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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

STATEMENT OF AUTHORITIES

Other Authority

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., who will 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. References to the State's Answer Brief will be as follows: "AB" followed by the page number.

The purpose of this Reply Brief is to address the State's answer to the claims of error and legal arguments set forth in Mr. Brown's initial brief. However, by not addressing each and every issue or legal argument here, Mr. Brown does not concede or otherwise waive or abandon any claims he has brought before this Court in his Amended Initial Brief. Those issues and legal arguments are incorporated herein.

COMMENT ON (RESTATED) QUESTIONS PRESENTED

While Mr. Brown appreciates the State's desire to reframe his issues to something more State-friendly, Mr. Brown is the one who has been convicted and is seeking review in this Court. Mr. Brown herein suggests his recitation of his claimed issues of error are properly stated and were properly preserved for review in this Court. The questions presented need no restatement or clarification from the State.

COMMENT ON APPELLEE'S STATEMENT OF THE CASE AND FACTS

The State in its Answer Brief suggests it was submitting "relevant facts, in addition to those contained in Appellant's Brief" but fails to identify which relevant facts were left out of Mr. Brown's exhaustive, complete, and neutral recitation of the facts as determined through the testimony at trial. While Mr. Brown appreciates the State's attempt to suggest further record development is necessary, or that Mr. Brown's recitation of the case and facts contained irrelevant facts and/or was missing relevant facts, he would suggest his statement of the case and facts is sufficient for this Court to resolve any issue presented.

Additionally, the State has misstated facts and/or has contradicted its own statements which require correction. For example, the State recites as "fact" that Mr. Brown was driving his car with a friend in the passenger seat. There is no citation to the record where this fact is found because it was untrue. Mr. Brown was alone in his car. The State, on page two of its brief, recites as "fact" first, that the Crown Victoria, the other vehicle involved in the collision, was driven by Lakeisha Williams but cites no record citation to where this fact is found because it was not true. The Crown Victoria was driven by Jasmine Jack as it states as "fact" on page three of its brief.

The State recites that Dale Clark, who observed the incident and said the Crown Victoria was not the vehicle that passed him going the wrong way. This fact

was part of Mr. Brown's statement of facts, too, but also added that Mr. Clark testified he observed the incident for a split second in his rearview mirror as he was leaving I-295. The State, on page three of its brief, recites as "fact" that Ms. Williams testified she was "certain" that the car she was in, the Crown Victoria driven by Ms. Jack, was traveling in the proper direction. However, on page four of its brief, the State recites exactly what Mr. Brown stated in his initial brief: Ms. Williams told a paramedic on the scene who was treating her right after the accident that the "woman that was driving was going the wrong way down the street when they were struck."

The State, on page 7 of its brief, recites as "fact" that one of the eyewitnesses to the incident interviewed by Florida Highway Patrol Corporal Austin Bennett, Janice Balay, was "less than clear" about which car she said was travelling in the wrong direction. However, on page 8 of its brief, the State recites as "fact" that, according to the transcript, Corporal "Bennett testified that Janice Balay said a larger, dark colored, older vehicle was traveling northbound in the southbound lane. The transcript is clear about what Ms. Balay told Corporal Bennett.

The State presents its "facts" related to Kristie Shaw, an expert who testified about something called retrograde extrapolation. Absent from its recitation of "facts" was any statement that Ms. Shaw never conducted an analysis of Mr. Brown's blood and that she lacked critical data points she testified were absolutely necessary before rendering an expert opinion. Finally, with regard to the cell phone records, the State

improperly interjects its opinion into its supposed statement of "facts." AB at pg. 11. The statement of facts should state only the facts in a clear, concise, and neutral manner without comment or opinion.

ARGUMENT IN REPLY

I. THE STATE WAIVED ANY ARGUMENT REGARDING THE COURT'S JURISDICTION TO HEAR DEFENDANT'S MOTION FOR NEW TRIAL WHEN IT CONSENTED TO THE TRIAL COURT CONSIDERING THE MOTION ON THE MERITS, OR, IN THE ALTERNATIVE, APPELLANT IS ENTITLED TO RELIEF AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, *NUNC PRO TUNC*.

The State's sole argument on this point is that the Trial Court was without jurisdiction to even consider the motion for new trial because it was untimely filed. What the State ignores is that it waived any claim based on the untimeliness of the motion for new trial and permitted the Trial Court to enter a ruling on the merits.

> "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.

The State admits it provided a "qualified waiver of the ten-day period" but that its waiver was irrelevant. The State also avers that because the Trial Court lacked any jurisdiction to hear the motion, regardless of the waiver, then any argument

about an improper standard used to decide the merits is also irrelevant. And even if the Trial Court granted relief, the State argues, this Court would be compelled to reverse.

In the alternative, Mr. Brown agrees with the State that his trial counsel was ineffective *per se* for failing to timely file a motion for new trial. AB at 19 (citing *Robinson v. State*, 462 So.2d 471, 477 (Fla. 1st DCA 1984). The Florida Supreme Court in *Robinson* ruled that "the deprivation of the defendant's right to any judicial review of evidentiary weight constitutes a fundamental injustice." *Id.* Importantly, as it relates to the State's jurisdiction argument, *Robinson* is instructive:

> "The defendant never waived or intended to forego his right to judicial review of the weight of the evidence pursuant to a motion for new trial under rule 3.600(a)(2), Florida Rules of Criminal Procedure. We must assume that counsel for the defendant and the state, as well as the trial judge, were acting under a good faith misconception as to the applicable rule when the unauthorized extension was granted without objection from the state."

Id., at 478.

Here, the facts are nearly identical to those in *Robinson*. Mr. Brown never intended to waive or forego his right to the motion for new trial and that when the Trial Court inquired about the timeliness issue, both counsel for Mr. Brown and for the State, as well as the Trial Court "were acting under a good faith misconception as to the applicable rule" in taking up the motion on the merits without objection from the State. The end result, according to the Supreme Court, was a clear statement

that it was not willing to allow, among other reasons, the Trial Court's "misconception of its authority under the applicable rule to override the interest of the courts in seeing that justice is ultimately done." *See Robinson*, 464 So.2d at 478. The interests of justice require at least a fair consideration of the merits of the motion for new trial despite the procedural challenge and the State's waiver.

If Trial Counsel was ineffective *per se* in failing to timely file a motion for new trial, as the State conceded, and the Supreme Court in *Robinson* equated this failure as "substantially analogous, if not equal, to" trial counsel's failure to timely file a notice of appeal to preserve appellate review (*see State v. Meyer*, 430 So.2d 440 (Fla. 1983)), this Court is obligated to reverse and remand this matter to the Trial Court because the record is unclear if the Trial Court applied the correct standard in denying the motion.

The State avers that the failure to timely file the motion for new trial was only *per se* procedurally deficient and that there is still a requirement for Mr. Brown to demonstrate prejudice. However, the State fails to recognize the prejudice the Supreme Court precisely found in *Robinson*, namely, the loss of any judicial review of the weight of the evidence is a fundamental injustice, recognizing "the critical need for some form of discretionary judicial review to serve as a safety valve in those cases where the evidence is technically sufficient to prove the charges but the weight does not support the verdict." *See Robinson*, 464 So.2d at 477. This is the prejudice

Mr. Brown suffered as a result of the plainly obvious failure to timely file the motion for new trial.

The State argues *Robinson* does not establish a rule of *per se* prejudice for failing to file a timely motion for new trial and that as a result, Mr. Brown is required to establish prejudice, namely, that but for Trial Counsel's failure to timely file a motion for new trial, there is a reasonable likelihood that the outcome of the proceeding would be different. *See Strickland v. Washington*, 466 U.S. 668 (1984). Here, the State argues the motion for new trial, even if timely filed, was without merit and therefore Trial Counsel's failure to file the motion cannot be deemed ineffective. Mr. Brown avers the State has not provided any counter-argument concerning the merits of the motion for new trial and thus its conclusion that the motion itself was meritless is speculative and conclusory.

The record is unclear as to what standard the Trial Court employed in denying the motion. Mr. Brown has averred that because the record is unclear, it cannot be said the Trial Court did not apply an incorrect standard. 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 v. State*, 817 So.2d 1042, 1045 (Fla. 2d DCA 2002). This Court

should vacate the conviction and sentence and remand this matter to the Trial Court to consider his motion for new trial on the merits, *nunc pro tunc*, on the basis that, like in *Robinson*, Mr. Brown was denied his right to seek judicial review of the weight of the evidence as a result of Trial Counsel's *per se* ineffective assistance.

II. THE EXPERT TESTIMONY ON RETROGRADE EXTRAPOLATION WAS IMPROPERLY ADMITTED BECAUSE IT LACKED REALIBILITY

The State conceded their expert witness, Kristie Shaw, never conducted a retrograde extrapolation analysis as it relates to blood taken from Mr. Brown. Further, the expert testified she would not complete a retrograde extrapolation analysis if there was evidence of an open container in the vehicle. She was not told by the State that there was an open container found in Ms. Jack's vehicle. But she was told by the State that there was no alcohol found in Mr. Brown's vehicle.

The expert testified she could not determine how fast or how slow either Mr. brown or Ms. Jack eliminated alcohol in their systems. The expert further testified there are two pieces of required information in order to complete retrograde extrapolation analysis (absolute barebones): gender and the time of last drink. The expert also testified that important to the analysis is whether the person was drinking on an empty stomach or on a recent meal, information she lacked for Mr. Brown but had for Ms. Jack.

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). However, if an expert's opinion is based on speculation and conjecture, not supported by the facts, it should not be admitted. *See M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A.*, 932 So.2d 459, 464 (Fla. 4th DCA 2006).

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, and NEVER completing a report on alleged retrograde extrapolation involving Mr. Brown's BAC at the time of the accident, she was permitted to offer her expert opinion regarding exactly that point. Further, the chart the State introduced purportedly was a visual depiction of the retrograde extrapolation analysis Ms. Shaw conducted. However, she admits she lacked critical data points and information to complete her analysis and any depiction of this so-called analysis was improper and not based on reliable data.

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. The chart was improperly admitted over objection. And whether cumulative or not, there is no way to correctly state the full effect of this error on the outcome of the trial such that its admission can be fairly deemed harmless. this Court should reverse and remand this case for a new trial.

CONCLUSION

Based upon the foregoing, and the claimed points of error and legal argument contained in Mr. Brown's amended initial brief, none of which is waived or abandoned, 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 grant Mr. Brown a new trial based upon the erroneous introduction of expert testimony; and for such other and further relief as this Honorable Court shall deem just, fair, and equitable.

DATED this 5th day of August, 2016.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief complies with the requirements of the Florida Rules of Appellate Procedure. Exclusive of parts not counted, this Reply Brief contains less than 7,000 words. This Reply Brief is typed in 14-Point Times New Roman font.

/s/ *Mark K. McCulloch*
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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 5th day of August, 2016, to:

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/s/ *Mark K. McCulloch*
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