County Criminal Court: CRIMINAL LAW—Evidence. We find the order granting the motion for new trial in this case demonstrates legal error in application of the law to the facts of the case. We further find the evidence in the record is legally insufficient and that the order is not generally supported by the record. Therefore, based on the review of the record and applicable law, the order of the trial court is reversed and remanded with instructions to reinstate the jury verdict on remand. *State of Florida v. Harry Kambourolias,* No. 12-CF-4237-WS (Fla. 6th Cir. App. Ct. November 12, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

HARRY KAMBOUROLIAS,
Appellee.
_____/

UCN: 512012CF004237A000WS
Appeal No: CRC1204237CFAWS
L.T. No: 10-4780XDUTWS

On appeal from County Court,

Honorable Candy VanDercar,

Catherine Mansfield, Esquire,
Assistant State Attorney,
for Appellant,

Gerasimos Theophilopoulos, Esquire,
for Appellee.

ORDER AND OPINION

Appellant contends that the trial court erroneously granted Appellee's motion for new trial. We hold it was error to grant the motion for new trial, after the jury found Appellee guilty of driving while under the influence. We therefore reverse the order granting the motion for new trial and remand the case with instructions to reinstate the jury verdict.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on appeal of an order granting Appellee's motion for new trial, following a jury verdict finding Appellee guilty of driving while under the influence of alcohol. The jury trial was the second trial had in this case.[1] The facts of the case are as follows.

Appellee was found asleep behind the wheel of his car with the engine running while parked at a convenience store. Deputy Stritt was the first officer on the scene, who testified that he responded to a call from the clerk working at the store reporting a vehicle parked in the parking lot. Deputy Stritt testified he attempted to wake Appellee by knocking on the window. According to the Deputy, Appellee was slouched down in the driver's seat and apparently sleeping. Deputy Stritt testified that Appellee woke up and cracked the window, and he noticed an odor of alcohol coming from Appellee that grew stronger as he spoke. The Deputy testified Appellee had slurred speech, and avoided eye contact and was reluctant to speak, but that he observed Appellee to have glassy, bloodshot eyes. On cross examination, the Deputy acknowledged that at the first trial in this case, he testified that Appellee avoided making eye contact, and therefore he could not say whether Appellee had glassy, bloodshot eyes. Avoidance of eye contact was noted in the Deputy's report as an indicator of impairment. The Deputy further noted in his report that Appellee admitted to having at least one drink and was found asleep behind the wheel of the car. After noting the indicators that Appellee was impaired, Deputy Stritt called for an officer from the STEP unit to perform sobriety tests.[2]

Pasco County Deputy Orndorff was the STEP officer who arrived on the scene. Deputy Orndorff testified that he observed Appellee as having glassy, watery and bloodshot eyes, slurred mumbled speech, and an odor of alcohol that grew stronger when he spoke. The Deputy testified that when asked to exit the vehicle, Appellee fumbled for the door latch, used the door for support, and was swaying and staggering and using a 'wide stance,' all indicators of impairment according to the Deputy's training. Deputy Orndorff testified that Appellee seemed angry with him, that he had to

[1] The first trial had in this matter resulted in a hung jury and consequent mistrial.
[2] STEP Unit is a specially trained traffic and DUI enforcement squad.

repeat questions asked of Appellee, that Appellee admitted to having three drinks over the course of the evening, and that Appellee stated he could not remember where he had dinner that night. Although Deputy Orndorff testified as to these indicators of impairment at the trial, the trial court focused on the fact that the Deputy's report from the night of the arrest listed only that Appellee admitted to drinking alcohol as an indicator of impairment. Deputy Orndorff testified that Appellee initially agreed to perform field sobriety tests, but then declined to perform the tests after the Deputy demonstrated the tests to Appellee. Appellee was read the provisions of the implied consent law, § 316.1932, Fla. Stat., and declined to take a breathalyzer test.

Deputy Davidson was an officer in training with Deputy Orndorff who was present on the night of Appellee's arrest. Deputy Davidson testified that he could not recall an answer to most of the questions asked of him on cross examination regarding the particular details of the events of that night. Deputy Orndorff testified that Deputy Davidson did not participate in the stop, but was only riding along with Deputy Orndorff as a trainee to observe DUI enforcement.

The first trial in this case was held on August 17, 2011. At the conclusion of the trial the jury was unable to reach a verdict and the court declared a mistrial. A second trial was held on February 22, 2012, and Appellee was found guilty of driving while under the influence in violation of § 316.193, Fla. Stat. Within ten days of the verdict Appellee filed a motion for new trial. The trial court granted the motion, based on the finding that the Deputies' testimony in this case was inconsistent and completely lacking in credibility, that Deputies Stritt and Orndorff were regularly impeached, and the lack of video evidence in this case. The trial court additionally relied on a statement allegedly made to defense counsel by a member of the jury from the first trial, at the conclusion of that trial, claiming the jurors were split five against one in favor of an acquittal. The trial court found that the weight of the evidence did not support a guilty verdict. Appellant now appeals the order granting the motion for new trial.

STANDARD OF REVIEW

The trial court determines a motion for new trial using the "weight of the evidence" standard. *Geibel v. State*, 817 So. 2d 1042, 1044 (Fla. 2d DCA 2002) (citing *Moore v. State*, 800 So. 2d 747 (Fla. 5th DCA 2001). This standard differs from the "sufficiency of the evidence" test, which looks to "whether the evidence presented is legally adequate to permit a verdict." *Id.* "'Weight of the evidence' tests whether a greater amount of credible evidence supports one side of an issue or the other." *Id.*

> In deciding a motion for new trial pursuant to Florida Rule of Criminal Procedure 3.600[a] on the ground that the verdict is contrary to the weight of the evidence, the trial court acts as a "safety valve" by granting a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict.

Id. (citing *Moore*, 800 So. 2d at 749). When doing so the trial judge is able "to weigh the evidence and to determine the credibility of witnesses so as to act, in effect, as an additional juror." *Id.* (citing *Uprevert v. State*, 507 So. 2d 162, 163 (Fla. 3d DCA 1987) (quoting *Tibbs v. State*, 397 So. 2d 1120, 1123, n.9 (Fla. 1981))).

This Court reviews the trial court's ruling on the motion for new trial for abuse of discretion. *See Stephens v. State*, 787 So. 2d 747, 754 (Fla. 2001); *Ferebee v. State*, 967 So. 2d 1071, 1073 (Fla. 2d DCA 2007). This standard requires that "the nonprevailing party must establish that no reasonable person would take the view adopted by the trial court." *Stephens v. State*, 787 So. 2d 747, 754 (Fla. 2001). "As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact." *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981). The question on appeal is "whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment," and "[l]egal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." *Id*. The standard for reviewing an order granting a motion for new trial which addresses questions of law is de novo. *Hartzog v. State*, 133 So. 3d 570, 573 (Fla. 1st DCA 2014).

ANALYSIS

Florida Rule of Criminal Procedure 3.600(a) provides that a motion for new trial shall be granted if it is established that "[t]he verdict is contrary to law or the weight of the evidence." The order appealed states that "testimony of all Law Enforcement personnel in this case was evasive, inconsistent, and lacked any sense of reliability." The court found that Deputy Stritt, the first officer to stop the Defendant, "was impeached regularly during his testimony" and "was so inconsistent in his testimony that it was almost difficult for this Court to watch." The court was concerned that Deputy Stritt only observed four out of nineteen potential indicators of impairment that officers look for during DUI stops, which included: being asleep behind the wheel of the car, cracking the car window rather than rolling the window down, avoiding conversation and eye contact and admitting to having one drink. The Deputy additionally testified that Appellee had alcohol on his breath, slurred his speech, had glassy, bloodshot eyes and appeared nervous, but the trial court took issue with the fact that these observations were not noted in the Deputy's report from the night of the arrest.

The court also found Deputy Orndorff's testimony inconsistent and that he was "impeached on a regular basis with prior transcripts from a Motion to Suppress Hearing and from the first trial of the Defendant." The court "was especially startled by the statement of Deputy Orndorff that video is not the best evidence in a DUI case," and found the lack of video in this case to be "extremely disturbing" considering "the capacity to have actually had video on the scene." The record demonstrates Deputy Orndorff testified he was confused by the question as to whether video would be the best evidence in this case, and testified that overall the best evidence in his opinion would be a breath or blood alcohol test to determine impairment, but "as far as field sobriety tasks," a video-recording of the test would be the best evidence. The court found that Deputy Orndorff "repeatedly failed to give substantive answers" to questions during the trial, and had "made a conscious decision not to obtain answers" to questions that were asked during the first trial. The court found that Deputy Orndorff testified to only observing one out of the nineteen indicators of impairment that officers look for in a DUI stop: that Appellee admitted to having three drinks that evening. It appears this statement by the trial court may be in reference to the Deputy's testimony that only one

indicator is included in his written report, as the Deputy testified at trial to observing several additional indicators of impairment, as well as relying on Deputy Stritt's report.

The court found it appeared that Deputy Davidson did not want to get involved in the case, and that the Deputy's "testimony was almost tantamount to taking the Fifth Amendment." Pursuant to the "weight of the evidence standard," the court found that based on its perception of the credibility of the Deputies' testimony, there was "no other option but to grant the Defendant a new trial."

Appellant contends there is no justification for the granting of a new trial in this case, that the jury verdict is supported by the weight of the evidence, and that there is no competent, substantial evidence to support the order granting the motion for new trial. Appellant further contends that the testimony of the Deputies in this case was consistent and credible, and that the order overstates or misstates the number of times the Deputies were impeached. Appellant's main contention is that the trial court based its decision on "an incorrect recollection of testimony . . . and the evidence presented."

Appellant takes issue with the trial court's characterization of Deputy Stritt as being constantly impeached, and contends the Deputy was impeached only at one point during the trial, when the Deputy acknowledged that his testimony that Appellee's eyes were red and glassy was different from the Deputy's testimony at the first trial, which was that one of the indicators of impairment the Deputy observed was Appellee's avoiding eye contact with the Deputy, and therefore he could not say whether Appellee's eyes were red and glassy. Appellant further contends that the indicators of impairment noted in Deputy Stritt's report were sufficient evidence to support the jury verdict, and that his testimony as to observing additional indicators was further credible evidence supporting the jury verdict.

Appellant claims the trial court expressly based its decision on factors that were improper to consider, including Deputy Orndorff's testimony as to whether video would be the best evidence in this case, which Appellant claims was taken out of context and mischaracterized as impeachment, and the trial court's stated concern that no video of the DUI stop was made in this case.

Appellant further maintains it was error for the trial court to rely on negative impeachment in the form of testimony elicited on cross-examination from the Deputies

as to indicators of impairment which were not noted on the police reports, and that it was error to rely on Deputy Davidson's inability to recall details from the evening as a basis for the order, as he did not participate in Appellee's arrest. Additionally, State cites *Smith v. Brown*, 525 So. 2d 868, 870 (Fla. 1988), for the proposition that the jury properly determines credibility of witnesses and "the trial judge should refrain from acting as an additional juror."

Appellee counters that the trial court appropriately granted the motion for new trial based on the finding that the Deputies' testimony was not credible. Further, Appellant's contention that the trial court should have refrained from acting as an additional juror in this case ignores case law providing that the rule in criminal cases, when the "judgment has greater impact upon the defendant's due process liberty interest," is different, and "the established precedent has appropriately given the trial court more power when considering a motion for new trial." *Geibel v. State*, 817 So. 2d 1042, n.1 (Fla. 2d DCA 2002) (citing *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981)). Appellee concludes that the trial court applied the appropriate standard and the decision is supported by the record.

It is true that the trial court may intervene and grant a motion for new trial "when the *manifest* weight of the evidence dictates such action." *Smith*, 525 So. 2d at 869, 870. However, if the reasons supporting the order granting the motion for new trial are not supported by the record, "or are based on incorrect conclusions of law," deference to the trial court is not warranted." *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013). This Court is not permitted to reweigh the evidence on appeal, but may only determine whether the trial court has abused its discretion in granting the motion for new trial. *Tibbs*, 397 So. 2d at 1123. We find the record in this case demonstrates it was error to grant the motion for new trial, and that the jury verdict should be reinstated on remand.

The Florida Supreme Court clarified the standard of appellate review of a trial court's decision granting a motion for new trial on this basis:

> When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion. If an appellate court determines that reasonable

> persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. The fact that there may be substantial, competent evidence in the record to support the jury verdict does not necessarily demonstrate that the trial judge abused his or her discretion.

Van, 122 So. 3d at 254. In *Van*, the Court restated that a "trial judge should only intervene when the manifest weight of the evidence dictates such action," because "the jury has reached an unjust decision on the facts." *Id.* at 260 (citing *Brown v. Estate of Stuckey*, 749 So. 2d 490, 495, 497 (Fla. 1999)). "This discretionary power emanates from the common law principle that it is the duty of the trial judge to prevent what he or she considers to be a miscarriage of justice." *Brown*, 749 So. 2d at 495. Further, "a stronger showing is required to overturn an order granting a new trial than to overturn an order denying a new trial." *State v. Andrews*, 820 So. 2d 1016, 1022 (Fla. 4th DCA 2002). "Nevertheless, that discretion is not without limits and a reversal may be warranted where the evidence clearly supports the jury's verdict." *Id.*

In *State v. Coffman*, 746 So. 2d 471, 472 (Fla. 2d DCA 1998), the Second District Court of Appeals held that the trial court's denial of a defendant's motions for judgment of acquittal amounted to an explicit finding "that the State presented legally sufficient evidence which, if believed by the jury, would support a conviction." Legally sufficient evidence is that which amounts to "proof beyond a reasonable doubt on every element of the offense charged." *Id.* at 472-73 (citing *Tibbs*, 397 So. 2d 1120). Despite this finding, Fla. R. Crim. P. 3.600(a)(2) specifically authorizes the trial court to set aside the jury verdict using a weight of the evidence standard. *Coffman*, 746 So. 2d at 473 (holding that the trial judge "exceeded his limits in ordering a new trial on the basis that the verdict was against the weight of the evidence, because the record before us reveals the contrary"). *See State v. Monroe*, 691 So. 2d 518 (Fla. 2d DCA 1997) (although the trial court has wide discretion in determining witness credibility and weighing the evidence, that discretion is not unlimited and in this case was exceeded).

The record in this case demonstrates it was error to grant the motion for new trial because the evidence is legally insufficient to support the challenged order and because the order is based in part on legal error.

First, the trial court relied on a statement not appearing in the record, which is not appropriately a part of this Court's record on review, as evidence which was not appropriate for consideration when granting the motion for new trial, by referencing in the order a comment allegedly made to defense counsel at the conclusion of the first trial regarding jury deliberations during that trial.

Second, a careful review of the record demonstrates the officers who testified in this case were not regularly and consistently impeached on cross examination in a material and meaningful manner. *See State v. Johnson*, 284 So. 2d 198, 200 (Fla. 1973); *State v. Smith*, 573 So. 2d 306, 313 (Fla. 1990); *Pierce v. State*, 137 So. 3d 578, 581 (Fla. 2d DCA 2014); *Varas v. State*, 815 So. 2d 637, 640 (Fla. 3d DCA 2001). Additionally, the trial court's finding that the lack of a video-recording in this case was "extremely disturbing," considering the ability to have a video-recording of the arrest, is not supported by the general law. "There is no case law or statute imposing a duty on law enforcement to record a criminal transaction or to perform any particular tests even where, as here, the agency has the means to do so." *State v. Daniels*, 699 So. 2d 837, 838 (Fla. 4th DCA 1997) (citing *State v. Powers*, 555 So. 2d 888, 890 (Fla. 2d DCA 1990)).

We find the order granting the motion for new trial in this case demonstrates legal error in application of the law to the facts of the case. *See Robinson v. State*, 770 So. 2d 1167, 1170 (Fla. 2000). We further find the evidence in the record is legally insufficient and that the order is not generally supported by the record. *See Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013); *State v. Coffman*, 746 So. 2d 471, 472 (Fla. 2d DCA 1998). Therefore, based on the review of the record and applicable law, the order of the trial court is reversed and remanded with instructions to reinstate the jury verdict on remand.

CONCLUSION

The Court finds no reasonable basis in the record to support the order granting the motion for new trial in this case. Additionally, it was legal error to grant the motion

based on certain grounds listed in the challenged order. The order granting the motion for new trial is therefore reversed, with directions to reinstate the jury verdict on remand.

It is therefore ORDERED that the order of the trial court granting the motion for new trial is hereby REVERSED and the cause is REMANDED with instructions to reinstate the jury verdict.

Done and ordered in Chambers at New Port Richey, Pasco County, Florida this 12th day of November, 2014.

Original order entered on November 12, 2014, by Circuit Judges Stanley R. Mills, Shawn Crane and Daniel D. Diskey.