IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC02-927

HOWARD RUSSELL BONINE,

Respondent.
_____/

PETITIONER'S MERITS BRIEF

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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STATEMENT OF THE CASE AND FACTS

On June 2, 1998, the Defendant crashed his car into the back of the victim's motorcycle, killing the victim. (T.539-552, 573). Based on results of a blood alcohol test of the Defendant's blood taken more than an hour after the crash, the State charged the Defendant with DUI Manslaughter. (R.79). The case proceeded to a jury trial on April 5, 2000.

At trial, the State presented numerous witnesses who had contact with the Defendant at the scene of the crash. Mr. Wilburn was driving behind the Defendant that night at about 10:30 or 10:45 p.m. (T.45). He noticed the Defendant's car ahead of him, swerving. (T.46). That made Mr. Wilburn decide to "back off" and let the Defendant's car get way ahead of him, out of sight. (T.47-48).

Mr. Wilburn initially drove past the crash site, but thought he saw something on the side of the road. (T.48). As he turned around, he also saw the Defendant's car off to the side of the road. (T.48). Once back at the crash site, Mr. Wilburn saw the motorcycle and the victim lying off to the side of the road. (T.49). He stopped to see if he could help. (T.49). While Mr. Wilburn was helping, the Defendant walked up to the scene. Mr. Wilburn stated that the Defendant staggered as he approached. (T.83).

Another witness, Ms. Brown, also came upon the crash scene. (T.117-118). She held a flashlight while others tried to help the victim. (T.123). She also testified that she noticed the Defendant walk up to the scene. (T.121). She stated that he was stumbling as he walked. (T.121). He spoke to her, saying "I did it. I hit him." (T.121). She noted that his speech was slurred. (T.121). However, she never got close enough to the Defendant to smell him. (T.128).

Deputy Twiss arrived soon after the crash also. (T.140). He helped initially until the emergency medical workers arrived, but had to leave to take his prisoner to the jail. (T.142-143). He returned about an hour later and assisted with traffic control. (T.151). At one point, he came in contact with the Defendant when he let the Defendant out of the patrol car to go to the bathroom. (T.152). He noted that the Defendant stumbled when he got out of the car. (T.152). However, he also testified that he never got close enough to smell the Defendant. (T.154).

Deputy Briggs responded to the crash. (T.168). He also gave testimony about seeing the Defendant walk up to the crash scene. (T.172). He testified that the Defendant staggered as he walked. (T.172). Deputy Briggs also noticed a strong odor of alcohol on the Defendant's breath. (T.172). The Defendant

told the Deputy that he hit a deer and his car was disabled. (T.172). Deputy Briggs stated that when the Defendant spoke, his speech was slurred. (T.172). The Defendant had admitted to Deputy Briggs that he had a few drinks that night. (T.180).

Deputy Briggs noticed that even after the Defendant got out of Deputy Briggs' car, the car still had a strong odor of alcohol. (T.177). Based on his training and experience, after being with the Defendant for about two hours, Deputy Briggs rendered the opinion that the Defendant was under the influence of alcohol and was impaired. (T.178).

Trooper Reeves arrived at the scene at about 11:30 p.m. or 12:00 midnight. (T.206). The Defendant told the Trooper that he thought he hit a deer. (T.209). Trooper Reeves testified that, even though he was within three or four feet of the Defendant that night, he could not smell anything because he had a cold. (T.223, 238).

Teresa Adams, a lab analyst for FDLE, testified as to the blood alcohol test results. She stated that the Defendant's blood alcohol level at the time the blood was drawn was .226. (T.404). When the prosecutor asked her to calculate what the Defendant's blood alcohol level was at the time of the crash, Ms. Adams made her calculations based on the hypothetical facts provided by the prosecutor. (T.413). Based on the hypothetical

situation which included the circumstances surrounding the Defendant at the time of the crash, Ms. Adams testified that the Defendant's blood alcohol level at the time of the crash was within the range of .21 to .23. (T.413).

Trooper Parnell assisted in the homicide investigation. He examined the Defendant's car and testified that it had hit a concrete barrier of some sort before stopping. (T.467). He testified that he interviewed the Defendant that night. (T.468). He also smelled the odor of alcohol on the Defendant. (T.467). He testified that, based on his experience and training, he thought the Defendant was under the influence of alcohol. (T.477).

Corporal Wells was the primary homicide investigator that night. After his full investigation, he determined that the crash occurred when the Defendant drove up onto the victim's motorcycle from behind at a higher rate of speed than the motorcycle was going, pushing it. (T.539-552). The victim was slammed back onto the Defendant's car, then knocked off the road. (T.539-552, 573).

The Defendant traveled another 617 feet before hitting a concrete bench/sign. (T.552). He ultimately stopped 1,478 feet past the crash site before coming to a stop. (T.552-553). Corporal Wells found no indication that the Defendant ever put

on his breaks before running over the victim. (T.574).

At trial, the defense objected to the admission of the blood test results. (T.337-339). After argument on the issue, the trial court ruled that, based on *State v. Miles*, 732 So. 2d 350 (Fla. 1st DCA 1999), the State must lay the traditional predicate as set out in *Robertson v. State*, 604 So. 2d 783 (Fla. 1992). (T.356). The trial court also ruled that "the way I read them, after you present those three things pursuant to *Robertson* and *Bender*, then you move right back to the presumption." (T.358).

When the trial court conducted the discussion about jury instructions, defense counsel made no objection to the set of proposed instructions. (T.774-777, R.89-110). At the close of the case, the trial court instructed the jury pursuant to the instructions agreed by the parties, including that portion of the instruction on DUI that states:

> 1. If you find from the evidence that the defendant had a blood or breath alcohol level of 0.05 or less, you shall presume that the defendant was not under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.
>
> 2. If you find from the evidence that the defendant had a blood or breath alcohol level in excess of 0.05 but less than 0.08, you may consider that evidence with other competent evidence in determining

> whether the defendant was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired; or,
>
> 3. If you find from the evidence that the defendant had a blood or breath alcohol level of 0.08 or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcohol to the extent that his or her normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence.

(T.936, C.100). After the jury instructions were given and the jury left to deliberate, the trial court asked the parties, "Were the jury instructions given as both sides understood them to be?" (T.952). Both parties answered, "Yes". (T.952). The jury returned a verdict of guilty to DUI manslaughter. (T.959).

On appeal, Defendant's counsel initially filed a brief which did not include any challenge to the jury instructions. However, upon request of defense counsel, the Fifth District Court of Appeal allowed defense counsel to file a supplemental brief raising the issue. After briefing and oral argument, the Fifth District Court of Appeal *sua sponte* considered the case *en banc*. The split court rendered its opinion on March 28, 2002, reversing the case for new trial. *Bonine v. State*, 27 Fla.L.Weekly D738 (Fla. 5th DCA March 28, 2002). The one-judge

majority held that “the harmless error rule cannot be applied” when the presumptions are given in violation of *State v. Miles*, 775 So. 2d 950 (Fla. 2000). The court certified conflict with *McBride v. State*, 27 Fla.L.Weekly D438 (Fla. 2d DCA Feb. 20, 2002). The State filed its Notice To Invoke Discretionary Jurisdiction on April 16, 2002.

SUMMARY OF ARGUMENTS

At the outset, it is clear that the Defendant never preserved for appellate review the issue relating to the jury instruction on presumptions. The Defendant never objected to the proposed instructions, nor did he object at the time the instructions were given. The law requires that a defendant object before the jury retires to deliberate. The Defendant failed to object to the presumption instruction at any point in the proceedings, even though this Court had already granted review of the very same issue in *State v. Miles*, 740 So. 2d 529 (Fla. 1999). Since the Defendant failed to object at any time, the issue was not properly preserved for appellate review. Therefore, the Fifth District Court of Appeal was without jurisdiction to decide the matter.

Even if the appellate court had jurisdiction over the matter, the court erred when it found that the harmless error rule could not be applied when the jury is erroneously instructed as to the presumption of impairment. The presumption of impairment only becomes relevant when there is evidence of unlawful blood alcohol. Before a jury can utilize the presumption, it **must** have already found that there was an unlawful blood alcohol level. So merely instructing the jury on the presumption is clearly harmless.

The State may prove DUI by alternative theories: 1) unlawful blood alcohol level, or 2) impairment. Impairment can be proved by either of two methods: 1) evidence as to the defendant's actions and demeanor which show physical impairment, or 2) evidence of blood alcohol content combined with presumptions associated with that blood content result. If one of the alternative **methods** of proving impairment is erroneously used, that does not make the **theory** of impairment unlawful. It is still a lawful theory of guilt if there is adequate evidence to support it, apart from the improper presumption instruction.

In the instant case, there was overwhelming evidence to show that the Defendant was driving with an unlawful blood alcohol level. There was also abundant evidence, presented by witnesses, to show that the Defendant was actually impaired and his normal faculties were affected. The guilty verdict was supported by both of the two prosecution theories – unlawful blood alcohol level **and** impairment. Since there was sufficient evidence to support the guilty verdict under **both** of the alternative theories, it was error for the Fifth District Court of Appeal to refuse to apply the harmless error rule. That refusal was in direct conflict with the Second District Court of Appeal's decision in *McBride v. State*, 27 Fla.L.Weekly D438 (Fla. 2d DCA Feb. 20, 2002).

This Court should follow the well-reasoned dissent of Judge Harris, and the reasoning of the Second District Court of Appeal in *McBride*, and reverse the Fifth District Court of Appeal's decision in this case.

ARGUMENT

POINT ON REVIEW

THE HARMLESS ERROR RULE APPLIES WHEN THERE IS EVIDENCE TO SUPPORT A GUILTY VERDICT FOR DUI MANSLAUGHTER UNDER BOTH ALTERNATIVE THEORIES – UNLAWFUL BLOOD ALCOHOL LEVEL AND IMPAIRMENT – EVEN WHEN THE JURY WAS ERRONEOUSLY INSTRUCTED AS TO THE STATUTORY PRESUMPTIONS.

There is no question in the instant case that the evidence was overwhelmingly sufficient to support the jury's verdict of guilt as to DUI Manslaughter. The Fifth District Court of Appeal very clearly stated so in its opinion. *Bonine v. State*, 27 Fla.L.Weekly D738 (Fla. 5th DCA March 28, 2002). It is equally clear that the trial court erred when it gave the jury instruction on the statutory presumptions. The sole questions is whether the harmless error rule can be applied in such a situation.

At the outset, it is apparent on the face of the trial record that the Defendant failed to preserve for appellate review the issue before this Court. As a general matter, a reviewing court will not consider an issue unless it was presented to the lower court by way of an objection. *Castor v.*

State, 365 So. 2d 701 (Fla. 1978). The requirement of a contemporaneous objection is designed to place the trial judge on notice that an error may have been committed, and provide him with an opportunity to correct it at an early stage of the proceedings. *Id*. at 703. To satisfy the contemporaneous objection rule, an objection must be not only timely, but it must apprize the trial judge of the possible error and preserve the issue for intelligent review on appeal. *Id*.

In order to be cognizable on appeal, an argument must have been presented fully to the trial court. *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982). The same specific legal argument must have been presented to and determined by the lower court. *Bertolotti v. State*, 514 So.2d 1095 (Fla. 1987). When an objection is made on one ground before the trial court, no new or different ground can be raised on appeal. *Steinhorst*.

Additionally, it is well-settled that jury instructions are subject to the contemporaneous objection rule. *State v. Wilson*, 686 So. 2d 569 (Fla. 1996); *Archer v. State*, 673 So. 2d 17 (Fla. 1996). Absent an objection at trial, a jury instruction issue can only be raised on appeal if fundamental error occurred. *Archer; Wilson*. In order to be fundamental, an error must be so severe that it undermines the validity of the entire trial "to the extent that a verdict of guilty could not have been obtained

without the assistance of the alleged error". *State v. Delva* 575 So. 2d 643 (Fla. 1991)(quoting *Brown v. State*, 124 So. 2d 481 at 484 (Fla. 1960).

In the instant case, while the Defendant clearly challenged the admissibility of the blood evidence, he never objected to the jury instruction on the presumptions. At the time of trial, the First District Court of Appeal had already decided *State v. Miles*, 732 So. 2d 350 (Fla. 1st DCA 1999), which held that the implied consent statute could not be used unless the State met the three-prong test for admissibility of the test results as laid out in *Robertson v. State*, 604 So. 2d 783 (Fla. 1992). The First District determined that, once the State met that burden and the test results were admitted, then the presumptions **could** be given. The First District, however, certified the question to be of great public importance, and this Court granted review. *State v. Miles*, 740 So. 2d 529 (Fla. 1999).

When defense counsel challenged the admissibility of the blood results, he relied on the District Court's ruling in *State v. Miles*, 732 So. 2d 350 (Fla. 1st DCA 1999). He argued to the court, at that time, that the State "must simply lay an entire predicate about the reliability, the testing method, and what the test actually means. They do not get any of the presumptions created in the implied consent statute." (T.348).

The trial court recessed for the evening so that the judge and the parties could do research on the issue and argue it further the next day. (T.351-352). The next morning, the trial court announced that under *Miles*, the State must lay the three-pronged predicate. (T.356). Once the State did that, the court would allow the instruction on the presumptions. (T.356-358). Defense counsel failed to object at that time, and never made any further objections to the instruction on the presumption.

Defense counsel failed to object to the presumption instruction at each and every crucial step. He failed to do so during the jury instruction conference. He also failed to object either right before the instructions were given or right after the instructions were read to the jury. He never put the trial court on notice that he objected to the instructions in any way. Therefore, the Defendant waived any objection to the instruction and failed to properly preserve the issue for appeal.

Since the Defendant failed to object at any time, the issue was not properly preserved for appellate review. Therefore, the Fifth District Court of Appeal was without jurisdiction to decide the matter. This Court, therefore, should reverse the Fifth District's decision and remand for consideration of the properly preserved issues.

Even if the issue was properly before the court, there was no ground for reversal. Based on the case law at the time of trial, the trial judge ruled in accordance with the First District's decision in *Miles*. At that moment, there was no error. This Court subsequently decided that the First District was wrong – that the presumptions are **not** available when the evidence is only admissible under the three-prong test of *Robertson*. Once this Court ruled, the trial court's instruction on the presumptions was clearly error. The inquiry does not stop there, however.

The question then becomes whether the harmless error rule can be applied where there is abundant evidence to support the jury's verdict that the Defendant was guilty of DUI Manslaughter under **both** methods of proof – 1) that the Defendant's blood alcohol level was way above the legal limit **and** 2) that the Defendant was impaired at the time of the crash.

There was no conflict in the evidence at trial. Those witnesses who were close enough to the Defendant to smell his breath testified that there was a strong odor of alcohol about him. Others simply testified that they were not close enough or were too busy assisting the victim to notice any odor emanating from the Defendant. The Defendant himself made statements to the police that he has been drinking from early in the evening.

His speech was slurred, he staggered when he walked, and smelled of alcohol. (T.171-172, 177, 178).

The Defendant told the police that he knew he hit something, but he thought it was a deer. He continued driving for more than 1/4 of a mile after running over the victim, until he finally crashed again into a concrete sign/bench. (T.173, 211, 552). All totaled, he traveled 1,478 feet more after slamming into the rear of the victim's motorcycle. (T.552-553).

The blood alcohol test results showed that when the blood was drawn from the Defendant more than an hour after the crash, he had a BAL of .226, almost three times over the legal level. (T.404). A State expert testified that at the time of the crash, the Defendant's BAL could have been as much as .257, or as low as .21. (T.413). Even the low measure is still more than twice the legal level.

Section 316.193(1)(b), Fla. Stat. (Supp.1994), sets the legal limit for blood alcohol in Florida. The statute provides that it is illegal to drive with a blood alcohol level of .08 percent or higher. There are two alternative ways to prove the crime of DUI: 1) by showing an unlawful blood alcohol level (.08 percent or higher), or 2) by showing that the driver was under the influence of alcohol to the extent that his normal faculties were impaired. §316.193(1)(a). Under the first alternative, the

driver commits the crime of DUI simply by driving with a blood alcohol level of .08 or higher, and the State does **not** have to prove that he was impaired. In short, "[h]aving the unlawful blood alcohol level is itself the offense." *Euceda v. State*, 711 So. 2d 122 (Fla. 3d DCA 1998); *See also State v. Rolle*, 560 So. 2d 1154 (Fla. 1990); *State v. Kliphouse*, 771 So. 2d 16 (Fla. 4th DCA 2000).

In the instant case, it is clear that the evidence of unlawful blood alcohol was properly admitted. The State easily met the three-prong test which allowed the blood evidence to be admitted. That evidence overwhelmingly showed that the Defendant's blood alcohol level was well over the legal limit at the time of the crash. Once the State proved unlawful blood alcohol level, there was no need to prove impairment. The jury had ample evidence of unlawful blood alcohol level apart from the equally ample evidence of impairment.

Because the State proved clearly that the Defendant was driving with an unlawful blood alcohol level, the jury **must** have convicted the Defendant under the theory of driving with an unlawful blood alcohol level. Even if the presumptions were given, the jury could only consider the presumption of impairment **if** the Defendant's blood alcohol level was over .08, because before a jury can utilize the presumption of impairment

it **must** already have found that there was an unlawful blood alcohol level. If the verdict was **not** based on the unlawful blood alcohol level, then the jury could **not** have relied on the presumption.

The error caused by giving the presumptions was harmless since the evidence clearly showed unlawful blood alcohol level. A divided Fifth District Court of Appeal, however, refused to apply the harmless error rule to the instant case based on its determination that the mere giving of the presumption instruction created a "legally improper theory" of guilt. The court stated that the instruction "was erroneous as a matter of law" and, therefore, "one of the ways to prove the offense was legally inadequate". *Bonine v. State*, 27 Fla.L.Weekly D738 (Fla. 5th DCA March 28, 2002).

The well-reasoned dissent, however, pointed out that the presumption of impairment is **not** a theory of guilt. It is merely one method of proving a particular theory of guilt – impairment. Judge Harris concisely described the situation:

> There is no question but that driving while impaired and driving with an unlawful blood-alcohol level are valid alternative theories on which to base this manslaughter charge. Thus both theories are "legal" and either theory is sufficient to sustain the conviction. The impairment

> instruction, even though improper in this case, was but one way of establishing the *fact* of impairment. Impairment was also established in this case, totally separate from the instruction, by proving that the defendant, after consuming alcohol to the extent that his blood level reached .226, drove down the highway, weaving, and overtook and ran into the rear of a motorcycle, mistaking the motorcycle for a deer, and continued down the highway for a quarter of a mile until he ran into a concrete sign/bench.

(emphasis in original) *Bonine,* dissent. Judge Harris' dissent, in which three other judges joined, emphasized that this Court long ago delineated the obligation that appellate courts have in applying the harmless error test. In *State v. Burns*, 491 Do. 2d 1139 (Fla. 1986), the rule set out by this Court requires an appellate court to uphold the verdict if the court believes beyond a reasonable doubt that the error did not affect the verdict. In other words, as this Court wisely stated in *State v. Marshall*, 476 So. 2d 150 (Fla. 1985),"It makes no sense to order a new trial, because of a non-fundamental error committed at trial, when we know beyond a reasonable doubt **that the defendant will be convicted again**". (emphasis added) *Id*. at 153. This rule is based on the principle that a defendant is not entitled to a perfect trial, only a fair one.

It is clear in the instant case that the evidence of unlawful blood alcohol was properly admitted. It is equally clear that upon a retrial without the instruction on the presumptions, the Defendant will again be convicted, based solely on the evidence that his blood alcohol level at the time of the crash was more than two times over the legal limit.

The Fifth District Court of Appeal created a new "fundamental error" when it determined that the presumption instruction made the impairment theory of guilt a "legally inadequate theory". The appellate court's reasoning is wrong because the presumptions provide but one way for the State to prove the legal theory of impairment. When the presumption option is not available, the theory is still legally available by way of other evidence to show impairment. Even though it was error to give the instruction, the State still presented sufficient evidence under the legal theory of impairment by way of witness testimony, apart from the proof of unlawful blood alcohol level. So, even if the presumption method of proving the legal theory of impairment was not available, there was ample evidence of impairment presented under the other method. The legal theory itself did not become "inadequate" simply by the trial court's error in giving the unavailable instruction.

The Fifth District Court of Appeal erred when it refused to

apply the harmless error rule. This Court should accept jurisdiction, find conflict with *McBride*, and adopt Judge Harris' well-reasoned and thorough dissent.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully asks this Court to reverse the decision of the Fifth District Court of Appeal and to adopt the well-reasoned dissent of Judge Harris in its place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Merits Brief has been furnished by delivery to **Rosemarie Farrell**, Assistant Public Defender for Respondent,

this _____ day of August, 2002.

Rebecca Roark Wall
Of Counsel

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief is produced in COURIER NEW, 12 point font, and thereby fully complies with the font requirement of Fla.R.App.P. 9.210(a)(2).

Rebecca Roark Wall
Of Counsel

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APPENDIX

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