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IN THE SUPREME COURT OF IOWA

No. 17-0476

STATE OF IOWA,
Appellee,

vs.

JOHN NESS
Appellant

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WOODBURY COUNTY, IOWA
THE HONORABLE TIMOTHY JARMAN, DISTRICT JUDGE

APPELLANT'S AMENDED REPLY BRIEF

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ARGUMENT

I. NESS PRESERVED ERROR.

The State, in its responsive brief, argues that Ness failed to preserve error on the question whether the district court erred by admitting evidence of the results of his PBT, rather than excluding those results Iowa Code § 321J.5. This Court should reject that argument.

The State writes, in its brief, that Ness objected to the admission of the PBT results for only two reasons:

> 1. Defendant believed the probative value of the evidence did not outweigh its prejudice, and 2. Defendant stated [his probation officer] was not sufficiently trained to operate a PBT.

State's Br. at 10.

This is not quite correct. While it certainly would have been preferable for Ness's trial counsel to have been clearer in his arguments, there is no question that the district court and the parties were discussing the substance of § 321J.5, even without citing that code section by name. This is most obvious from the district court's discussion, during the pretrial conference, of the "normal circumstances, where a law enforcement officer conducting a traffic stop and suspecting OWI situation might use this device [*i.e.*, the PBT] as a preliminary breath test," when "the results would not get into evidence." *See* PTC Tr. at 7. This question – whether the PBT results here

are excluded under the Iowa Code – was the heart of the dispute before the district court over the admissibility of the PBT results, and was the issue that the district court actually decided. And what other code section could the parties have been disputing, and could the district court have relied on, than § 321J.5? Accordingly, Ness did adequately, although not eloquently, reserve error.

Nor is the State correct in its suggestion, in its brief, that Ness failed to preserve error because he failed to object at trial to the admission of the PBT evidence. *Cf.* State's Br. at 10. As Ness argued in his opening brief, where district court conclusively overrules, in limine, a particular objection, the proponent of that objection need not renew it when the evidence if offered in order to preserve error on that same objection. *See State v. Schaer*, 757 N.W.2d 630, 634 (Iowa 2008). That is what happened here.

As such, this Court should hold that Ness has preserved error, and so that there is no need to consider Ness's issue through his alternative, ineffective assistance of counsel argument.

II. THE DISTRICT COURT'S ERROR WAS PREJUDICIAL AND NOT HARMLESS.

The State argues, in its brief, that any error by the district court in admitting the PBT results either was harmless or, if error was not preserved and this Court considers Ness's alternative ineffective assistance argument,

that Ness cannot show that he was prejudiced by his trial counsel's error to appropriately object to the PBT evidence. But this argument fails.

First, the State, in describing the evidence of Ness's guilt as "overwhelming," *see* State's Br. at 13, overstates its case.

Ness explained, in his opening brief, how the evidence at trial undermined an inference, from evidence other than the PBT results, that Ness was intoxicated at the relevant time. Ness's the probation officer testified, in response to an inquiry by counsel for the State, that Ness's behavior and mannerisms at the time of their encounter did not seem out of the ordinary for Ness. Trial Tr. at 41-42. In light of this admission, the probation officer's other testimony about Ness's behavior is a less powerful indicator that Ness was intoxicated. The same is true of the probation officer's denial that Ness "was having trouble parking," as opposed to merely "wanting to straighten out his vehicle," when he pulled into the probation officer parking lot. Trial Tr. at 38.

In light of what in reality is the weakness of the State's case against Ness, and in particular the weakness of the evidence in the record that Ness was intoxicated at the time when he operated a motor vehicle, Ness prevails regardless of whether error was preserved and the harmless error test applies, or if error was not preserved and Ness must demonstrate prejudice.

To prove prejudice under an ineffective assistance of counsel claim, Ness need only prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688. And a "reasonable probability" is nothing more than "a probability sufficient to undermine confidence in the outcome." *Id.* The harmless error analysis, which applies if this Court concludes that Ness preserved error on his claim that the PBT evidence should have been excluded under § 321J.5, is even more favorable to Ness. *See State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) ("Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?" (citing *State v. Trudo*, 253 N.W.2d 101, 107 (Iowa 1977))).

The PBT is, on its face and by its very nature, almost certain to be powerful evidence in the mind of the jury. Its illusion of accuracy – purporting to specify down to the hundredths of a percent the amount of alcohol in the breath of a test subject – is the type of precise evidence that a jury will seize in order to avoid the messy business of weighing the imprecision of mere observations, like the observations of Ness's probation officer and the booking officer in the jail. Moreover, the State repeatedly

emphasized, including in its closing argument to the jury, the PBY results. *See, e.g.*, Trial Tr. at 79, 82.

This is why, when faced with this same question, courts from other jurisdictions have concluded that the erroneous admission of PBT results are prejudice. *See, e.g.*, *State v. Duncan*, 27 S.W.2d 486, 489 (Mo. Ct. App. 2000) ("Any credibility [the arresting officer's subjective impressions] gained because the PBT corroborated his subjective evaluation would certainly have influence the jury's determination."); *accord id.* ("[W]hile the [PBT] test was not the only evidence the state put forward, it was emphasized both at the evidentiary phase and in closing argument."); *People v. Palencia*, 130 A.D.3d 1072 (N.Y. S. Ct. 2015) (holding that the introduction of PBT evidence was so prejudicial that it deprived the defendant of his constitutionally guaranteed right to a fair trial); *Commonwealth v. Marshall*, 824 A.2d 323, ¶17-18 (Pa. 2003) ("The record here prevents confidence beyond a reasonable doubt that extensive PBT evidence did not contribute to the jury's verdict. While other evidence in the case may have been sufficient to convict Appellant on both DUI counts, it was not overwhelming.").

CONCLUSION

For the foregoing reasons, Appellant John Ness respectfully requests

that this Court reverse the judgment and sentenced entered by the district court, and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Appellant's Proof Reply Brief was served on the 30th day of October, 2017, upon the following persons, by EDMS and United States Mail, respectively:

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The undersigned further certifies that the Appellant's Proof Brief was sent to the Clerk of the Supreme Court, Iowa Judicial Branch, 1111 East Court Avenue, Des Moines, Iowa 50319, on the 30th day of October, 2017, by EDMS.

_/s/ Zachary S. Hindman__________

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903 (1)(g)(1) because this brief contains 1,167 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14.

Dated this 30th day of October, 2017.

_/s/ Zachary S. Hindman___________