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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal, Logan County District Court Honorable Charles Hobbs Case Number 2015CR228	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JOSHUA S. UNREIN	
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,494 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

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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.

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II. Did the trial court err when it admitted into evidence a pair of black jeans and allowed the prosecutor to argue Mr. Unrein was wearing them during the accident where no one testified that they saw him wearing the jeans or even pants that looked like them?

III. Does the cumulative effect of the errors in this case require reversal because Mr. Unrein was deprived of his right to a fair trial?

STATEMENT OF THE CASE

On October 1, 2015, the State charged Joshua Unrein with vehicular homicide, a class-three felony, § 18-3-106(1)(b)(I), C.R.S. (2015), driving under restraint ("DUR"), an unclassified misdemeanor, § 42-2-138(1)(d), C.R.S. (2015), and careless driving, a class-one traffic offense, § 42-4-1402(1), (2)(b), C.R.S. (2015). Supr, pp 6-7. The prosecutor then changed the careless driving charge to a charge for vehicular assault, a class-four felony, § 18-3-205(1)(b), C.R.S. (2015). Supr (second pdf), pp 13-17; CF, pp 186-89. And the prosecutor dismissed the

DUR charge. TR 10/3/16, p 23:2-12. The court held a jury trial from October 3-6, 2016, and the jury found Mr. Unrein guilty as charged. TR 10/6/16, pp 171-73; CF, pp 228-29. The court gave him concurrent sentences to the Department of Corrections, six years for vehicular homicide, and three for vehicular assault. CF, p 301.

STATEMENT OF THE FACTS

The charges here arose out of an accident on September 23, 2015, where a car went out of control on a county road outside Sterling, swerved off the road, and rolled multiple times in a field. There were three people in the car, who were all in their 20s: Mr. Unrein, his best friend, Bradley Birchfield, and Birchfield's girlfriend, Jonnelle Jenkins. TR 10/4/16, pp 43-49, 121-26; TR 10/6/16, pp 44-45. Everyone had been drinking, and Unrein and Birchfield had also used some drugs. TR 10/6/16, pp 17-18, 25-33. Unrein's blood alcohol content was .145 and Birchfield's was .190. *Id.* Additionally, no one was wearing a seatbelt, and so everyone was thrown out of the car. TR 10/4/16, pp 43-49; TR 10/5/16, pp 210-16, 218-29. As a result, Unrein and Jenkins were seriously injured, and Birchfield was killed. *Id.* The prosecutor charged Unrein with vehicular homicide and assault because the police believed he was driving, and so held him responsible for Jenkins's injuries and his best friend's death, but it is not clear Unrein was driving.

At trial, everyone agreed Jenkins was in the backseat, and that Unrein and Birchfield were in front, but it was unclear who was driving because everyone had been thrown out of the car. TR 10/4/16, pp 86-87; TR 10/6/16, pp 60-66. The prosecutor charged Unrein because, immediately after the accident, Jenkins called 911 and said Unrein was driving. TR 10/4/16, pp 36-39; Supp, Ex 1. However, Jenkins was disoriented during the call and could not remember her last name. *Id.* She also told officers at the scene that Unrein was driving, but she was extremely upset at the time because she had just learned that Birchfield was dead, and she could not remember her birthdate when asked. TR 10/4/16, pp 56:3-9, 60-63, 76-79, 86-87. Jenkins had also suffered a severe concussion as a result of the accident, which affected her memory for some time afterward. TR 10/6/16, pp 48-51, 60-64, 78-79.

After she started to recover from her concussion, Jenkins said she thought about the accident, and she did not think Unrein was driving. She said that she might have said he was driving because he drove the three of them around most of the time, and he had been driving earlier in the day. *Id.* at 47-55, 65-69, 92:5-9. But she said Birchfield also liked to drive, and, when she thought through the day, she remembered that he had asked to drive shortly before the accident. *Id.*

Because Jenkins did not actually think that Unrein was driving, the prosecution had to find some other evidence to support the charges against him. As a result, it decided to offer expert testimony from Trooper Seth Soukup, an accident reconstructionist with the Colorado State Patrol. At the preliminary hearing, Soukup had said he could not tell who was driving because everyone was ejected from the car, and he could not tell from where people were ejected based only on where they landed outside the car. TR 12/15/15, pp 18-19, 24-25, 28-32. Soukup, however, reversed positions and decided that he could tell who was driving based solely on where people landed once it became clear that Jenkins's testimony was not going to support the prosecution's case.

The nature of Jenkins's testimony became clear at the preliminary hearing because Soukup testified, after defense counsel refreshed his recollection, that Jenkins had told a victim advocate just two days after the crash that she was not sure Unrein was driving. *Id.* at 14:13-20, 20-22, 36:13-18. Defense counsel then tried to call Jenkins to testify so she could tell the court that she thought her statements after the crash were inaccurate. *Id.* at 38-52. Counsel also moved to dismiss the case because Jenkins's statements were the only evidence that Unrein was driving. *Id.* The court agreed this was a "close" case, and that Jenkins's statements right after the crash "may well be inaccurate," but it refused to dismiss

the case because the standard for establishing probable cause at a preliminary hearing is low. *Id.* at 49-52.

Shortly after this ruling, Soukup issued a new expert report in which he claimed for the first time that he could tell who was driving based just on where Birchfield and Unrein landed in the field. CF, pp 127-57; Second Supp, pp 11-48. Soukup said he had looked again at his 3D model of how he thought the car rolled during the crash, and, based on this model, he thought Birchfield was ejected from the passenger's window before Unrein was ejected from the driver's window. Second Supp, p 45. Based on this conclusion, Soukup said he could tell Unrein was driving. Second Supp, pp 46-48. He explained his new opinion by saying it was based on "vehicle orientation," "[o]ccupant final rest," his "experience," and "[j]ust kind of overall totality of the circumstances." TR 4/1/16, pp 10-12.

Defense counsel moved to exclude Soukup's testimony because it was not based on any scientific principles and so it appeared Soukup was just speculating about what might have happened. CF, pp 98-102. But the court denied the motion and admitted Soukup's testimony without any limitations. TR 4/1/16, pp 126-43.

The following evidence was then presented at trial: In September 2015, Unrein, Birchfield, and Jenkins were all living with Unrein's grandparents on a farm outside Sterling. TR 10/4/16, pp 121-26. Unrein's grandmother had

purchased the car involved in the accident for the three of them to use while they were living and working on the farm. *Id.*

On September 23rd, Unrein's grandparents were out of town, and so Unrein, Birchfield, and Jenkins were on their own. *Id.* at 123-24. They did the chores around the farm, feeding animals, etc. TR 10/6/16, pp 47-48, 52-56. Then they drove into Sterling to run errands. *Id.* After that, they went to do some work at an old church rectory outside Sterling on another piece of property the Unreins owned. *Id.* at 47-48. Jenkins said she, Birchfield, and Unrein were all drinking throughout the day, and that the boys smoked marijuana together. TR 10/6/16, pp 60-64, 91:14-23. When they left the rectory, they headed back to the farm, and that is when Jenkins thought Birchfield started driving. *Id.* at 47-48, 50-51, 65-69.

Shortly thereafter, at 5:17 p.m., Jenkins called 911 and said she had been in a car accident. TR 10/4/16, pp 36-39. She was obviously distressed and did not know where she was or what her last name was, but she said her "boyfriend" was dead, and her "friend" was unconscious. Supp, Ex 1. She also described the person who was unconscious as her "little brother" and said he "was driving." *Id.*

The police found Jenkins because she read the road signs near her to the dispatcher, *id.*, and Sergeant Jeff Harris from the Logan County Sheriff's Office was the first to arrive, TR 10/4/16, pp 43-46. He said Jenkins was "in shock," and

"crying and obviously upset by what she had seen and just kind of not really understanding what was going on." *Id.* at 56:3-9. Harris checked Birchfield and confirmed he was dead, and then started working on Unrein because he was still breathing. *Id.* at 46-49. Medical personnel then arrived and took over. *Id.*

Deputy Jeff Moser from the sheriff's office also responded to the crash. When he arrived, he said there were a lot of people already at the scene, including the Fleming Fire Department and medical personnel, medical personnel from Logan County, and other officers from the sheriff's office. *Id.* at 57-58. Moser said he assisted with Unrein's care and spoke with Jenkins. *Id.* at 57-58, 60-63. Moser said she told him Unrein was her brother, and that they had been driving and "[h]er brother had lost control of the vehicle." *Id.* But Moser also said Jenkins had blood on her face and clothes and was "hysterical and obviously hurt and injured." *Id.*

Trooper Tom Davis from the Colorado State Patrol was also on scene, and he said he also asked Jenkins who was driving. *Id.* at 76-79. He said she pointed at Unrein, but he also said she seemed to be "overwhelmed" by what was happening, and could not remember her birthdate when asked. *Id.* at 76-69, 86-87. Jenkins could only say she was born in "June." *Id.*

Once Jenkins was loaded into an ambulance, Davis began photographing the scene. *Id.* at 79-80; Ex 2-26. He took photos of the car in the field and its

surroundings, but he did not take a picture of Unrein to show where he landed because Unrein had already been taken to the hospital. TR 10/4/16, pp 81:12-15, 89-90, 98-99. Davis just took pictures of the general area where Unrein was lying when he received medical treatment because the grass had been trampled by medical personnel and littered with medical debris. *See* Ex 4-6, 8 (Exhibits pdf, pp 448-50, 452). These photos show Unrein landed somewhere between the car and the road. Davis also took photos of Birchfield, who landed about 40 feet on the other side of the car, and who had not yet been moved. *See* Ex 24-25 (Exhibits pdf, pp 432-33).

Trooper Soukup then arrived and started his investigation. TR 10/4/16, pp 140-41; TR 10/5/16, pp 17-19. He said he first tried to determine how the car moved during the crash by looking for tire marks on the road and for tire and vehicle impressions in the dirt in the field. TR 10/4/16, pp 148-50. He then used lasers to map the crash site and all of the marks that he thought the car had left on the ground so he could create a 3D model of the scene and figure out how it rolled. TR 10/4/16, pp 153-57. Once he figured out how he thought the car moved, Soukup said he used a mathematical formula to estimate how fast it was going when it left the road. TR 10/4/16, pp 157-63. He said he thought the car rolled three times and was going at least 69 miles per hour when it left the road. *Id*.

Soukup then told the jury that he could tell Unrein was driving, and he showed two animations that he had made that showed how he thought Birchfield and Unrein were ejected from the car. TR 10/4/16, pp 167-70, 209-18; Second Supp, Env (animations CD). Soukup said he could figure out who was ejected when and where just by looking at his model of how he thought the car rolled during the crash, and the final locations of Birchfield and Unrein. Soukup said his conclusion that Unrein was driving was based on "simple physics principles." TR 10/4/16, p 210:3-9. First, he compared Birchfield's body to a basketball and said he had to have been ejected with more force than Unrein because he landed further from the car. TR 10/4/16, pp 210-12. To get the requisite amount of force, Soukup said Birchfield had to have been "slingshot[ed]" out of the car, "probably" on the high side of a roll. *Id.* at 212-13.

Second, Soukup said Unrein had to have been ejected on the "low side" of a roll because he was in the path of the vehicle, and so must have been ejected with less force since he landed closer to the car. *Id.* at 213-14. Soukup then asserted, without any explanation, that "the first half of the second roll is when it would be most likely that someone such as Mr. Unrein would be able to be ejected from the vehicle in a low side manner." *Id.* However, he also said that Unrein likely "tumble[d]" a little after he was ejected because a person ejected at a low point

would "follow behind the vehicle." *Id.* And, indeed, Soukup's animation shows Unrein's body moving a fair amount after it exits the vehicle to get to where Soukup believed it landed. Second Supp, Env (animations CD).

Based on this information, Soukup said he could conclude that Unrein was driving, and he said he was "very certain" about this. *Id.* at 215:6-18; TR 10/5/16, p 177:8-17. Soukup reached this conclusion even though he could not be sure where Unrein was found after the crash because he arrived after Unrein was taken to the hospital, TR 10/4/16, pp 142-44; TR 10/5/16, p 19:17-19, and even though he thought Unrein kept moving after he was ejected, TR 10/4/16, pp 213-14.

Soukup also did not explain why Birchfield had to be ejected out of the passenger's window, and why he could not have come out the driver's window when it was on the high side of a roll. And he did not explain why Unrein could not come out the passenger's window when it was on the low side of a roll, since the car rolled all the way over three times. Finally, Soukup did not explain why the two men had to come out different windows, and why one could not follow the other.

On October 29, 2015, Soukup said he examined the car at the tow lot and found a small blue, cotton fiber caught on the broken window frame of the front passenger window. TR 10/4/16, pp 181-82; Ex 36-39 (Exhibits pdf, pp 425-28).

Soukup thought this fiber might have come off someone's jeans when they flew through the window, and Birchfield's jeans were ripped. Ex 26 (Exhibits pdf, p 434). Soukup did not, however, save either Birchfield or Unrein's clothing, so the police could not compare the fiber to their clothes. TR 10/5/16, pp 185-93. In fact, no one even knew what Unrein's clothes looked like. *Id.* at 151:4-20.

While Soukup was looking through the car, he noticed, for the first time, a pair of black jeans on the front driver's seat under a plastic bag full of medical debris from the scene, including bandage wrappers, etc. TR 10/4/16, pp 188-90; Ex 42 (Exhibits pdf, p 416). These jeans were not in the passenger compartment of the car when Davis took his photos on September 23rd. Ex 15 (Exhibits pdf, p 440). And Soukup had no idea how they got there. TR 10/4/16, pp 190-91, 204-05. Nevertheless, he speculated that maybe they came off Unrein because, at other crash sites, Soukup had seen medical personnel cut clothing off injured people and put it in a vehicle. TR 10/4/16, pp 190-91. However, the black jeans were not cut, and they did not have any visible blood on them. Third Supp, pp 1-6 (color photos of jeans). Regardless, the trial court found Soukup's speculation about what medical personnel might have done was sufficient to allow the prosecutor to admit the black jeans into evidence, and to argue that they had come off Unrein, and so

the blue cotton fiber on the passenger window must have come from Birchfield's pants. TR 10/4/16, pp 192-204.

Finally, the prosecutor offered into evidence the results of Birchfield's autopsy. Dr. Michael Burson said Birchfield died because he injured his head and neck, either while being banged around inside the car or when he was thrown from it. TR 10/6/16, pp 3-17. Burson also noted that Birchfield had some lacerations on his right shoulder that could be consistent with a "dicing" injury, which occurs when a person's skin is up against a piece of tempered glass, like a car window, when it breaks. *Id.* at 20-23. Tempered glass is designed to break into little cubes for safety. *Id.* And Burson claimed the abrasions on Birchfield's right shoulder were "little square to rectangular and linear shaped abrasions." *Id.* However, he did not mention this in his autopsy report. On the contrary, his report described the lacerations on Birchfield's right shoulder as "scattered" and of "variable size and shape." *Id.* And the report noted Birchfield also had injuries to his left arm and shoulder. *Id.* at 22-24.

Dr. Molly Decker, who treated Unrein, also testified and said most of Unrein's injuries were on his right side. Unrein had abrasions on his upper and lower back, and the right side of his abdomen, and the bone around his right eye was broken. TR 10/5/16, pp 218-29. He also had a broken nose and a possible

concussion. *Id.* The fact that he had injuries on his right side suggests that Unrein may have fallen out of the right or passenger's side of the car.

In the end, the prosecution's case depended heavily on Soukup's claim that he could tell who was driving based solely on where Birchfield and Unrein landed in the field.

SUMMARY OF THE ARGUMENTS

The trial court erred because it allowed Trooper Soukup, who was qualified as an expert in accident reconstruction, to testify that he could tell Mr. Unrein was driving at the time of the car accident based just on where Unrein and his friend, Mr. Birchfield, landed in the field. This testimony was directly contrary to Soukup's testimony at the preliminary hearing, where he said it was impossible to tell who was driving based just on the physical evidence. It was also clear Soukup's new opinion was not based on reliable, scientific principles, as required by CRE 702, because he could not explain, either before or at trial, why he thought Unrein was driving. Therefore, his testimony was not proper expert testimony.

The trial court also erred because it admitted a pair of black jeans that Trooper Soukup found in the car a month after the accident, and allowed the prosecutor to argue Unrein was wearing the jeans during the accident. The jeans were inadmissible under CRE 401-403 because no one saw Unrein wearing them

or any pants that looked like them. Therefore, there was no evidence that proved he was actually wearing the jeans, and they should have been excluded as irrelevant. The jeans were important because Soukup found a blue, cotton fiber on the broken frame of the passenger's window, and the prosecutor argued Unrein must not have come out that window because his jeans were black.

The cumulative effect of these errors deprived Unrein of his constitutional rights to due process and a fair trial. So, this Court should reverse and remand for a new trial.

ARGUMENTS

I. The trial court erred because it admitted testimony from an accident reconstructionist about who was driving that was not based on scientific principles and was merely speculation dressed up as expert testimony. This violated CRE 702 and 403 and Mr. Unrein's constitutional right to due process.

a. Standard of Review

Defense counsel moved to exclude Trooper Soukup's testimony about who was driving under CRE 702 and 403 and the due process clauses of the state and federal constitutions. CF, pp 98-102, 116-57; TR 4/1/16, pp 1-94. Counsel argued Soukup's testimony was not based on reliable, scientific principles, and so he was not qualified to give it, and it was unreliable and unhelpful. CF, pp 98-102. But the court denied the motion. TR 4/1/16, pp 126-43; CF, p 179. Defense counsel

renewed his objection at trial, and objected to Soukup's use of animations to show the jury what he thought happened during the accident. TR 10/4/16, pp 15-22, 103-15, 138:17-22. But the court again overruled the objections. *Id.* Finally, after the verdict, defense counsel moved for a new trial because Soukup had given improper expert testimony, but the court denied this motion. CF, pp 265-80.

Whether admission of Soukup's testimony violated Mr. Unrein's constitutional right to due process is a question of law that this Court reviews de novo. *See Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008), *superseded by statute on other grounds*, § 16-8.5-103, C.R.S. (2008); *People v. Ortega*, 370 P.3d 181, 184 (Colo. App. 2015). Absent a constitutional violation, this Court reviews the decision to admit expert testimony for abuse of discretion. *People v. Rector*, 248 P.3d 1196, 1200 (Colo. 2011).

b. Trial Proceedings

At the preliminary hearing on December 15, 2015, Trooper Soukup said he could not tell who was driving based only on where Mr. Birchfield and Mr. Unrein landed in the field. TR 12/15/15, pp 18-19, 24-25, 28-32. He explained that when you have a crash like this, where everyone is ejected, an accident reconstructionist will "very rarely, if ever," be able to say that "an occupant in the passenger seat came out halfway through or 60 percent of the way through the second roll, and

flew at a height of 48 feet for a distance of 162 feet, to land where he landed." *Id.* at 31:13-23. He said there is no formula that is "available or dependable enough to do that" because "*[t]here are just too many variables, too many unknowns to actually be able to figure that out*." *Id.* at 31-32 (emphasis added). Defense counsel then asked if Soukup would ever feel comfortable saying that "Person A must have been driving because of their location outside the vehicle in relation to the—the flipping or the rolling," and Soukup said, "[N]ot in this case." *Id.* at 32:3-10.

In light of this testimony, defense counsel asked the court to dismiss the case because the only evidence Unrein was driving was Ms. Jenkins's statements immediately after the crash, which she had recanted. *Id.* at 47-49. The court declined to dismiss the case because the standard for probable cause is low, but agreed it was a close question even under that standard. *Id.* at 49-52. This ruling made it clear the prosecution's case against Unrein was weak.

After that, Soukup reversed positions. Just three weeks later, on January 8, 2016, he issued a new expert report in which he claimed he could determine who was driving based just on where Birchfield and Unrein landed. CF, pp 127-57; Second Supp, pp 11-48. Soukup said he had looked again at his 3D model of how he thought the car rolled during the crash, and, based on this model, he thought it was "highly possible" that "Mr. Birchfield was ejected from the vehicle *through*

the passenger's side window during the first half of the second roll, and that Mr. Unrein was ejected from the vehicle *through the driver's side window as the vehicle was entering the second half of the second roll*." Second Supp, p 45 (emphasis added). In other words, Soukup made exactly the type of determination that he said was impossible at the preliminary hearing. Based on this information, Soukup said he thought Unrein was driving. Second Supp, pp 46-48.

As additional support for his theory, Soukup noted that "[t]here was no physical evidence observed during the course of the investigation to indicate that Joshua Unrein had *not* been the driver at the time of the crash." Second Supp, p 46 (emphasis added). In other words, he claimed that the fact that there was no physical evidence to support his theory about who was driving somehow proved that he must be correct.

Defense counsel moved to exclude Soukup's new testimony because it did not appear to be based on scientific principles. CF, pp 98-102. In response, the prosecutor argued that the basic principles behind accident reconstruction have been accepted "for decades," and so the court should assume all of Soukup's testimony was reliable. CF, pp 118-20.

The trial court held a hearing. At the hearing, Soukup said his opinion changed after the preliminary hearing because he continued working on his 3D

model of the crash, and by looking at it he "was able to get a better understanding and idea of where the possibilities were for an occupant to have been ejected out of that vehicle." TR 4/1/16, p 10:5-16. He said this additional analysis had given him "the confidence to say it's *probable* or *likely* that somebody *may* have exited the vehicle at this point." *Id.* at 10-11 (emphasis added). However, he said he still could not say, "[Y]es, I know they came out of the vehicle at this point." *Id.*

Soukup also said he did not use any math to determine where people were ejected from the car. The only mathematical formula he used was the one for determining how fast the car was going when it left the road. *Id.* at 15-20. When defense counsel specifically asked if Soukup's opinion about who was driving was based on "any scientific principles," Soukup replied it was based on "the totality of my evidence." *Id.* at 22-23.

Soukup then explained why he could not use a formula to determine when people were ejected from the car. He said he could not use math to determine where a person was ejected based just on where the person landed because there were too many unknown variables, including "the angle that they were thrown out of the vehicle," and the force with which they were ejected. *Id.* at 38-39. He said without this information it was impossible to figure out what path a person took to arrive at a particular spot. Unless someone was out there with a video camera,

Soukup said all an expert can do is make an "educated guess" about where a person was ejected. *Id.* And he said that is what he did in this case. *Id.* at 41-43.

Soukup also conceded that he did not know exactly where Unrein landed after the accident because Unrein was taken to the hospital before Soukup arrived. *Id.* at 70-71. Soukup's report says Unrein came to rest "approximately 40.8 feet" to the southeast of the car. Second Supp, p 47. But it is unclear where he got this number because Soukup only knew the general area where Unrein was receiving medical treatment because the grass had been trampled by medical personnel. TR 4/1/16, pp 70-71; *see also* Ex 5-6 (Exhibits pdf, pp 449-50). Therefore, it appears Soukup was also guessing when he determined where Unrein landed after the crash.

Even though Soukup could not explain the basis for his opinion about who was driving, and in fact explained why it was impossible to determine where someone was ejected from the car based solely on where he landed, the trial court decided to admit all of Soukup's proposed testimony. TR 4/1/16, pp 126-43. The court said Soukup's testimony about how fast the car was going was reliable because the method he used for determining its speed has been "accepted for decades." *Id.* at 130-31. The court did not, however, explain why Soukup's testimony about ejection points and driver identity was reliable, even though

defense counsel made it clear that was the part of Soukup's testimony he was challenging. *Id.* at 134-43.

Soukup then testified at trial and made his expert testimony sound much stronger than it did at the pretrial hearing. First, he said he was more certain about who was driving than he had previously indicated. Instead of saying it was "probable," "likely," or "highly possible" that Unrein was driving, Soukup said he was "very certain" Unrein was driving. TR 10/4/16, p 215:6-18; TR 10/5/16, p 177:8-17.

Second, Soukup tried to make the basis for his opinion sound scientific. He told the jury his opinion was based on "physics principles." TR 10/4/16, p 210:3-9. He then compared Birchfield's body to a basketball and talked about its "trajectory," or the path it took to arrive at its destination—even though there was no reason to talk about this because Soukup had said it was impossible to determine Birchfield's trajectory. *Id.* at 209-10.

Soukup also claimed, for the first time, that he had relevant expertise in "occupant kinematics," or the study of how people's bodies move inside a car. When questioned by defense counsel, Soukup conceded that most of his training with the state patrol was on vehicle movement, and not occupant kinematics. TR 10/5/16, pp 89-91. However, he claimed he had additional, relevant training in

applied physics because he had also done some research on his own. *Id.* at 88-89. Specifically, Soukup said he knew about "occupant kinematics" and "ejection trajectories" because he likes to read research papers from the Society of Automotive Engineering. *Id.* He then said on redirect that his opinions in this case were actually based on some of the articles he had read on his own. The prosecutor asked him what was the basis for his opinion that Unrein was driving, and Soukup said his opinion was based in part on "a number of papers that I have read that talk about occupant kinematics during a high speed rollovers [sic]." TR 10/5/16, p 174:10-24. This was another attempt by Soukup to bolster his opinion by making it sound scientific.

Finally, Soukup's testimony was different from the pretrial hearing because he showed the jury two animations of what he thought happened during the crash. Second Supp, Env (animations CD). These animations make it clear that Soukup's testimony was just speculation because to make them he had to guess about a lot of variables. For example, the animations show Birchfield flying out of the car at a particular angle and height, even though Soukup said it was impossible to know at what angle Birchfield left the car and how high he flew. *See* TR 4/1/16, pp 38-39. And Soukup admitted that he just picked an angle and height of travel for

Birchfield because he did not know what Birchfield's trajectory was. TR 10/5/16, pp 69-72.

The animations also show Birchfield bouncing and skidding on the ground after he lands, and they show Unrein tumbling around on the ground for several feet after he is ejected. Second Supp, Env (animations CD). Soukup was just guessing when he decided how the bodies moved and how far they moved after they were ejected, and the fact that the men's bodies move so much after ejection shows how many unknown variables there are in this case. Interestingly, Soukup said he could have made Birchfield's body cartwheel in the air in his animation, but decided not to because "that would just be *more speculation* on my part because I don't know that he actually cartwheeled or not." *Id.* at 176:2-12 (emphasis added).

c. Analysis

Trooper Soukup's expert testimony that Mr. Unrein was driving was inadmissible because it was not based on reliable, scientific principles, and the facts he relied on when forming his opinion were not reliable either. CRE 702 allows a witness to offer expert testimony if it is based on "scientific, technical, or other specialized knowledge," it "will assist the trier of fact to understand the evidence or to determine a fact in issue," and the witness is qualified to give the

testimony "by knowledge, skill, experience, training, or education." This rule requires expert testimony to satisfy "more stringent standards" than lay testimony. *People v. Martinez*, 74 P.3d 316, 322-23 (Colo. 2003). It requires a court to find that expert testimony is both relevant and reliable. *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001); *Ruibal v. People*, 2018 CO 93, ¶ 12 (when admitting expert testimony under CRE 702, court must make "specific findings on the record" as to "the reliability of the scientific principles upon which the expert testimony is based," and "the qualifications of the witness giving the testimony").

To be reliable, expert testimony "must be grounded in 'the methods and procedures of science rather than subjective belief or unsupported speculation.'" *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007) (quoting *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 639 (D. Colo. 2006)). That means the proponent of the evidence "must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which satisfy Rule 702's reliability requirements." *Id.* It also means a court must reject expert testimony that "is connected to existing data only by a bare assertion resting on the authority of the expert." *Id.*

Here, Soukup's testimony that he thought Unrein was driving was not reliable because it was not based on any scientific principles. He said he thought it

was “highly possible” that “Mr. Birchfield was ejected from the vehicle through the passenger’s side window during the first half of the second roll, and that Mr. Unrein was ejected from the vehicle through the driver’s side window as the vehicle was entering the second half of the second roll.” Supp, p 45. But he never explained why he thought the men came out of these particular windows at these particular times. At trial, Soukup said he thought Birchfield was ejected on the high side of a roll because he travelled past the car, and that Unrein was ejected on the low side of a roll because he fell behind the car. TR 10/4/16, pp 210-14. However, he did not explain how this information allowed him to conclude that the men came out at the precise moments he claimed they did. After all, both the driver’s and passenger’s side windows were on the high and low side of a roll at different points during the crash because the car rolled over three times. Soukup also did not explain why the men could not come out the same window, one after the other.

Moreover, Soukup did not explain how he knew how far the men’s bodies travelled after they exited the car. His animations show both bodies moving a fair amount after they are ejected from the car, and so neither body lands in the place where it is first ejected. Supp, Env (animations CD). Assuming Soukup is correct that both bodies continued to move after being ejected, it is unclear how he knew

how far each body moved before reaching its final location. Therefore, neither his testimony nor the animation he showed was based on scientific principles.

Ultimately, Soukup's testimony that he thought Unrein was driving was just a bare assertion that he asked the jury to accept because he is an expert in accident reconstruction, and this is not a sufficient basis for admitting expert testimony under CRE 702. The testimony was not based on reliable, scientific principles, or at least not on any Soukup could articulate. The trial court also erred because it did not make specific findings that explained why it found Soukup's testimony on this point to be reliable. *See* TR 4/1/16, pp 130-43; *see also Ruibal*, 2018 CO 93, ¶ 14 ("In the absence of [specific findings concerning the reliability of expert testimony], or a record not only supporting admission but virtually requiring it or precluding any reasonable dispute as to the basis of the court's admission, the trial court must be considered to have abused its discretion in admitting expert testimony.").

Soukup's testimony was also unreliable because it was not based on reliable evidence. He said his conclusion that Unrein was driving was based on where the two men landed after the accident. *See* TR 10/4/16, p 215:10-14. However, he admitted he did not know where Unrein landed because Unrein went to the hospital before Soukup arrived, and no one recorded Unrein's location when the police first

found him. TR 4/1/16, pp 70-71; TR 10/4/16, pp 142-44; TR 10/5/16, p 19:17-19. Since Unrein's location after the crash was one of only two data points that Soukup relied on, his conclusion that Unrein was driving was unreliable. The proponent of expert testimony must show that the method the expert used to reach a conclusion is scientifically sound, and that the expert's opinion is based on reliable facts. *Ramirez*, 155 P.3d at 378.

Soukup was also not qualified to give this testimony because it was not based on scientific principles, and so was outside the scope of his expertise. When deciding whether testimony is reliable, a court should consider "whether the witness is qualified to opine on such matters." *Shreck*, 22 P.3d at 77. Here, Soukup was qualified as an expert in accident reconstruction, but his testimony that Unrein was driving was not based on recognized principles of accident reconstruction. Therefore, he could not give it. *See People v. McFee*, 412 P.3d 848, 863 (Colo. App. 2016) (expert witness's testimony must "be limited to the scope of his or her expertise").

The trial court also should have excluded Soukup's testimony under CRE 403, which requires a court to exclude expert testimony if its probative value is substantially outweighed by the risk of unfair prejudice. *Shreck*, 22 P.3d at 70. Evidence is unfairly prejudicial "when it has an undue tendency to suggest a

decision on an improper basis." *Martinez*, 74 P.3d at 325. Soukup's testimony that he thought Unrein was driving had no probative value because it was speculation, and there was a risk of unfair prejudice. Because Soukup dressed his speculation up as science, there was a risk the jury would give it more weight than it deserved and rely on speculation when rendering a verdict. *See Ramirez*, 155 P.3d at 379 (danger of admitting speculative testimony as expert testimony "is that what appears to be scientific testimony but is really not may carry more weight with the jury than it deserves"); *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999) (verdict cannot be based on "guessing, speculation, or conjecture").

There was also a risk the jury would defer to Soukup's opinion about Unrein's guilt rather than weighing the evidence for itself because he was an "expert," and he was "very certain" Unrein was driving. *See* TR 10/4/16, p 215:6-18; TR 10/5/16, p 177:8-17; *see also People v. Cook*, 197 P.3d 269, 277 (Colo. App. 2008) (therapist's status as expert witness "augmented her testimony with an aura of trustworthiness and reliability"); *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988) (en banc) ("[T]here is a substantial danger the jury simply adopted the expert's conclusions rather than making its own decision.").

In addition to violating CRE 702 and 403, Soukup's testimony violated Unrein's constitutional right to due process because it was unfairly prejudicial and

went to the main question in this case, who was driving. The due process clauses of the state and federal constitutions guarantee criminal defendants the right to a fair trial with an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. This right may be violated if a trial court admits improper evidence because "[a] jury that has been misled by inadmissible evidence or argument cannot be considered impartial." *Harris v. People*, 888 P.2d 259, 264 (Colo. 1995); *see also Payne v. Tennessee*, 501 U.S. 808, 809 (1991) (due process clause is violated when evidence is so unduly prejudicial it renders a trial fundamentally unfair); *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005) (right to fair trial includes "right to have an impartial jury decide the accused's guilt or innocence solely on the basis of the evidence properly introduced at trial"). Here, Soukup's testimony misled the jurors because it led them to believe there was scientific proof that Unrein was driving when there was not.

Because Soukup's testimony violated Unrein's constitutional rights, this Court must reverse unless the State can prove the error was harmless beyond a reasonable doubt. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012). Therefore, the State must show there is no reasonable possibility the error might have contributed to Unrein's convictions. *Id.* It cannot meet this burden.

It was unquestionably prejudicial to allow Soukup to offer "expert" testimony about who he thought was driving since this was the pivotal issue at trial. Soukup was not only labeled an "expert," he was also the prosecution's advisory witness, which means he sat at counsel table throughout the trial. TR 10/3/16, p 33:6-10. This suggested that he had special insights into this case, and his testimony likely impacted the jury's verdict because this was a close case. The only evidence, other than Soukup's testimony, that indicated Unrein was driving was Ms. Jenkins's statements right after the crash, which she had recanted.

The prosecutor also amplified the risk of prejudice by asking the jury to rely on Soukup's testimony. In opening, the prosecutor said the jury would hear "extensive" testimony from Trooper Soukup, and that this testimony would be "very important" because Soukup would "focus on *the physical and scientific evidence* that points to the fact that the defendant was driving and not Mr. Birchfield." TR 10/4/16, pp 25-26 (emphasis added). Therefore, the prosecutor asked the jury to "pay close attention" to all the evidence, "especially when Mr. Trooper Soukup [sic] is testifying." *Id.* at 28-29.

The prosecutor then told the jury in closing that Soukup was "the best there is" in accident reconstruction, and that he was "as highly certified as you can get in accident reconstruction." TR 10/6/16, pp 131-33. He then reminded the jury that

Soukup had said he could tell Unrein was driving just based on the physical evidence. *Id.* These comments ensured the jury would rely on Soukup's testimony when rendering a verdict. *See Venalonzo v. People*, 388 P.3d 868, 881 (Colo. 2017) ("The prosecutor . . . pointed out in his closing argument that Mother is the one person who knows A.M. best, thus furthering the impact of her improper [vouching] testimony."); *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000) (prosecutor compounded error in admitting expert testimony by encouraging jury to rely on it).

The legal instruction on expert testimony did not remedy the error in admitting Soukup's testimony. It told the jurors they were not bound by his testimony and they should weigh his credibility like any other witness. CF, p 238. However, it did not tell them to disregard Soukup's testimony because it was not based on reliable, scientific principles.

Even if this Court reviews this issue under the ordinary, harmless-error standard, reversal is still required. This standard requires the State to prove the error did not affect Unrein's substantial rights. *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009); *James v. People*, 426 P.3d 336, 340 (Colo. 2018) (if government is beneficiary of error, it bears the burden of proving it was harmless). The question is "not whether there was sufficient evidence to support the verdict without the

improperly admitted evidence," but "whether the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Yusem*, 210 P.3d at 469. In this context, "a reasonable probability" does not mean it is "more likely than not" the error caused the defendant's conviction. *People v. Cernazanu*, 410 P.3d 603, 607 (Colo. App. 2015) (quoting *People v. Casias*, 312 P.3d 208, 220 (Colo. App. 2012)). It only means "a probability sufficient to undermine confidence in the outcome of the case." *Id.*

For the reasons discussed, this Court cannot say that Soukup's testimony about who was driving did not influence the jury's verdicts. Therefore, this Court should reverse Unrein's convictions and remand for a new trial.

II. The trial court erred when it admitted into evidence a pair of black jeans found in the car after the accident and allowed the prosecutor to argue they belonged to Mr. Unrein because no one testified that they saw him wearing the jeans or even pants that looked like them. This error was important because the prosecutor relied on the fact that Unrein was wearing black jeans to prove he was driving at the time of the accident.

a. Standard of Review

The trial court admitted into evidence a pair of black jeans Trooper Soukup found in the crashed car on October 29, 2015, after it was towed to a police facility. TR 10/4/16, pp 188-204. Defense counsel objected to admission of the jeans and to Soukup's testimony about them because there was no testimony about where they came from or how they got into the car, and so no chain of custody and

no foundation for admitting them. *Id.* at 190-93, 195-96, 199-200. Defense counsel also argued admitting the jeans without a proper foundation would unfairly prejudice Mr. Unrein and violate his constitutional right to due process. *Id.* at 199-200. The court, however, overruled the objection and admitted the jeans and Soukup's testimony about where he found them. *Id.* at 200-03.

This Court reviews the record de novo to determine whether evidence was so unduly prejudicial that it violated a defendant's constitutional right to due process. *See Bloom*, 185 P.3d at 806; *Ortega*, 370 P.3d at 184. Absent a constitutional violation, this Court reviews the decision to admit evidence for abuse of discretion. *See Kaufman v. People*, 202 P.3d 542, 553 (Colo. 2009).

b. Trial Proceedings

Trooper Soukup first saw the black jeans sitting on the driver's seat of the car when he examined it on October 29, 2015, over a month after the crash. TR 10/4/15, pp 88-190. He said they were sitting under a plastic bag containing medical debris, bandage wrappers, etc., and he had no idea where they came from. *Id.* at 190:4-6. Based on this testimony, defense counsel objected that there was no foundation for admitting the jeans into evidence. *Id.* at 190:7-9. The prosecutor then tried to lay a foundation by asking Soukup if he had investigated other accidents where people were injured, and if it was common for medical personnel

to cut clothing off an injured person and put it into a vehicle, and Soukup said he had and it was. *Id.* at 190-91. Defense counsel objected that this was still not enough evidence to lay a proper foundation. *Id.* at 191-92.

In response, the prosecutor argued the evidence was sufficient because the jeans had been locked inside the car since the day of the accident, they were near a bag containing medical debris, Mr. Unrein received medical treatment after the crash, and there were no photos that showed what he was wearing. *Id.* at 192:4-18. Based on this evidence, the prosecutor argued it was reasonable to conclude Unrein was wearing the jeans. *Id.* And he argued this information was relevant because the black jeans did not match the blue cotton fiber found on the passenger window, and so tended to prove Unrein did not come out that window. *Id.*

Defense counsel maintained the objection and pointed out that the chain of custody was still incomplete because no one had testified that they took the jeans off Unrein or even that they saw him wearing pants that looked like these jeans. *Id.* at 192-93, 198-99. Therefore, the prosecutor's argument was just speculation. The court, however, overruled the objection and admitted the jeans and Soukup's testimony about where he had found them. *Id.* at 200-03. The court said the chain of custody for this piece of evidence was not important, and said the fact that no

one knew where the jeans came from just went to their weight, and not their admissibility. *Id.*

Once the black jeans were admitted, defense counsel asked Soukup if he had sent them to the Colorado Bureau of Investigation for any kind of analysis, to see if they had blood or Unrein's DNA on them, and Soukup said he had not. TR 10/5/16, pp 151-53. He said he did not take them out of the vehicle until a week before trial, and that he had not even checked to see if they would fit either Unrein or Mr. Birchfield. *Id.*

There was also evidence in the record that indicated that Unrein was *not* wearing the black jeans. First, Deputy Moser, who helped provide medical treatment to Unrein, could not remember exactly what Unrein was wearing, but Moser said he thought Unrein had on light colored pants, not black pants. TR 10/4/16, pp 66-71. He said he remembered the paramedics cutting off Unrein's shirt, but not his pants because Moser remembered seeing a lot of blood on Unrein's right pant leg. *Id.* Moser said he remembered the red blood standing out against the material of the pants, and so they must have been light in color. *Id.* Trooper Davis also said he saw Unrein at the scene, and he thought Unrein was wearing "a T-shirt and blue jeans." *Id.* at 85-86.

Finally, the photos of the jeans in the record show that they have not been cut, and there is no visible blood on them. Third Supp, pp 1-6 (color photos of black jeans). Therefore, it does not appear that the paramedics cut them off anyone while giving medical treatment.

c. Analysis

CRE 402 states that evidence must be relevant to be admitted at trial, and CRE 401 defines relevant evidence as evidence that has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 901(a) also requires evidence to be authenticated or identified before it can be admitted. It states that this requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Because evidence must be authenticated, courts have developed the "chain of custody rule," which "requires that the proponent of physical evidence connect it to the incident and show the evidence is substantially unchanged." *People v. Grace*, 55 P.3d 165, 172 (Colo. App. 2001), *overruled on other grounds, Gibbons v. People*, 328 P.3d 95 (Colo. 2014). This rule requires the proponent to present testimony that shows the evidence is connected in some manner with "the perpetrator, the victim, or the crime." *Reynolds v. People*, 471 P.2d 417, 420

(Colo. 1970). Without such a connection, the evidence is irrelevant. *People v. Valencia*, 257 P.3d 1203, 1206 (Colo. App. 2011).

Here, the black jeans found in the car were irrelevant to this case, unless someone could testify that they either took them off Mr. Unrein after the crash, or that they saw him wearing jeans that looked like these. Without this evidence, there was no connection between the jeans and the crimes charged in this case. The prosecutor argued the jeans must have come off Unrein because they were not sitting in the driver's seat of the car when Trooper Davis photographed it after the accident, and the photos of Mr. Birchfield show he was wearing blue jeans. TR 10/4/16, pp 192:4-18, 195:6-18. But there are other explanations for where the jeans came from.

It is possible the jeans were in the trunk, which no one photographed, and that they were moved to the passenger compartment before the car was towed because the trunk would not close. *See* Ex 5 (Exhibits pdf, p 449). They also could have been sitting in the field somewhere because they were stored in the car and flew out of it during the crash. The jeans are not visible in the photos of the field in the record, but there are not that many photos, and Trooper Davis was not looking for these jeans so he may not have photographed them. *See* Ex 2-10, 23 (Exhibits pdf, pp 431, 446-54).

Without some evidence showing Unrein was wearing these jeans, there is no way to know if the prosecutor's theory about where they came from is correct. It is just speculation, and speculation is not a sufficient basis for admitting evidence. The trial court said the chain of custody did not matter because the jeans are not a fungible item, like white powder in a drug case. *See* TR 10/4/16, pp 200-03. But that is incorrect. The chain of custody is important even though the jeans are not fungible because the prosecution had to show the jeans were connected to this case. Everyone agreed they were found in the car, but no one knew how they got there. Without that information, the jeans are irrelevant. *Cf. People in interest of R.G.*, 630 P.2d 89, 92 (Colo. App. 1981) (sufficient evidence to show chain of custody for a knife where two witness said it looked like the one in defendant's hand on night of murder, and victim's stab wounds were consistent with the knife).

In short, it does not matter if the jeans *could* be relevant. The prosecution needed to show they actually were. Because the prosecution did not do that, the jeans were inadmissible under CRE 401, 402, and 901.

The trial court also should have excluded the jeans under CRE 403, which states that even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Here, the jeans had no probative value, and there was a

danger of unfair prejudice because they invited the jury to render a verdict based on speculation that Unrein might have been wearing them. *See People v. Martinez*, 74 P.3d 316, 325 (Colo. 2003) (evidence unfairly prejudicial "when it has an undue tendency to suggest a decision on an improper basis"); *Sprouse*, 983 P.2d at 778 (verdict cannot be based on "guessing, speculation, or conjecture").

This Court should find that admission of the jeans also violated Unrein's constitutional right to due process because they deprived him of his right to a fair trial with an impartial jury by misleading the jury and inviting them to rely on speculation when rendering a verdict. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Harris*, 888 P.2d at 264; *Payne*, 501 U.S. at 809; *Domingo-Gomez*, 125 P.3d at 1048. Because the error in admitting the jeans violated Unrein's constitutional rights, this Court must reverse unless the State can prove the error was harmless beyond a reasonable doubt. *Hagos*, 288 P.3d at 119. This means the State must show there is no reasonable possibility the error might have contributed to Unrein's convictions. *Id.*

The State cannot meet its burden because the jeans went to the main issue at trial, who was driving, and the prosecutor invited the jury to rely on them as evidence of guilt in closing. The prosecutor told the jury the jeans had to belong to Unrein, and argued that this proved Unrein was driving because the black jeans did

not match the blue fiber found on the passenger's window. TR 10/6/16, pp 134-35. This closing ensured the jury would consider the black jeans when rendering a verdict. *See Venalonzo*, 388 P.3d at 881; *Salcedo*, 999 P.2d at 841.

Even if this Court reviews under the ordinary, harmless-error standard, reversal is still required. This standard requires the State to prove the error did not affect Unrein's substantial rights. *Yusem*, 210 P.3d at 469; *James*, 426 P.3d at 340. For the reasons discussed, this Court cannot say the decision to admit the black jeans and Trooper Soukup's testimony about where they found them did not influence the jury's verdicts. Therefore, this Court should reverse and remand for a new trial.

III. The cumulative effect of the errors in this case requires reversal because Mr. Unrein was deprived of his right to a fair trial.

A defendant has right to due process and a fair trial. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Individual errors in a trial may not warrant reversal, but reversal may still be required if the errors considered together deprived the defendant of these constitutional rights. *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986); *People v. Stewart*, 417 P.3d 882, 890 (Colo. App. 2017). Here, the errors discussed in Issues I-II deprived Mr. Unrein of his right to a fair trial because the jury was presented with improper expert

testimony and irrelevant black jeans and told it could consider both as evidence of Unrein's guilt. Therefore, this Court should reverse and remand for a new trial.

CONCLUSION

For the reasons stated under Issues I-III, this Court should vacate Mr. Unrein's convictions and remand for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on January 24, 2019, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.