this Court maintains jurisdiction over appeals from the Fourth Judicial Circuit. Mr. Brown was sentenced August 28, 2015. A Notice of Appeal was timely filed August 31, 2015. *See* ROA 4:537-538.

QUESTIONS PRESENTED

1. Did the Trial Court err when it denied Defendant's Motion for New Trial where the verdict was against the greater weight of the evidence?

Suggested Response: Yes

2. Did the Trial Court err in permitting expert testimony regarding retrograde extrapolation where the opinions offered were unreliable?

Suggested Response: Yes

3. Did the Trial Court err when it permitted the State to improperly comment on the Defendant's right to decline to consent to a blood draw?

Suggested Response: Yes

4. Did the Trial Court err when it improperly admitted the expert testimony of George Ruotolo and Corporal Austin Bennett where the testimony was unreliable and where the testimony of one expert improperly bolstered the testimony of the other such that its admission was not harmless beyond a reasonable douhbt.

STATEMENT OF THE CASE

Appellant, ROBERT BROWN, was arrested on January 4, 2014, in relation to a fatal motor vehicle accident that took place July 7, 2013, on Interstate 295 in Jacksonville. *See* ROA 1:1-17. On January 31, 2014, the State charged Mr. Brown by Information with one count of Driving Under the Influence Manslaughter, in violation of Fla. Stat. §§ 316.193(1) and 316.193(3)3, and two counts of Driving Under the Influence with Serious Bodily Injury, in violation of Fla. Stat. §§ 316.193(1) and. *Id.*, at 22-23. Assistant Public Defender Fred C. Gazaleh was appointed to represent Mr. Brown. *Id.*, at 19. Mr. Brown pleaded not guilty to the Information on February 3, 2014.

The matter was originally set for trial to begin May 27, 2014, however, because discovery was not yet complete, the Defense sought a continuance. *See* ROA

1:35-36. The Trial Court granted the continuance and Mr. Brown signed a waiver of his right to a speedy trial. *Id.*, at 37. The Defense sought a pre-trial motion to exclude certain opinion evidence, specifically, certain expert testimony regarding accident reconstruction. *Id.*, at 77-79. The motion was denied on June 15, 2015. *Id.*, at 102-105.

On June 16, 2015, the Defense and the State entered into a "Agreement of Facts" whereby it was stipulated that on July 7, 2013, the day of the accident, Mr. Brown was operating a 2008 Nissan Altima that was involved in the crash with a 1995 Ford Crown Victoria operated by Jasmine Jack. *See* ROA 1:107.

The trial on the charges took place over the course of three days beginning June 29, 2015. The Defense moved for a judgment of acquittal at the close of the State's case-in-chief and again at the close of all of the evidence. The motions were denied. The jury returned a verdict of guilty on all counts on July 2, 2015. *See* ROA 2:284-286.

Mr. Brown, through Trial Counsel, filed a motion for new trial raising eleven (11) points of error. *See* ROA 2:321-323. Mr. Brown appeared with new counsel for sentencing on August 28, 2015. Prior to sentencing, the Trial Court denied the motion for new trial. *See* ROA 3:415. Mr. Brown was sentenced to a term of fifteen

(15) years in the custody of the Department of Corrections on Count I (DUI Manslaughter) and to a term of two and one-half years on each of the other counts (DUI Serious Bodily Injury), all sentences to run consecutively. *Id.*, at 405-411.

This appeal now follows.

STATEMENT OF THE FACTS

A. Introduction

The instant case was prosecuted following a two-car, near head-on collision in Jacksonville in the early morning hours of July 7, 2013. One of the vehicles, a 2008 Nissan Altima, was operated by Mr. Brown, and the second vehicle was a 1995 Ford Crown Victoria, operated by Jasmine Jack ("Ms. Jack"). *See* ROA 7:422-423. Mr. Brown was alone in his vehicle and Ms. Jack was accompanied in the Ford by two passengers, the deceased, Jerome Cason, Jr. ("Mr. Cason"), and Lakeisha Williams ("Ms. Williams").

Both Mr. Brown and Ms. Jack were found to be operating with a blood alcohol level above the legal limit in the State of Florida. According to the State, Mr. Brown was travelling the wrong way, northbound, in the southbound lanes of Interstate 295 in Jacksonville. The Defense argued Ms. Jack was the one travelling the wrong way contributing to the accident. Eyewitnesses who testified at the trial differed in their accounts. The State presented two accident reconstruction experts. Each concluded

Mr. Brown was driving the wrong way on I-295 at the time of the collision. In addition, the State offered an expert who testified concerning retrograde extrapolation to determine the blood alcohol levels of each driver at the time of the crash.

B. The Events Before the Accident

Mr. Cason, Ms. Williams, and Ms. Jack were co-workers at the United States Post Office on July 6, 2013, working a 3 p.m. to 11 p.m. shift. *See* ROA 6:275-276; 335; 337. The three had planned to go out after work to a bar/restaurant called Da Real Ting Café. *Id.*, at 278; 337-338. After their shift, Ms. Williams and Ms. Jack said they returned to their homes to change clothes and get ready to go out. *Id.*, at 279; 338. The plan was that everyone would meet at Mr. Cason's apartment. *Id.*, at 279.

Ms. Jack arrived in a separate vehicle before Ms. Williams at some point after midnight. *See* ROA 6:280; 339. Ms. Williams arrived about twenty to thirty minutes after Ms. Jack. *Id.*, at 339. Once everyone arrived, they all got into Mr. Cason's car, a Ford Crown Victoria. *Id.*, at 280; 340. Mr. Cason was driving. *Id.* Before arriving at Da Real Ting Café ("Café"), they stopped at gas station up the street from Mr. Cason's apartment to get some cash for the club and to purchase alcohol. *Id.*, at 280-281; 341. Each person purchased a 20-ounce Straw-Ber-ita alcoholic malt beverage. *Id.*, at 281; 340.

They were all drinking in the car and finished their drinks before arriving at the Cafe. *See* ROA 6:282; 341. Mr. Cason had parked in a parking lot a few blocks away. *Id.*, at 281. They waiting in line for a short time before entering the Cafe. *Id.*, 342. Once inside, they all had additional drinks. *Id.*, at 284; 342. Ms. Jack had two mixed drinks – Tequilla Sunrise – and Ms. Williams had two mixed drinks – Ciroq and pineapple juice. *Id.*, at 284-285; 343. Mr. Cason had a Long Island Ice Tea. *Id.*, at 342.

Ms. Williams said the trio left the café about 3:00 a.m. or 3:30 a.m. and hung around in the parking lot. *See* ROA 6:285-286. Ms. Jack said they left the Café after 2:00 a.m. but was not sure the exact time. *Id.*, at 343. Mr. Cason was going to drive home and got into the driver's seat but when he started backing up out of the parking space, he hit a car behind him. *Id.*, at 286-287; 343; 344. Neither Ms. Jack nor Ms. Williams believed it was safe for Mr. Cason to drive. *Id.*, at 288; 345.

Ms. Williams said Mr. Cason asked her to drive but then said he wanted Ms. Jack to drive. *See* ROA 6:289; 345. Ms. Williams was seated in the rear passenger seat behind the passenger. *Id.*, at 289; 345. Ms. Williams said Ms. Jack was intoxicated and should not drive. *Id.* Ms. Williams was so concerned that she asked Ms. Jack if she could get out of the car and call someone to pick her up. *Id.*, at 289-290.

Ms. Jack had trouble navigating from the café through the downtown in part, she said, because she was unfamiliar with the area. *See* ROA 6:295; 346. They used

a cell phone to obtain directions to get back onto Interstate 295. *Id.*, at 291; 346. Ms. Williams said she attributed the difficulty Ms. Jack was having navigating to just a confusing downtown area and not her alcohol consumption. *Id.*, at 292.

Ms. Williams said Ms. Jack was not swerving or weaving and had not run through any red lights or stop signs. *See* ROA 6:292-293. Ms. Williams said her fear was based upon the number of drinks Ms. Jack had and not on how she was driving. *Id.*, at 293. Ms. Jack said she was not feeling affected by the alcohol that she had consumed. *Id.*, at 347.

C. The Accident

Ms. Jack said she was on the interstate for ten to fifteen minutes prior to the accident. *See* ROA 6:347. She said thought one car might have passed by her on the highway. *Id.* She and Ms. Williams both said they did not see any headlights until right before the crash. *Id.*, at 292; 335. "I would have noticed," Ms. Williams testified. *Id.*, at 292. Ms. Jack said she did not have time to get out of the way. *Id.*, at 355.

After the accident, Ms. Jack said she blacked out. *See* ROA 6:355. She woke up in the car and tried to take off her seatbelt but could not do it. *Id.*, at 356. She said someone came and removed her from the car. *Id.* Ms. Williams said she remembered being passed out and then woke up and saw Mr. Cason next to her in the back seat.

Id., at 293. She said she did not see any blood and tried to wake Mr. Cason up but be never responded. *Id.*, at 295.

Ms. Williams said she must have blacked out a second time and when she awoke, she saw fire rescue personnel telling her to cover herself so they could cut her out of the car. *See* ROA 6:295. She said she passed out a third time and remembers waking up in the hospital (UF Health – Shands). *Id.*, at 296. She said she had no memory of being asked any questions by fire rescue. *Id.*, at 296.

Several motorists phoned 911 to report the accident happening. *See* ROA 6:392-7:403. Multiple callers reported that a vehicle was travelling the wrong way before the crash happened. *See* ROA 6: 392; 7:397; 399. Among those callers were Dale Clark and Janice Balay.

D. The Eyewitnesses

1. Dale Clark

Dale Clark woke early in the morning on July 7, 2013, and decided he would travel to a Dunkin Donuts on 103d street in Jacksonville. *See* ROA 6:255. He had been out at dinner with his wife the evening before and had gone to bed around 9 p.m. or 10 p.m. *Id.*, at 255. His drive to Dunkin Donuts took him to Commonwealth Avenue and onto Interstate 295 heading southbound to the 103d Street exit. *Id.*, at 255-256.

He said that while on I-295 southbound in the middle lane, he noticed a set of headlights coming towards him. *See* ROA 6:256. He said he had been on I-295 for about five minutes when he saw the headlights. *Id.*, at 264. He then moved to his right and the car passed by. *Id.* He said he was just past Normandy when the car that passed him was traveling in the wrong direction. *Id.*, at 257.

He said he looked in his rearview mirror and noticed a set of headlights coming towards the car that had passed him. *See* ROA 6:257. He reached for his cell phone to dial 911 but by the time he looked up again, the two vehicles had collided. *Id.*, at 257-258. Mr. Clark said the accident happened "in a matter of seconds" and that he could not determine the color, make, or model of the car that passed him going the wrong direction. *Id.*, at 258-259; 266; 271. The best he could make out, the car was a smaller, newer-model sport-type vehicle. *Id.*, at 259. He also said there was a "spoiler" on the rear of the vehicle. *Id.*, at 261.

He then got off I-295 at the Wilson exit and got back on I-295 northbound to check on the scene. *See* ROA 6:259. He never stopped and never identified himself to law enforcement or fire rescue personnel that he was a witness. *Id.*, at 269-270. In fact, he said, except for getting his name from 911 operators, he said he was not going to get involved. *Id.*, at 270.

2. Janice Balay

Janice Balay was driving her son, Justin, from her home in Fleming Island to the Jacksonville Airport. *See* ROA 9:808; 846. Her son, 22, lives in North Hollywood, California and had been visiting during the July 4 week. *Id.*, at 806. The two left her house around 3:45 a.m. *Id.*; *see also* ROA 9:845.

Mrs. Balay said she had been on I-295 about ten minutes when she said she saw a vehicle on the opposite side of the highway driving the wrong way. *See* ROA 9:809. The car she saw was a dark, older model, large-sized sedan. *Id.*, at 841. She said she "kind of panicked" and alerted her son to what was going on. *Id.*

Mrs. Balay said she then tried to catch up to the vehicle and perhaps try to honk her horn or get the driver's attention. *See* ROA 9:810. She said she was about a car length behind but did not see the driver and could not see if there were any passengers. *Id.* She was driving in the same direction for perhaps one and one-half to two miles. *Id.*, at 811.

During the time Mrs. Balay was travelling next to this vehicle going the wrong way, she said she had a clear, unobstructed view and saw the crash take place. *See* ROA 9:811. She said she could see other vehicles attempting to get out of the way. *Id.* After the crash, she stopped her car and called 911. *Id.* After the accident happened, later in the day, she remembered making notes about what happened and then memorializing them. *Id.*, at 813.

3. Justin Balay

Justin Balay said he was watching the car that was going the wrong way until it crashed. *See* ROA 9:847. He described the car as an "older car." *Id.*, at 851. After the crash happened, his mother pulled to the side and he got out to go check if everyone was okay. *Id.* He went up to the vehicle he had seen driving the wrong way and saw the driver passed out, one person he saw in the back seat "but it looked like it was crushed in," and either two or three in the back seat and they were all passed out. *Id.* He said before the crash, he could not tell how many people were in the car that was going the wrong way. *Id.*, at 850. However, he was sure that the vehicle that was going the wrong way had multiple people in it. *Id.*, at 852.

E. The Investigation

Florida Highway Patrol investigator Corporal Martha Fachko was the first investigator assigned to the case. *See* ROA 7:425. She said her role was to respond to traffic crashes where people have been seriously injured or killed.[1] *Id.*, at 424. She had no independent recollection of the investigation in the instant case. *Id.*, at 425.

Upon reviewing her report, she said that upon arriving on the scene, she made an assessment, took photographs and also took several measurements.[2] *See* ROA

[1] At the time of her trial testimony, Ms. Fachko had retired from the Florida Highway Patrol. *See* ROA 7:423.

[2] Corporal Fachko did not generate any reports of her own but did produce a rough sketch that was included in the "field note pack." *See* ROA 7:432; 433. She

7:427. Corporal Fachko said based upon the report, it was noted there were two crashed vehicles with debris "scattered all about." *Id.*, at 428. Among the pieces of debris were a headlight, plastic pieces, glass and various vehicle parts. *Id.* The report also noted "gouge marks" in the roadway. *Id.*, at 429.

The crash, according to Corporal Fachko, happened in the center lane on the southbound side of I-295. *See* ROA 7:429. There was no indication or evidence that either vehicle braked or took any excessive action prior to the crash. *Id.* She said if the driver of the Ford had swerved dramatically, Corporal Fachko said she would have expected to see evidence of it. *Id.*, at 434. Ms. Jack testified she did swerve "pretty suddenly, drastically" to try to avoid the collision but could not get out of the way in time. *See* ROA 6:382.

Four empty 24-ounce cans of Budweiser Straw-Ber-itas were found in the Crown Victoria. A cell phone was found in the Altima and two cell phones were found in the Ford Crown Victoria. *See* ROA 7:430; 471. No alcohol was found in the Altima. *Id.*; *see also* ROA 7:474.

Following the accident, Florida Highway Patrol Corporal Jason Tollman, a traffic homicide investigator, assisted in the investigation of the accident. *See* ROA 7:437; 438. He was asked to go to UF Health – Shands – in Jacksonville where the

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later testified on re-direct examination that she did not create the sketch that was in the field note pack. *Id.*, at 436.

injured were taken. *Id.*, at 438. He briefly spoke with Ms. Jack about the crash and asked if she would agree to have her blood drawn to determine the presence of controlled substances. *Id.*, at 439. He said Ms. Jack was emotional but cooperative. *Id.*, at 440. Her test came back with a Blood Alcohol Content (BAC) level of .102. *Id.*, at 358.

Corporal Tollman also said he "made contact" with Mr. Brown, who he said was asleep in a hospital bed. *See* ROA 7:440. He said he attempted to awaken Mr. Brown to speak with him and noticed "a very strong odor of an alcoholic beverage." *Id.*, at 440-441. Corporal Tollman said when Mr. Brown did wake up, his eyes were glassy and watery and he could not stay awake. *Id.*, at 441. It was then that more dramatic methods were used to arouse Mr. Brown including shaking his shoulders and eventually a sternon rub. *Id.*, at 442. According to Corporal Tollman, while Mr. Brown appeared awake, he was asked if he would consent to a blood draw.[3] *See* ROA 7:443. According to Corporal Tollman, Mr. Brown was mumbling when he spoke but said he would agree. *Id.*; see also ROA 7:445. When the time came to draw his blood, Corporal Tollman said Mr. Brown had to be re-awakened and when asked again about the blood draw, Mr. Brown shook his head indicating he would not consent. *Id.*, at 444. Shortly thereafter, Mr. Brown fell back to sleep. *Id.*

[3] Trial Counsel objected to questions about Mr. Brown's alleged consent to a blood drawn, arguing any answer was an improper comment on Mr. Brown's right to remain silent. The objection was overruled. *See* ROA 7:443.

Mr. Brown, when spoken to, was very lethargic and was being attended to by nurses. *See* ROA 7:477. Mr. Brown was subjected to two different blood draws. One was taken just before 7 a.m. and a second, legal blood draw following the issuance of a warrant, was taken at 9:14 a.m. *Id.*, at 481.

William Watts, a firefighter/paramedic with Jacksonville Fire Rescue, was dispatched to the scene at 4:23 a.m. *See* ROA 7:414. When he arrived, he said Ms. Williams, a passenger in the Ford that Ms. Jack was driving, was being extricated. *Id.*, at 408. Once Mr. Watts had a chance to evaluate Ms. Williams, he noted she was alert and awake with a Glasgow Coma Scale rating of 15 out of 15. *Id.* He said she was complaining of pain in her leg and was noted to have a cut on her right leg. *Id.*, at 409.

Mr. Watts evaluated Ms. Williams again three times before reaching the hospital and each time the Glasgow Coma Scale was 15 out of 15. *See* ROA 7:415-416. Mr. Watts recorded in his report that Ms. Williams told him she was out with friends from work and thinks the woman that was driving was going the wrong way down the road when they were struck. *Id.*, at 411. Mr. Watts said he had no doubt in his mind that Ms. Williams was awake and alert, understood what she was saying and doing, and that she had volunteered the information that "the woman" was driving the wrong way. *Id.*, at 417-418.

Associated Medical Examiner Dr. Aurelian Nicolaescu performed the autopsy on the body of Mr. Cason. *See* ROA 8:613. Dr. Nicolaescu said there was evidence of "medical interventions." *Id.*, at 614. He said Mr. Cason suffered lacerations to the heart, aorta, both lungs, his liver, and spleen. *Id.*, at 615. Mr. Cason also had suffered a lot of blood loss. *Id.*

Dr. Nicolaescu said Mr. Cason's Blood Alcohol Content was .35, more than four times the legal limit. *See* ROA 8:616. He said the .35 level is very close to a fatal level. *Id.*, at 619. He also said there was no specific level that is a threshold for determining alcohol poisoning. *Id.*

Dr. Bescoun Ahmed, an attending surgeon at Shands, was working in the trauma center on the morning of the crash when the victims were brought in. *See* ROA 8:773-774. He said Ms. Jack broke her right forearm, Ms. Williams had swelling in her right shoulder and a right leg injury, and Mr. Brown had evidence of a right forearm fracture. *Id.*, at 775; 777; 778. Dr. Ahmed also said all three were resuscitated in the trauma room. *Id.*, at 780. He also noted that when he was reviewing Ms. Williams chart, he noted she reported that the driver of the car she was in was going the wrong way on the interstate and that resulted in the head-on collision. *Id.*, at 787.

Florida Highway Patrol Corporal Austin Bennett, a traffic homicide investigator who has investigated nearly 100 cases over the course of his career, responded

to the crash scene about 5:21 a.m. to assist Corporal Fachko, the lead investigator, and arrived around 6 a.m. See ROA 7:463; 466. When he arrived, the Ford was in the inside lane facing northbound and the Nissan was on the outside shoulder facing southbound. *Id.*, at 467. Corporal Bennett also said he saw debris scattered all over the roadway, including a headlight assembly from the Nissan north of the crash scene.[4] *Id.*, at 469.

Ultimately, Corporal Bennett took over as the lead investigator. *See* ROA 7:473. On July 14, 2013, Corporal Bennett conducted the first interview in his investigation with Ms. Jack. *Id.*, at 499. He also said he spoke with Mr. Brown while he was in the hospital shortly after the crash. *Id.*, at 477. A week later, he interviewed Ms. Williams. *Id.*, at 500.

On July 31, 2013, Corporal Bennett interviewed Dale Clark. *See* ROA 7:500. Mr. Clark could not describe who was driving the vehicle that was going the wrong way and could not say how many people were in the car. *Id.*, at 519; 520. Importantly, Mr. Clark could not identify the make or model of the car that he said he saw going the wrong direction. *Id.*, at 520.

[4] Corporal Fachko said a headlight assembly from "V2" was south of the crash site. *See* ROA 7:431. Based upon the testimony, it was unclear is "V2" was, in fact, the Ford. The description provided by Janice Balay, an eyewitness, matches the Ford as being the vehicle that was at fault, hence, would be labeled V1. *Id.*, at 534.

On September 17, 2013, more than two months after the crash happened, Corporal Bennett interviewed Ms. Balay and her son about what they observed.[5] *See* ROA 7:520. Ms. Balay said she had written notes she made the morning of the crash about what she saw and had typed those notes at the time she spoke with Corporal Bennett. *Id.*, at 521. She said the Ford was travelling the wrong way.[6] *Id.*, at 521; 527; 533; 535.

Corporal Bennett said he compiled the crash investigation records and performed a crash reconstruction analysis. *Id.* He said ultimately, based upon his review, said he formed a conclusion about what happened. *Id.*, at 473. Corporal Bennett opined, over objection, that the Nissan was traveling in the wrong direction, northbound in the southbound lane, and crashed with the Ford front-right to front-right. *See* ROA 7:507. The vehicles then rotated off of each other 180 degrees and came to rest facing in the opposite direction each was traveling. *Id.* He said post-impact when vehicles collide and then disengaged, each will travel a certain direction and continue in that direction until each is acted upon by something else. *Id.*, at

[5] Corporal Bennett was provided the name and contact number for Ms. Balay on the morning of the crash but did not contact her until nearly three months later. *See* ROA 7:520.

[6] Corporal Bennett said he believed Ms. Balay had the best view of what was going on and had viewed the vehicle travelling the wrong way for at least a minute before the crash. *See* ROA 7:522.

502. If nothing acts on the vehicle, it will come to rest in the direction it was originally traveling. *Id.*

Corporal Bennett opined that if the Nissan was traveling in the correct direction, it was not possible for the crash to happen the way it did and for the Nissan to have ended up where it did. *See* ROA 7:512-513. He did say it was impossible to re-create a crash completely and that there is no basic error rate in the analysis but did say in every scientific calculation, an error rate does exist. *Id.*, at 514. He also admitted that he spoke with no eyewitnesses while at the crash scene but did form an initial conclusion about who was at fault based upon what Corporal Fachko relayed to him. *Id.*, at 516; 525.

F. The Experts

The State formally presented two experts during its case-in-chief. Kristie Shaw is a senior crime laboratory analyst in the toxicology section with the Florida Department of Law Enforcement. *See* ROA 7:550. Her responsibility was to examine blood samples for the presence or absence of alcohol, reviewing the data, and ultimately reporting her findings in court. *Id.*, at 551. She was certified in blood alcohol analysis. *Id.*, at 554. The preferred test is to use a gas chromatograph, the most widely used and accepted instrument in the field. *Id.*, at 557.

Ms. Shaw tested the blood samples of both Ms. Jack and Mr. Brown. *See* ROA 7:559. The first test found Ms. Jack's BAC was .102 and a subsequent test resulted

in the same level. *Id.*, at 561. Ms. Shaw said there was an error rate or margin for the test of .004, meaning Ms. Jack's BAC could be as high as .106 and as low as .098 at the time the blood was drawn. *Id.*, at 561-562. Mr. Brown's BAC was .085 the first time the blood was tested and .086 the second time it was tested. *Id.*

Ms. Shaw testified that the rate at which alcohol is absorbed depends upon the time of the person's last drink. *See* ROA 7:568. The most rapid absorption is between 30 to 45 minutes on an empty stomach. *Id.* She also said that the alcohol in a mixed drink with fruit juice will absorb the fastest, perhaps a little longer than 30 minutes. *Id.* On a full stomach, it might take 90 minutes or longer.[7] *Id.*

Ms. Shaw explained that when alcohol is being absorbed, the blood alcohol content (BAC) is rising as a result until it reaches a peak before starting to eliminate the alcohol which is done at a constant rate. *See* ROA 7:570. She said it was not possible to point to a specific person and say whether they will eliminate quickly or slowly but that it does happen at a constant rate. *Id.* However, she said, the body, no matter who it is, wants to eliminate alcohol from the blood because it is a poison. *Id.* The body will work very hard to get rid of the alcohol until it gets to a level of roughly .002. *Id.*, at 570-571.

[7] Ms. Shaw testified there was no way to place an error rate on her tests for absorption or elimination but that an expert will develop their own range of acceptable times based on studies they have read or other research that has been done. *See* ROA 7:569.

The crux of Ms. Shaw's testimony at trial involved so-called retrograde extrapolation, a mathematical calculation that permits her to scientifically calculate a BAC at an earlier point in time from when the blood is drawn. *See* ROA 7:571. She said the most important data point necessary for her analysis is the time of a person's last drink. *See* ROA 8:602. In this case, she did not have that information for either Mr. Brown or Ms. Jack. Also critical is whether or not there was evidence of an open container of alcohol in the vehicle because if there was, she will not perform the retrograde extrapolation analysis. *See* ROA 7:585.

Despite the lack of critical data points, Ms. Shaw did testify that she completed a retrograde analysis for both Ms. Jack and Mr. Brown. *See* ROA 7:572. Based upon her calculations, Ms. Shaw opined that Ms. Jack had a BAC of .12 to .14 at the time of the accident. *Id.*, at 574. No report was completed for Mr. Brown but she did opine that based upon her calculations from the blood draw that was done by the hospital roughly two and a half hours after the accident, his BAC was .11 to .12.[8] *Id.*, at 576.

The State's chief expert witness was George Ruotolo, a traffic reconstruction consultant based in Ponte Vedra Beach. *See* ROA 8:685-686. He had been in private

[8] The State presented a chart, over Defense objection, depicting the results of the tests Ms. Shaw conducted. The Defense argued the chart represented incomplete results and was inaccurate. The objection was overruled. *See* ROA 7:577-580.

practice for twenty-two (22) years in Florida and works with attorneys interested in finding out how auto accidents happen and determine what factors led to an accident. *Id.*, at 686. Prior to coming to Florida, he worked for twelve and one-half (12 ½) years as an instructor at the New York State Criminal Justice program in Albany, New York. *Id.*, at 686-687. However, he had no degree in any science discipline. *Id.*, at 738.

Mr. Ruotolo was retained by the State of Florida in November, 2014. *See* ROA 8:701. He said he was asked specifically to determine in this case which vehicle was heading in which direction at the time of the accident. *Id.*, at 702. The reconstruction analysis, in this case, is "limited to one or two central issues." *Id.*, at 703. He based his analysis on the information obtained by the investigators in the case and did not perform any measurements or take any photographs himself.[9] *Id.*, at 703-704. He also said his opinion was reliable to the extent the information from the investigators was accurate and reliable. *Id.*, at 744.

Mr. Ruotolo opined that Mr. Brown was driving northbound in the center lane of the southbound side of I-295 and that Ms. Jack was operating in the correct direction. *See* ROA 8:712; 714. Mr. Ruotolo opined that the physical evidence supported

[9] The State moved to have Mr. Ruotolo offered as an expert in accident reconstruction. The Defense incorporated its argument that was presented in its pre-trial motion in limine. The Trial Court overruled the objection and incorporated its prior pre-trial ruling. *See* ROA 8:710-711.

his conclusion in that the headlight from the Nissan Mr. Brown was driving continued northbound and came to rest on the shoulder. *Id.*, at 717-718. He opined that the 180 degrees of rotation is consistent with what happens in off-set frontal collisions. *Id.*, at 719. He also opined that it was "impossible" for the Nissan to have been travelling in the correct southbound direction. *Id.*, at 732.

Mr. Ruotolo said part of his conclusion was based upon the location of certain cell phone towers that were used by the cell phones found in each vehicle. *See* ROA 8:732. For example, he opined that the last "ping" from Ms. Jack's cell phone was from a tower located north of the accident scene. *Id.*, at 736-737. In contrast, the "pings" from Mr. Brown's cell phone started at a tower south of the accident site and then a second was from a tower north "so he had to be going north on 295." *Id.*, at 737. Mr. Ruotolo opined he was "100% certain" the Nissan was the vehicle travelling the wrong direction. *Id.*, at 738.

Mr. Ruotolo said he reviewed the witness statements contained in the investigation file that proffered two different possible scenarios. *See* ROA 8:744. He reviewed a crash diagram that was included in the field note pack and said generally, the vehicle that is determined more responsible for the accident is typically labeled as "V1." *Id.*, at 744-745. Mr. Ruotolo then reviewed "a typical crash report diagram" and noted the Ford Crown Victoria driven by Ms. Jack was shown travelling in the northbound direction. *Id.*, at 745. Mr. Ruotolo also said he reviewed the Jacksonville

Fire Rescue report regarding the statement that Ms. Williams made that she believed the woman driving the car was going the wrong way. *Id.*, at 746.

Over a Defense objection, Mr. Ruotolo speculated that the Florida Highway the number two." *See* ROA 8:756. It was "simply a clerical error of marking the vehicles with the wrong number." *Id.* He opined that "it would be nice" to have the witness accounts agree with the physical evidence but said many times, people see something from a different perspective and "some comport with the physical evidence and some do not." *Id.*, at 757. In particular, Mr. Ruotolo opined that Ms. Balay's recounting of what she saw was not possible. *Id.*, at 865.

Following Mr. Ruotolo's testimony, the State rested its case-in-chief. *See* ROA 9:791. Following the close of the State's case, the Defense argued the State had failed to present sufficient *prima facie* proof that the person who died in the accident was, in fact, Jerome Cason and moved for a judgment of acquittal. That motion was denied. The Defense presented Ms. Balay and Justin Balay in its case-in-chief and then rested. *Id.*, at 859. Mr. Brown did not testify. The State recalled Mr. Ruotolo in its rebuttal case before resting. *Id.*, at 870. The Defense renewed its motion for judgment of acquittal, which was, again, denied. *Id.*, at 872.

SUMMARY OF THE ARGUMENT

The Trial Court erred when it denied Mr. Brown's Motion for New Trial on the grounds that the jury verdict was against the greater weight of the evidence. First,

the Trial Court failed to articulate which standard it applied in denying the motion and absent a clear indication the Trial Court actually weighed the evidence as required, this Court should remand this case with instructions to properly determine the motion for new trial under the correct standard.

Substantively, the verdict was against the greater weight of the credible evidence. Two eyewitnesses identified the older model sedan – the Ford Crown Victoria – as the vehicle operating the wrong way and thus was the cause of the accident here. Those two eyewitnesses not only had a substantial amount of time to observe the vehicles, one of those witnesses actually got out of his car after the crash and observed multiple persons in the vehicle that he said was the one he saw driving the wrong way. There was a single other eyewitness unable to determine make or model and only observed the vehicle he said was traveling the wrong way for a matter of seconds in his rearview mirror.

Second, Lakeisha Williams, a victim from the Ford Crown Victoria, told an EMT the "woman" was driving the wrong way. The only "woman" driver involved in this accident was Jasmine Jack, driving the older model sedan. Based upon the eyewitness testimony presented to the jury, the greater weight of the evidence favors acquittal.

Additionally, the expert testimony regarding Blood Alcohol Content (BAC) was inherently unreliable based upon the expert's own testimony. The Trial Court

erred in allowing this evidence in the first place because the expert engaged in retrograde extrapolation without knowing critical data points she testified were the absolute barebones she needed in order to do the analysis. The expert testimony is unreliable and was improperly admitted. In addition, when weighing the evidence, the greater weight of the credible evidence favors acquittal.

Finally, the Trial Court erred in permitting the State to comment on Mr. Brown's right to decline to consent to a blood draw. The forced blood draw was taken before Mr. Brown was under arrest and taken despite his expressed denial. Commenting on this refusal was error and Mr. Brown is entitled to a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL WHERE THE VERDICT WAS AGAINST THE GREATER WEIGHT OF THE EVIDENCE.

A. Standard of Review

A trial court's ruling on a motion for new trial pursuant to Fla. R. Crim. P. 3.600(a)(2) is subject to review under an abuse of discretion standard. Where a trial court's ruling is based on the application of an incorrect legal standard, the ruling is reviewed *de novo* review." *See Velloso v State*, 117 So.3d 903, 904 (Fla. 4th DCA 2013) (citing *Ferebee v. State,* 967 So.2d 1071, 1073 (Fla. 2d DCA 2007)); *see also Geibel v.State*, 817 So.2d 1042, 1044-45 (Fla. 2d DCA 2002).

B. Preservation

Trial Counsel filed a motion for new trial on July 22, 2015, raising eleven (11) points of error. *See* ROA 2:321-323. There was no hearing conducted on the motion and the Trial Court took up the matter at the start of the sentencing hearing on August 28, 2015. *Id.*, at 415. The State at first argued the motion was untimely but abandoned its objection to the timeliness issue and permitted the Trial Court to consider the motion on the merits. *See* ROA 638; 639-640. Without hearing argument, the Trial Court denied the motion as follows:

> "I have carefully considered everything contained within the motion for new trial, so based upon the State's waiver of the untimeliness of this motion, the Court - - and the consent of the defense that I can go ahead and rule - - and you are consenting to that procedurally? I am your honor. The Court is denying the motion for new trial, and that will take us to the next phase of our hearing, which is a sentencing hearing."

See ROA 642.

C. Argument on the Merits

1. The Trial Court committed reversible error in failing to examine Defendant's motion for new trial under the proper standard of review.

Trial Counsel argued in his motion for new trial that the greater weight of the evidence favored acquittal. The Trial Court was thus required to review the motion under the correct "weight of the evidence" standard. *See Ferebee*, 967 So.2d at 1072. Here, the record is entirely devoid as to exactly what standard of review the Trial

Court applied before denying Mr. Brown's motion for new trial. The record demonstrates only that the Trial Court "carefully considered everything in the motion" without articulating exactly what standard it used in its "careful" consideration. While the Trial Court is not compelled to use "magic words" when ruling on a motion for new trial, the ruling should demonstrate that the court applied the proper standard to the motion. *See Geibel,* 817 So.2d at 1045.

Reversible error occurs when a trial court applies a sufficiency of the evidence standard to a motion for new trial under Fla. R. Crim. P. 3.600(a)(2). *See Ferebee,* 967 So.2d at 1073. "Appellate courts have thus reversed judgments when the trial court applied a sufficiency of the evidence standard to a motion for new trial. *Id.*; *see also Spear v. State,* 860 So.2d 1080 (Fla. 1st DCA 2003); *Moore v. State,* 800 So.2d 747 (Fla. 5th DCA 2001).

Because the Trial Court failed to reasonably demonstrate which standard it applied to the motion for new trial, this Court should reverse and remand for the Trial Court to clearly and directly consider Mr. Brown's motion for new trial under the proper "weight of the evidence" standard. *See Geibel,* 817 So.2d at 1045.

2. The verdict was against the manifest weight of the evidence and the Trial Court erred in denying Defendant's motion for new trial.

"Defendants have the right to have the trial judge evaluate and weigh the evidence independently of the jury's findings to determine whether the jury verdict was

contrary to the weight of the evidence." *See McCloud v. State*, 150 So.3d 822 (Fla. 1st DCA 2014) (citing *Kelley v. State*, 16 So.3d 196, 197 (Fla. 1st DCA 2009)). Fla. R. Crim. P. Rule 3.600(a)(2) provides that a trial court shall grant a new trial if the verdict is "contrary to ... the weight of the evidence." Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror." *See Tibbs v. State*, 397 So.2d 1120, 1123 n. 9 (Fla. 1981).

There is a distinction between the "sufficiency of the evidence" standard, which is used in determining whether to grant a judgment of acquittal, and the "weight of the evidence" standard, which is used in evaluating a motion for new trial. *See Geibel*, 817 So.2d at 1044. Weight of the evidence tests "whether a greater amount of credible evidence supports one side of an issue or the other." *See State v. Hart*, 632 So.2d 134, 135 (Fla. 4th DCA 1994); *see also Ferebee*, 967 So.2d at 1073.

"When considering a motion for new trial under rule 3.600(a)(2) based on a claim that the verdict is against the weight of the evidence, the trial court must exercise its discretion to determine whether a greater amount of credible evidence supports an acquittal." *See Ferebee*, 967 So.2d at 1073. The trial court is permitted to make its own witness credibility determinations, acting, in effect, as an additional juror. *See Uprevert v. State*, 507 So.2d 162, 163 (Fla. 3d DCA 1987) (quoting *Tibbs v. State*, 397 So.2d 1120, 1123 n. 9 (Fla. 1981)); *Ford v. Robinson*, 403 So.2d 1379

(Fla. 4th DCA 1981) (In making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence.)

In deciding a motion for new trial on the ground that the verdict is contrary to the weight of the evidence, the trial court acts as a "safety valve" by granting a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict. *See* ***State v Brokman***, 827 So.2d 299, 304 (Fla. 1st DCA 2002); *see also Velloso*, 117 So.3d at 904. Here, there were disputes from eyewitnesses, inconsistent victim testimony, and improperly admitted expert testimony concerning retrograde extrapolation. Given the significant disputes, the greater weight of the evidence points away from conviction and thus a new trial should have been granted.

a. Conflicting eyewitness identification concerning which vehicle was traveling in the wrong direction

One of the most significant facts at issue during trial was which vehicle, in fact, was traveling the wrong way and therefore was a cause of the accident. The sole eyewitness who identified the vehicle Mr. Brown was operating as the one traveling the wrong way was Dale Clark, who saw a car for a mere seconds in his rear-view mirror. In contrast, two eyewitnesses Janice Balay and her son, Justin, were able to view an "older model" car – the Ford Crown Victoria – traveling the wrong

way for a significant period of time and each testified unequivocally that the Altima Mr. Brown was operating was NOT the car they observed.

Mr. Clark said that while on I-295 southbound in the middle lane, he noticed a set of headlights coming towards him. *See* ROA 6:256. He said he moved to his right and the car passed by. *Id.*, at 264. He said he looked in his rearview mirror and noticed a set of headlights coming towards the car that had passed him. *Id.*, at 257. He then reached for his cell phone to dial 911 but by the time he looked up again, the two vehicles had collided. *Id.*, at 257-258.

Mr. Clark said the accident happened "in a matter of seconds" and that he could not determine the color, make, or model of the car that passed him going the wrong direction. *Id.*, at 258-259; 266; 271. The best he could make out, the car was a smaller, newer-model sport-type vehicle. *Id.*, at 259. He also said there was a "spoiler" on the rear of the vehicle. *Id.*, at 261.

On July 31, 2013, Corporal Bennett interviewed Mr. Clark. *See* ROA 7:500. Mr. Clark could not describe who was driving the vehicle that was going the wrong way, could not say how many people were in the car, and could not identify the make or model of the car. *Id.*, at 519; 520. Importantly, Mr. Clark could not identify the make or model of the car that he said he saw going the wrong direction. *Id.*, at 520.

Janice Balay was driving her son, Justin, from her home in Fleming Island to the Jacksonville Airport early on the morning of the accident and had been on I-295

about ten minutes when she said she saw a vehicle on the opposite side of the high-way driving the wrong way. *See* ROA 9:809. The car she saw was a dark, older model, large-sized sedan. *Id.*, at 841. She said she "kind of panicked" and alerted her son to what was going on. *Id.*

Mrs. Balay said she then tried to catch up to the vehicle and perhaps try to honk her horn or get the driver's attention. *See* ROA 9:810. She said she was driving in the same direction for perhaps one and one-half to two miles. *Id.*, at 811. During the time Mrs. Balay was travelling next to this vehicle going the wrong way, she said she had a clear, unobstructed view and saw the crash take place. *Id.*, at 9:811. She said after the accident happened, later in the day, she remembers making notes about what happened and then memorializing them. *Id.*, at 813.

Her son, Justin Balay, said he was watching the car that was going the wrong way until it crashed. *See* ROA 9:847. He described the car as an "older car." *Id.*, at 851. After the crash happened, his mother pulled to the side and he got out to go check if everyone was okay. *Id.* He went up to the vehicle he had seen driving the wrong way and saw the driver passed out, one person he saw in the back seat "but it looked like it was crushed in," and either two or three in the back seat and they were all passed out. *Id.* He said he was sure that the vehicle that was going the wrong way had multiple people in it. *Id.*, at 852.

Two eyewitnesses placed the vehicle that was going the wrong was as a late-model vehicle with multiple people inside. Justin Balay confirmed that during his testimony. His mother testified, unlike Mr. Clark, she had a prolonged view of the vehicle and definitely described it as an older model sedan. She also memorialized her observations contemporaneously with the events taking place.

Unlike Mr. Clark, Justin Balay and his mother did stop at the scene and Justin even got out of his car to check on the safety of the people in the vehicles. It was this action that provided clear information about who was in the vehicle he observed traveling the wrong way. He said he was absolutely sure there were multiple passengers in the at-fault vehicle. Weighed against the split-second observations of Mr. Clark, seen through a rear-view mirror for a matter of seconds, the observations and testimony of Mrs. Balay and her son are far more credible and weigh heavily against a guilty verdict.

b. Unrebutted testimony from a victim placed Jasmine Jack and NOT Mr. Brown as the at-fault driver.

Lakeisha Williams testified "the woman" who was driving the wrong way – Jasmine Jack. William Watts, a firefighter/paramedic with Jacksonville Fire Rescue, responded to the accident scene and evaluated Ms. Williams. He testified she was alert and awake with a Glasgow Coma Scale rating of 15 out of 15. *See* ROA 7:408.

Mr. Watts evaluated Ms. Williams again three times before reaching the hospital and each time the Glasgow Coma Scale was 15 out of 15. *Id.,* at 415-416.

Ms. Williams, Mr. Watts said and recorded in his report, told him that she was out with friends from work and thinks the woman that was driving was going the wrong way down the road when they were struck. *See* ROA 7:411. Mr. Watts said he had no doubt in his mind that Ms. Williams was awake and alert, understood what she was saying and doing, and that she had volunteered the information that "the woman" was driving the wrong way. *Id.*, at 417-418.

Ms. Williams' awake, alert, and clear statement to Mr. Watts confirms and corroborates the eyewitness testimony from Mrs. Balay and her son. The only "woman" who was driving was Jasmine Jack in an older-model sedan. The only vehicle involved in the accident with multiple passengers was the Ford Crown Victoria being operated by Ms. Jack. Weighed against the split-second observations of Mr. Clark, seen through a rear-view mirror for a matter of seconds, Ms. Williams' statement corroborates the only two eyewitnesses who observed the incident for a prolonged period of time and who stopped after the accident and made further observations consistent with Ms. Williams' testimony.

c. Improper and unreliable expert testimony concerning retrograde extrapolation

Retrograde extrapolation to establish a Blood-Alcohol Content (BAC) reading at the time of the crash was unreliable and improperly presented to the jury. Kristie

Shaw was a senior crime laboratory analyst in the toxicology section with the Florida Department of Law Enforcement. *See* ROA 7:550. The crux of Ms. Shaw's testimony at trial, after she was permitted to offer expert opinions, involved so-called retrograde extrapolation, a mathematical calculation that permits her to calculate a blood-alcohol content (BAC) level at an earlier point in time from when the blood is drawn. *Id.,* at 571.

She said the most important data point necessary for her analysis is the time of a person's last drink. See ROA 7:602. In this case, she did not have that information for Mr. Brown but still was opined as to his BAC using her flawed retrograde extrapolation analysis. *Id.*, at 7:585. Despite the lack of critical data points, including the time of Mr. Brown's alleged last drink (a required data point – absolute barebones, she said) Ms. Shaw testified she never completed a retrograde extrapolation report on the "legal" blood draw taken from Mr. Brown. *Id.*, at 579. Instead, still lacking critical data points which she testified were absolutely essential to even consider making some analysis, she testified she completed a retrograde analysis for Mr. Brown based upon the forced blood draw taken without Mr. Brown's consent roughly two and a half hours after the accident.

Further, Ms. Shaw testified specifically about her report from the retrograde extrapolation of Jasmine Jack. Ms. Shaw testified that part of her necessary data points in performing her extrapolation analysis is whether or not there is alcohol

found in the car because if there is, she cannot complete her analysis. *See* ROA 7:585. In this case, even though there was clearly evidence of alcohol in the car in which Ms. Jack was riding, she was never told that information by the State.

In light of its unreliability, based upon Ms. Shaw's own explanation of what data points she must have in order to proceed, her testimony should be given no weight. Her testimony was vital to the State's prosecution to make out its case. It is proper to assume that without her testimony, the weight of the evidence favors acquittal.

In deciding a motion for new trial on the ground that the verdict is contrary to the weight of the evidence, the trial court acts as a "safety valve" by granting a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict. *See* ***Brokman***, ***supra***. Here, weighing the credible evidence from Janice and Justin Balay, the credible statement from Ms. Williams to Mr. Watts, and discounting the incredible testimony from Ms. Shaw, the greater weight of the evidence points away from conviction and thus a new trial should have been granted.

II. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO IMPROPERLY COMMENT UPON THE DEFENDANT'S RIGHT TO DECLINE CONSENT TO A BLOOD DRAW.

A. Standard of Review

The appellate court reviews evidentiary rulings for an abuse of discretion. *See Salazar v. State*, 991 So.2d 364, 373 (Fla. 2008).

B. Preservation

During the State's opening statement, mention was made regarding Mr. Brown refusing to consent to a blood draw while in the hospital. *See* ROA 2:234. Trial Counsel immediately objected. *Id.*, at 235. Following brief argument, the Trial Court overruled the objection. *Id.*, at 237. Further, at the time Corporal Tolman testified about the blood draw, Trial Counsel again objected and the Trial Court again overruled the objection relying on its prior ruling. *Id.*, at 443. Finally, Trial Counsel argued in his motion for new trial the Trial Court erred when it permitted the State to comment on Mr. Brown's refusal to consent to a blood draw following the accident. *Id.*, at 2:322.

C. Argument on the Merits

The legislature has narrowly defined the circumstances in which a blood draw may be performed in place of a breath or urine test without the driver's express consent. One circumstance allowing for forcible extraction of a blood sample is set forth in Florida Statutes section 316.1933(1) (1997), which authorizes a blood test where

an officer has probable cause to believe a driver under the influence of alcoholic beverages has caused death or serious injury to a human being, including himself. *See State v. Kilphouse*, 771 So.2d 16, 18 (Fla. 4th DCA 2000).

This Court has acknowledged that probable cause for a DUI arrest is required under section 316.1933(1):

> "The purpose of the blood test taken under section 316.1933(1) is to aid in determining whether the driver causing a serious automobile accident, when reasonably believed to be under the influence of alcoholic beverages, had his normal faculties impaired by alcohol. The statutory provision contains sufficient requirements to establish probable cause to believe a criminal offense has been committed because, in addition to the required showing that the driver is 'under the influence,' the statute also requires that the driver 'has caused the death or serious bodily injury of a human being.'"

See Jackson v. State, 456 So.2d 916, 919 (Fla. 1st DCA 1984).

The law is well settled that it is not an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution, as made enforceable against the states under the Due Process clause of the Fourteenth Amendment (*see Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)) for police to obtain a warrantless involuntary blood sample from a defendant who is *under arrest* for DUI provided (1) there is probable cause to arrest the defendant for that offense, and (2) the blood is extracted in a reasonable manner by medical personnel pursuant to medically approved procedures. *See Schmerber v. California*, 384 U.S. 757 (1966).

Florida's implied consent statutes impose, in certain respects, higher standards on police conduct in obtaining breath, urine, and blood samples from a defendant in a DUI case than those required by the Fourth Amendment. See [§§316.1932, 316.1933, 316.1934, Fla. Stat. (1991)]. *See Sambrine v. State,* 386 So.2d 546, 548 (Fla. 1980) ("What is at issue here ... is ... the right of the state of Florida to extend to its citizenry protections against unreasonable searches and seizures greater than those afforded by the federal constitution [through the Fourth Amendment]. This it has done through the enactment of section 322.261, Florida Statues (1975) [now sections 316.1932, 316.1933, Florida Statutes (1991)]."

Pursuant to Fla. Stat. §§316.1932, 316.1933, and 316.1934, the power of police is limited in the way it may compel a blood draw without the person's consent who is *lawfully arrested* for DUI and prescribe the exact methods by which such samples may be taken and tested. Section 316.1933(1) provides that a law enforcement officer is authorized to demand a blood withdrawal from any person who is lawfully arrested for DUI if there is probable cause to believe that the person "has caused the death or serious bodily injury of a human being." *See State v Slaney,* 653 So.2d 422, 426-427 (Fla. 3d DCA 1995). The arrested person has no right to refuse a blood withdrawal in such a serious case, and, indeed, a law enforcement officer "may use reasonable force if necessary to require such person to submit to the administration of a blood test." *Id.*

Here, Mr. Brown was not "lawfully arrested" at the time of the forced blood draw hours after the accident. Mr. Brown was not arrested until January 3, 2014, five months after the accident. Additionally, the record is clear Mr. Brown was unable to effectively consent to any blood draw regardless of the application of the state's implied consent provision. While an arrested person has no right to refuse, Mr. Brown certainly did have that right and the State violated that right by not only taking his blood but then later commenting to the jury concerning Mr. Brown's initial refusal to consent.

Corporal Tolman said he "made contact" with Mr. Brown at the hospital following the accident and found Mr. Brown asleep in a hospital bed. *See* ROA 7:440. Corporal Tolman said he attempted to awaken Mr. Brown to speak with him and noticed "a very strong odor of an alcoholic beverage." *Id.*, at 440-441. Corporal Tolman said when Mr. Brown did wake up, his eyes were glassy and watery and could not stay awake. *Id.*, at 441. It was then that more dramatic methods were used to arouse Mr. Brown including shaking his shoulders and eventually a sternon rub. *Id.*, at 442.

According to Corporal Tolman, while Mr. Brown appeared awake, he was asked if he would consent to a blood draw. *See* ROA 7:443. According to Corporal Tolman, Mr. Brown was mumbling when he spoke but said he would agree. *Id.*; *see also* ROA 7:445. When the time came to draw his blood, Corporal Tolman said Mr.

Brown had to be re-awakened and when asked again about the blood draw, Mr. Brown shook his head indicating he would not consent. *Id.*, at 444. Shortly thereafter, Mr. Brown fell back to sleep. *Id.* Corporal Tolman testified Mr. Brown was not under arrest at the time. He further testified he had no information about the extent of the injuries Mr. Brown suffered in the accident or the condition or facts concerning other potential victims. *See* ROA 7:445.

Under the facts of this case, Mr. Brown could not consent to a request to extract blood while he was semi-conscious in the hospital. He had to be re-awakened after passing out again when the nurse came to extract blood. When he was asked again, he refused. Corporal Tolman then left and returned several hours later with a warrant to extract blood.

Importantly, the forced blood draw taken before the warrant was issued was used as a basis for the State's expert witness testifying about so-called retrograde extrapolation. Further, Mr. Brown's initial refusal to consent was commented upon by the State during its opening and closing statements with the single objective of suggesting guilt. In short, the consent issue became a focal part of the trial and it was error for the Trial Court to permit comment upon the refusal.

This Court has previously reversed a conviction where the trial court allowed impermissible testimony regarding the defendant's refusal to consent to a warrantless search. *See Rose v State*, 134 So.3d 996, 998 (Fla. 1st DCA 2012) (citing *Bravo*

v. State, 65 So.3d 621 (Fla. 1st DCA 2011) (reversing conviction where trial court allowed impermissible testimony regarding defendant's refusal to consent to search of home without a warrant)). Other Courts of Appeal have come to the same conclusion. *See, e.g.*, *Gomez v. State,* 572 So.2d 952, 953 (Fla. 5th DCA 1990)(holding "[c]omment on a defendant's denial of permission to search a vehicle, although not exactly the same thing as comment on a defendant's right to remain silent, since the Fourth Amendment is involved rather than the Fifth, constitutes constitutional error of the same magnitude.").

Here, the improper comments were erroneously permitted over objection. This error, because it cannot be said how the improper comments may have affected the jury, requires reversal for a new trial.

III. THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY TO CONSIDER IMPROPER EXPERT TESTIMONY ON RETROGRADE EXTRAPOLATION

A. Standard of Review

The improper admission of expert opinion testimony is subject to a harmless error analysis. *See Daniels v. State*, 4 So.3d 745, 749 (Fla. 2d DCA 2009) (citing *Shaw v. State*, 557 So.2d 77, 78 (Fla. 1st DCA 1990)); *see also Nardone v. State,* 798 So.2d 870, 874 (Fla. 4th DCA 2001). Under a harmless error review, "the question is whether there is a reasonable possibility that the error affected the verdict." *See State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla. 1986). The application of the harmless

error test requires a review of the entire record, "'including a close examination of the permissible evidence on which the jury could have legitimately relied, and an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.'" *See Brooks v. State,* 918 So.2d 181, 194 (Fla. 2005). If the appellate court "cannot say beyond a reasonable doubt" the error did not affect the verdict, "then the error is by definition harmful." *See Blanton v. State*, 978 So.2d 149, 156 (Fla. 2008).

B. Preservation

Trial Counsel objected to the testimony of Kate Shaw, and FDLE analyst, whose testimony was focused on so-called retrograde extrapolation. Trial Counsel argued the data was inaccurate and unreliable. The Trial Court overruled the objection and admitted the testimony. Trial Counsel later raised the improper admission of her testimony in his motion for new trial.

C. Argument on the Merits

An expert's opinion is admissible if it is "based on valid underlying data which has a proper factual basis." *See Daniels v. State*, 4 So.3d 745, 748 (Fla. 2nd DCA 2009); *see also Carnival Corp. v. Stowers,* 834 So.2d 386, 387 (Fla. 3d DCA 2003). However, if an "expert's opinion is based on speculation and conjecture, not supported by the facts, or not arrived at by [a] recognized methodology," it should not be admitted into evidence. *See M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki,*

P.A., 932 So.2d 459, 464 (Fla. 4th DCA 2006). "'[T]he basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion.'" *Schindler Elevator Corp. v. Carvalho*, 895 So.2d 1103, 1106 (Fla. 4th DCA 2005) (quoting *Arkin Constr. Co. v. Simpkins*, 99 So.2d 557, 561 (Fla. 1957)).

Kristie Shaw was a senior crime laboratory analyst in the toxicology section with the Florida Department of Law Enforcement. *See* ROA 7:550. The crux of Ms. Shaw's testimony at trial, after she was permitted to offer expert opinions, involved so-called retrograde extrapolation, a mathematical calculation that permits her to calculate a blood-alcohol content (BAC) level at an earlier point in time from when the blood is drawn. *Id.*, at 571. She said the most important data point necessary for her analysis is the time of a person's last drink. *See* ROA 8:602. In this case, she did not have that information for Mr. Brown. *See* ROA 7:585.

Despite the lack of critical data points, including the time of Mr. Brown's alleged last drink (a required data point – absolute barebones) Ms. Shaw testified she never completed a retrograde extrapolation report on the proper blood draw taken from Mr. Brown pursuant to the warrant. *See* ROA 7:579. However, she testified she completed a retrograde analysis for Mr. Brown based upon the forced blood draw taken without Mr. Brown's consent roughly two and a half hours after the accident and determined his BAC was .11 to .12. *Id.*, at 576.

During Ms. Shaw's testimony, the State presented a chart, over Defense objection, depicting the results of the tests Ms. Shaw conducted. The Defense argued the chart was hearsay, represented incomplete results, and was inaccurate particularly because, as the State admitted, no report on retrograde extrapolation was completed for Mr. Brown and therefore any such results on the chart was inadmissible. The objection was overruled. *See* ROA 7:577-580.

Further, Ms. Shaw testified specifically about her report from the retrograde extrapolation of Jasmine Jack. Ms. Shaw testified that part of her necessary data points in performing her extrapolation analysis is whether or not there is alcohol found in the car because if there is, she cannot complete her analysis. *See* ROA 7:585. In this case, even though there was clearly evidence of alcohol in the car in which Ms. Jack was riding, she was never told that information by the State.

An expert's opinion is admissible if it is "based on valid underlying data which has a proper factual basis." *See Daniels, supra*. Here, the record is clear Ms. Shaw did not have valid underlying data upon which to base her opinions. This testimony was improperly admitted. As there is no way to correctly state the full effect of this error on the outcome of the trial, this Court should reverse and remand this case for a new trial.

IV. THE TRIAL COURT ERRED IN PERMITTING UNQUALIFIED EXPERT TESTIMONY BEFORE THE JURY AND WHERE THE TESTIMONY OF ONE EXPERT IMPROPERLY BOLSTERED THE TESTIMONY OF THE OTHER EXPERT

A. Standard of Review

We review trial court decisions on the admissibility of evidence for an abuse of discretion. *See Miller v. State*, 127 So.3d 580, 585 (Fla. 4th DCA 2012) (citing *Dessaure v. State*, 891 So.2d 455, 466 (Fla. 2004)).

B. Preservation

Trial Counsel filed a pre-trial motion to exclude the expert testimony of Trooper Austin Bennett and George Ruotolo. *See* ROA 77-79. The Trial Court denied the motion. *Id.*, at 102-105. At the start of the trial, before witnesses were called and before the jury was sworn. *See* T.T. at 213-214. Finally, during the testimony of both experts, at the point where their opinions were sought, there was an additional objection that was overruled. *Id.*, at 711; 758.

C. Argument on the Merits

The State proffered two "experts" to testify regarding crash reconstruction and specifically about the mechanics that resulted in the accident that was the subject of the trial below. Given the sharply divergent eyewitness accounts, supra., and the questionable testimony concerning blood alcohol content (BAC), it was the expert testimony that played a critical role in the State's ability to secure a conviction. However, the field of crash reconstruction is not a science and is, at its heart, a best-guess

using principles that have no established error rate and relies upon the unverified conclusions of others. Such testimony is improper and it was error for the Trial Court to admit it.

An expert improperly bolsters his opinion when he relies on the opinion of another expert. *See Bunche v. State*, 5 So.3d 38, 40 (Fla. 4th DCA 2009); *Telfort v. State*, 978 So.2d 225, 227 (Fla. 4th DCA 2008). An expert also cannot testify that his opinion was formed by consulting with others in the same field. *See Miller*, 127 So.3d at 585 (citing *Schwarz v. State*, 695 So.2d 452 (Fla. 4th DCA 1997) *(approved by Linn v. Fossum*, 946 So.2d 1032 (Fla. 2006))). The prohibition applies equally "whether the expert relies on a second expert's opinion or testifies about other experts' opinions in explaining the process employed." *See Bunche*, 5 So.3d at 40–41.

Here, George Ruotolo was one of the experts who testified for the State regarding crash reconstruction and specifically, in this case, which vehicle was operating in the wrong direction at the time of the accident. However, during his testimony he made some critical admissions:

a. His opinion is based not upon his own investigation but rather relying upon the reports and photographs collected and prepared by others.
b. He never visited the crash site, never did any independent investigation and spoke to no eyewitnesses.
c. The reconstruction analysis he was asked to perform was limited to one or two central issues the State asked him to examine.
d. He testified to the veracity of the "original work that was done" and which formed the entire basis for his opinion.

e. He testified that the reliability of his opinion depended upon the reliability of someone else's investigation, agreeing in "the old garbage in, garbage out scenario.

Corporal Bennett admitted if there was an error rate associated with crash reconstruction, he did not know what it was. Corporal Bennett testified that every scientific calculation and process has an error rate to determine reliability. He explained that crash reconstruction opinions vary because "everybody's different in collecting what evidence they collect, types of measurements, how far they will be allowed to collect that evidence and the photos they take and the evidence speaks for itself on each investigator." He also candidly admitted it is impossible to re-create any crash.

Both Mr. Ruotolo and Corporal Bennett dismiss the widely divergent eyewitness accounts because the analysis that was performed did not match up with those eyewitness statements. For example, Corporal Bennett dismissed Janice Balay's significant eyewitness account as mistaken based upon nothing more than conjecture and speculation. Mr. Ruotolo dismissed her account because, he said, people see things a little differently." Mr.Ruotolo admitted he never spoke with any eyewitness and thus his opinion is based upon mere conjecture and speculation.

An expert's opinion is admissible if it is "based on valid underlying data which has a proper factual basis." *See Daniels*, 4 So.3d at 748 (citing *Carnival Corp.*, 834 So.2d at 387. However, if an "expert's opinion is based on speculation and conjecture, not supported by the facts, *or* not arrived at by [a] recognized methodology,"

it should not be admitted into evidence. *See M.A. Hajianpour, M.D., P.A.*, 932 So.2d at 464 (emphasis added).

In this case, both experts' opinions were based in part on conjecture and speculation, relying upon inferences drawn from the conclusions of others without any independent examination or investigation. "[T]he basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." *See Schindler*, 895 So.2d at 1106 (quoting *Arkin*, 99 So.2d at 561.

The improper admission of expert opinion testimony is subject to a harmless error analysis. *See Nardone*, 798 So.2d at 874; *Shaw*, 557 So.2d at 78. The application of the harmless error test requires a review of the entire record, "including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *See Brooks*, 918 So.2d at 194 (quoting *DiGuilio*, 491 So.2d at 1135. "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." *See Blanton*, 978 So.2d at 156 (quoting *DiGuilio*, 491 So.2d at 1139).

Here, the improper admission of the expert testimony from Mr. Ruotolo and Corporal Bennett was not harmless. Mr. Ruotolo's expert opinion was based entirely

upon the work of someone else, without any basis to judge its reliability, and requiring him to place his own imprimatur on the underlying data collection to bolster his own conclusions. Corporal Bennett admitted crash reconstruction is not an exact methodology and could not say what the error rate was, a key measure in determining the reliability of any scientific calculation.

In this light, considering all the circumstances, absent the expert crash reconstruction testimony, the State would have a significantly weaker case. It was error for the Trial Court to admit the testimony and the proper remedy is to reverse and remand for a new trial.

CONCLUSION

Based upon the foregoing, this Court should vacate the judgment and conviction of the Trial Court and remand this matter with instructions to the Trial Court to conduct a full hearing on Defendant's Motion for New Trial; or in the alternative, remand with instructions to enter a judgment of acquittal to the charges; or in the alternative, remand this matter to the Trial Court for a new trial; and for such other and further relief as this Honorable Court shall deem just, fair, and equitable.

DATED this 11th day of April, 2016.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Service this 11th day of April, 2016, to:

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