DATE FILED: November 4, 2019 6:57 AM
FILING ID: BDD1E661882B7
CASE NUMBER: 2017CA217

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 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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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

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

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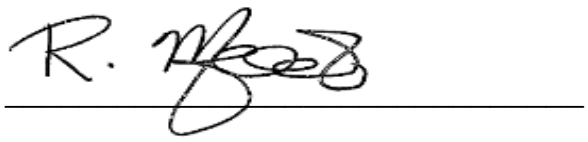

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In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENTS

I. The trial court erred because it admitted expert testimony from a state trooper about who was driving at the time of the accident, which 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. Analysis

The State claims that Trooper Seth Soukup's testimony that he thought Mr. Unrein was driving was based on reliable, scientific principles, but the trial transcript does not support this claim.

First, the State claims that Soukup's opinion was based on reliable, scientific principles because he said he could tell when the windows in the car broke based on the impact marks it left on the ground, and this narrowed down the point at which Mr. Unrein and Mr. Birchfield could have been ejected. Answer Brief ("AB"), p 22. It is clear, however, that Soukup's opinion about who was driving was *not* based on an analysis of when the windows broke because his expert report did not say when he thought they broke, or offer this as evidence to support his conclusion that Unrein was driving. *See* CF, pp 147, 152, 154-56. Additionally, Soukup said at the pretrial

hearing that he could not tell when the windows broke. TR 4/1/16, pp 12-13. He also said, “I don't know a whole lot about glass specifically. I've never studied it.” TR 4/1/16, p 13:7-8.

At trial, Soukup also admitted that there was no evidence that proved the windows broke when the top of the car hit the ground during the first roll. On direct examination, he said it was “likely” the windows broke at that point. TR 10/4/16, p 216:13-19. But on cross-examination he admitted that he did not map any of the broken glass in the field, or try to use a mathematical formula to determine how much force it took to break the windows, or when that level of force was applied to the car. TR 10/5/16, pp 37-40. Defense counsel then asked Soukup if he actually knew when the windows broke, and Soukup said, “I don’t know that I could actually testify to this particular window broke exactly at this point on the scale diagram. No.” TR 10/5/16, pp 39:8-14. This shows that Soukup’s statement that the windows “likely” broke during the first roll was not based on any kind of scientific analysis.

Moreover, even if Soukup’s guess about when the windows broke is correct, this evidence would not support his claim that Unrein was driving. If Soukup’s guess is correct, then the first window that was on the low side of a roll after the windows broke was the passenger side window. That means Unrein could have come out the passenger’s window. It also means that the driver’s side window was the first

window on the high side of a roll after the windows broke. That means Birchfield could have been thrown out of the driver's window before Unrein exited that window. Therefore, Unrein could have been the passenger, and Birchfield could have been the driver.

Second, the State claims that Soukup's opinion about who was driving was based on reliable, scientific principles because Soukup said Unrein must have fallen out of the driver's window because he would have been crushed by the car if he had fallen out the passenger's window. AB, pp 23-25. This Court should also reject this claim because Soukup did not claim this was part of the basis for his opinion in his expert report or pretrial testimony—even though defense counsel repeatedly asked him to explain why he thought Unrein was driving. *See* CF, pp 154-56; TR 4/1/16, pp 43-44, 63-64. This is just something that Soukup came up with at trial to try and make his opinion sound more scientific.

This Court should also reject this claim because Soukup did not explain why he thought it was more likely that Unrein would have been run over by the car if he came out the passenger's window. He just asserted that it was. At trial, Soukup said: "[Unrein] most likely would have been run over by the vehicle because he would have actually had to come out of the vehicle from the passenger side of the vehicle as the vehicle entered that portion of the roll where he came out of the vehicle."

TR 10/4/16, p 217:8-18. But Unrein would also have come out of the car as it entered the portion of the roll where he came out of the vehicle if he fell out of the driver's side window on the low side of the roll. Therefore, Soukup's own analysis makes it sound like the risk that Unrein would be run over by the car was the same regardless of which side he exited.

Finally, the State claims Soukup's opinion was based on reliable, scientific principles because he said the gear shift would likely have been bent or marked if one man followed the other out the same window. AB, p 25. But, again, this was not a basis for Soukup's opinion that Unrein was driving because he did not talk about the gear shift in either his expert report or pretrial testimony. This was just a theory that he came up with for the first time at trial on *redirect* examination. *See* TR 10/5/16, pp 164-65.

Even if Soukup had talked about the gear shift before trial, it would not have made his testimony that he was "very certain" that Unrein was driving admissible under CRE 702. Soukup said, "[I]n cases in the past where I have seen a driver get thrown out of the other side of the vehicle—a driver either ejected out of the far side of the passenger side window or just displaced to the passenger seat, I've commonly seen jean imprints on the center console from their leg dragging up against the center console. I have also seen the gear shift bent over . . . ." TR 10/5/16, pp 164-65. This

testimony did not support his assertion that Unrein was driving because Soukup did not say that the gear shift will always be bent or that there will always be marks on the console when someone moves from one side of a car to another before being ejected. He just said he had seen that happen in some cases. Moreover, even if the undamaged gear shift proved the men exited out of different windows, there was still a question about who came out which side, and Soukup could not point to any evidence that proved Unrein came out the driver's window.

Ultimately, the State cannot find a legitimate, scientific basis for Soukup's assertion that Unrein was driving because there was not one. This is clear from his testimony at the pretrial hearing. The prosecutor asked Soukup to explain why he thought Unrein was driving, and Soukup could not answer the question. The prosecutor asked: "What specific factors did you think of A plus B plus C equals the defendant's body came out of this window and ended up here?" TR 4/1/16, pp 63:10-12. Soukup said:

> The impact marks and his location and then more specifically in this case when I was placing the vehicle on top of the evidence and various role orientations that were based upon the marks that were left on the ground to be able to say on those tire imprints there had to be two tires touching the ground. And then to be able to determine if that was left side tires or the right side tires and then placing the vehicle on there. In an orientation that lined up with all the other evidence. And then based on those vehicle orientations and the defendant's final rest location is where I came up with my inference that, you know, it was most—it was most likely he came out of the this window at this point based on where

> he landed and where the vehicle's orientation was in relation to his final rest.

TR 4/1/16, pp 63-64. This answer explains how Soukup used the impact marks on the ground to determine how *the car* moved as it rolled across the field, but it does not explain how he determined how *the bodies inside the car* moved, or when they were ejected from the car, which is what matters in this case. *See State v. Bregar*, 390 P.3d 212, 225-26 (N.M. App. 2016) (finding it was error to admit police officer's opinion that defendant was driving during an accident because officer claimed his opinion was based on his knowledge of "occupant kinematics," but nothing in his testimony provided "a basis for gauging the reliability of [his] methodology").

To testify about how the people moved inside the car, Soukup needed to be an expert in occupant kinematics, which is the study of how bodies move during an accident, and he was not. He said his training with the Colorado State Patrol, and his certification in accident reconstruction, focused on how vehicles move during an accident, and not the people inside them. *See* TR 4/1/16, pp 78-88; TR 10/4/16, pp 129-40; TR 10/5/16, pp 88-91. Soukup also said he had read some articles about occupant kinematics on his own. TR 10/5/16, p 174:10-24. But obviously that is not enough to make him an expert in a scientific field—particularly one as complicated

as occupant kinematics. *See State v. Sipin*, 123 P.3d 862, 865-71 (Wash. App. 2005) (rejecting expert testimony from an engineer, who used mathematical formulas and a computer program to determine who was driving during an accident, because the analysis did not take into consideration all the necessary factors, including the specific dimensions of the interior of the car).

The State suggests that the "alleged analytical holes" in Soukup's testimony, i.e. his inability to point to *any* scientific evidence that supports his claim that Unrein was driving, go to the weight of his testimony, and not its admissibility. AB, p 21. That is not true. When expert testimony is based on scientific knowledge, the proponent of the testimony must establish the reliability of the methodology on which it is based. If this requirement is not met, the testimony is inadmissible, and no amount of cross-examination will correct the error in admitting it. *See People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007) (proponent of expert testimony based on scientific knowledge "must show that the method employed by the expert in reaching the conclusion is scientifically sound").

Alternatively, the State argues the error in admitting Soukup's improper, expert testimony was harmless because Jonelle Jenkins said Unrein was driving right after the accident, and a blue cotton fiber was found on the frame of the passenger's window, which could have come from Birchfield's jeans. AB, pp 29-30. There were,

however, obvious problems with the credibility of Jenkins's statements right after the accident because she was intoxicated and had just suffered a serious concussion, and she later recanted these statements. The evidence offered to prove the cotton fiber came from Birchfield's jeans, and not Unrein's, was also very weak. *See* Opening Brief ("OB"), pp 2-5, 10-12, 32-35. Therefore, this other evidence did not make the error in admitting Soukup's testimony harmless.

The State points out that Soukup was subject to extensive cross-examination. AB, p 30. But this did not remedy the prejudice created by his testimony because the court told the jury Soukup was an expert in accident reconstruction, and he maintained, even after cross-examination, that he was "very certain" Unrein was driving. *See* TR 10/5/16, p 177:8-17. This was obviously prejudicial to Unrein's defense. The State cannot present expert testimony and ask the jury to rely on it in closing, and then claim that any error in admitting it was harmless because the jury probably disregarded it.

Finally, the State claims the error was harmless because the trial court gave a limiting instruction that told the jury that Soukup's computer animations of what he thought happened during the accident were only a restatement of his version of these events, and not "an independent piece of substantive evidence." TR 10/4/16, pp 151-52. This instruction did not cure the prejudice created by Soukup's testimony

because the court did not tell the jury to disregard his testimony about who he thought was driving. On the contrary, it told the jury that Soukup's testimony was evidence, and that the jury could give this evidence as much weight as it wanted—which was probably quite a lot. TR 10/4/16, p 152:18-25; CF, p 238. As the State concedes, Soukup's testimony "was central to the key factual dispute at trial: who was driving when the crash occurred." AB, p 28. Therefore, the State cannot prove it was harmless to admit it.

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 that they belonged to Mr. Unrein because no one said 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 Mr. Unrein was wearing black jeans to prove he was driving at the time of the accident.

a. Standard of Review

The State argues that Mr. Unrein's objection to admission of the black jeans on relevance grounds and under CRE 403 was not preserved at trial, but it was. When talking about the jeans, counsel said, "It doesn't matter if it could be relevant. It doesn't matter if inferences could be drawn. What matters is whether the chain of custody is broken. [The prosecutor] has just acknowledged that he doesn't know where the jeans came from. His trooper doesn't know where the jeans came from. . . ." TR 10/4/16, pp 199-200. This argument made it clear that the defense was objecting to admission of the jeans on relevance grounds because no one knew

whose they were or how they got in the car. *See also* TR 10/4/16, pp 190:7-9, 192-93, 195:20-24. This argument asked the court to make a ruling on whether the jeans were admissible under CRE 401, 402 and 403, and to determine whether this piece of evidence had sufficient probative value to be admissible under these rules. As the Colorado Supreme Court has said, "We do not require that parties use talismanic language to preserve an argument for appeal. The objection need only draw the trial court's attention to the asserted error, thus allowing the court a meaningful chance to prevent or correct the error and creating a record for appellate review." *Rael v. People*, 395 P.3d 772, 775 (Colo. 2017) (internal citations and quotation marks omitted). Defense counsel's objection gave the trial court an opportunity to prevent the error in this case.

The State also argues that the trial court's decision to admit the jeans should only be reviewed for abuse of discretion. AB, p 32. This is incorrect because Unrein is also raising a due process claim because the jeans were so unduly prejudicial that they rendered his trial fundamentally unfair. OB, pp 38-39. As the State concedes, this Court reviews due process claims de novo. AB, p 32. Therefore, this Court needs to review the record de novo to decide whether the trial court's decision to admit the jeans rendered Unrein's trial fundamentally unfair.

b. Analysis

The State concedes that there was no evidence presented at trial that explained how the black jeans got into the car. AB, p 4. Nevertheless, it maintains they were relevant and admissible under CRE 401 and 402 because Ms. Jenkins said that Mr. Unrein sometimes wore black jeans, and Trooper Soukup said he had seen medical personnel cut clothing off injured people after car accidents, and put it in a person's car. AB, p 39. This Court should reject this argument because Jenkins did not say Unrein was wearing black jeans on the day of the accident, and the jeans were not cut up. *See* Third Supp, pp 1-6 (photos of black jeans). Therefore, there was no evidence to support Soukup's speculation that maybe a paramedic had cut them off Unrein while he lay unconscious in the field receiving medical care.

Because there was no evidence Unrein was wearing the black jeans during the accident, this evidence should not have been admitted, and the prosecutor should not have been allowed to invite the jury to speculate that Unrein was wearing them, or to rely on this as proof that he was driving the car that killed his best friend. *See People v. Welsh*, 80 P.3d 296, 307 (Colo. 2003) ("[A] trial court should exclude evidence which has only the most minimal probative value, and which requires a jury to engage in undue speculation as to the probative value of that evidence."). The State asserts that the jury knew the limits of this evidence because Soukup admitted

that no one knew where the jeans came from, but the State cannot have it both ways. It cannot argue in closing that the evidence proved Unrein was wearing the black jeans, and then assert on appeal that it was okay to admit them because the jury knew there was not actually any evidence that Unrein was wearing them. Because the court admitted the jeans into evidence, and the prosecutor argued that Unrein was wearing them, this Court should assume that the jury did rely on this evidence when rendering its verdicts.

Alternatively, the State claims that any error in admitting the jeans was harmless because there was other, "far stronger" evidence that proved Unrein was driving the car. AB, pp 48-49. As support, the State notes that Ms. Jenkins told people right after the accident that Unrein was driving, and that "Trooper Soukup provided his expert opinion that he was very certain defendant was seated in the driver's seat at the time of the crash." AB, p 48. This evidence did not make the error in admitting the jeans harmless because it was not that strong. As noted, there were problems with the credibility of Jenkins's statements right after the crash because she was intoxicated and had just suffered a severe concussion. *See* OB, pp 2-5, 10-12, 32-35. There were also problems with Soukup's testimony because he could not offer any scientific evidence to support his theory that Unrein was driving, and he

said before trial that it was impossible to tell who was driving based just on the physical evidence. *See* OB, pp 15-22.

Because there were many problems with the prosecution's evidence, it is likely that the improper admission of the black jeans impacted the jury's verdict. It was one more piece of evidence that helped the prosecution create the illusion that it actually had a case against Mr. Unrein. This additional evidence also distracted the jury from the real question in this case, which was whether Jenkins's statements right after the crash were credible.

The State also argues the error was harmless because Soukup could have told the jury that he found the black jeans in the car, even if they were not admitted. AB, p 49. But such testimony would also have been improper. Since the jeans had no relevance to this case, testimony about them would still be irrelevant and invite the jury to render a verdict based on speculation. In other words, the testimony would have been inadmissible for the same reason that the physical exhibit was inadmissible. This is why defense counsel also objected to Soukup talking about the jeans. *See* TR 10/4/16, pp 199-200 (Defense counsel: "[T]his Court should not allow this trooper to, one, to admit these *into testimony or into evidence* and then to talk about them after they have been admitted." (emphasis added)).

Even if this Court only reviews this issue for plain error, which it should not because it was preserved, reversal is still required. A plain error under Crim. P. 52(b) is one that is obvious and substantial. *Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012). The error here was obvious because it is well-established that evidence must be relevant and authenticated to be admitted at trial. *See* CRE 401; CRE 402; CRE 403; CRE 901(a); *Reynolds v. People*, 471 P.2d 417, 420 (Colo. 1970). The error was also substantial because it invited the jury to render a verdict based on speculation, and it deprived Unrein of his right to a fair trial. *See* OB, pp 36-39.

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

Mr. Unrein maintains that the two errors in this case require reversal when considered together, even if this Court finds that they do not require reversal when considered separately. *See* OB, pp 39-40. The trial court allowed the prosecution to present multiple pieces of unreliable and irrelevant evidence to the jury, which encouraged the jury to rely on speculation when deciding whether Unrein was driving during the accident. This deprived him of his right to a due process and a fair trial before an impartial jury. *See Howard-Walker v. People*, 443 P.3d 1007, 1011 (Colo. 2019).

CONCLUSION

For the reasons stated under Issues I-III, this Court should vacate Mr. Unrein's convictions and remand for a new trial without the unfairly prejudicial and misleading expert testimony and physical evidence.

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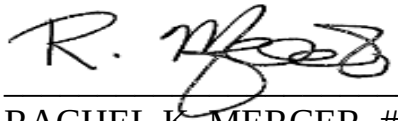

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CERTIFICATE OF SERVICE

I certify that, on November 4, 2019, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Elizabeth Ford Milani of the Attorney General's office.