Case Law Update
November 25, 2018
Prepared by
Richard L. Polin

Supreme Court of Florida

In Re: Standard Jury Instructions in Criminal Cases – Report 2017-07, SC17-1822 (Nov. 21, 2018) (Corrected opinion)

The Supreme Court authorized for publication and use amendments to standard instructions 3.6(f) (Justifiable Use of Deadly Force) and 3.6(g) (Justifiable Use of Non-Deadly Force).

"[B]oth instructions 3.6(f) and 3.6(g) are modified to be consistent with statutory changes to section 776.013(1), Florida Statutes 92018), as enacted in chapter 2017-77, section 1, Laws of Florida." Also, "with regard to those portions of each instruction pertaining to the situation where the defendant acted in response to the imminent commission of a forcible felony, as listed in section 776.08, Florida Statutes (2018), the Court has added an italicized note to trial judges clarifying that the instruction may need to be modified if the forcible felony at issue is not a crime against a person."

A new section was added to instruction 3.6(f) to "'inform the jury how to evaluate cases in which there is evidence that the defendant was engaged in criminal activity or was in a place that he or she had no right to be' because in those cases there is a duty to retreat before using deadly force."

An explanatory note was added to instruction 3.6(g) "to the instruction for 'aggressor' under section 776.041(1), Florida Statutes, that it should only be given in cases where the defendant is charged with either an independent forcible felony or felony murder, if the underlying felony is an independent forcible felony." New provisions are added, if applicable, "pertaining to 'prior threats' and 'specific act of victim known by defendant.'"

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-05, SC18-1131 (Nov. 21, 2018)

Amendments to the following standard instructions were approved for publication and use: 12.1 (Arson – First Degree); 13.1 (Burglary); 13.3 (Trespass –

In Structure or Conveyance); 13.4 (Trespass – On Property Other Than a Structure or Conveyance); and 13.21 (Impairing or Impeding Telephone or Power to a Dwelling to Facilitate or Further a Burglary).

Definitions of "dwelling" and "structure" in those instructions "that are based on sections 810.011(1) and (2), Florida Statutes (2018), were amended "to include a bracketed sentence clarifying whether an enclosed space surrounding a building can be considered part of the dwelling." The sentence now reads: "The enclosure need not be continuous as it may have an ungated opening for entering and exiting."

Three of the instructions amended the definition of "conveyance." And three were amended to include a definition of "great bodily harm." Instruction 13.1 was "amended to reflect that claims of consent to enter the structure or conveyance, or that the premises were open to the public, are affirmative defenses rather than elements of the crime." Instruction 13.1 also included an amendment regarding arming oneself during the course of a burglary. The new language is intended "to better reflect that a firearm must be found to be a 'dangerous weapon' under the burglary statute, because there is no authority making such a finding as a matter of law."

Eleventh Circuit Court of Appeals

Jordan, et al v. Commissioner, Mississippi Department of Corrections, et al., 17-12948 (Nov. 19, 2018)

Death row inmates filed a section 1983 complaint challenging the constitutionality of Mississippi's lethal injection protocol, arguing that it created an unacceptable risk of severe and unnecessary pain in violation of the Eighth Amendment. The argument was based on the contention that a one-drug protocol, such as Georgia's, which uses pentobarbital, reduces the risk of pain.

Mississippi disputed that assertion. The plaintiffs acknowledged that pentobarbital was difficult to obtain, but argued that it must be available since Georgia uses it. The plaintiffs served the Georgia Department of Corrections with a subpoena for deposition and production of documents as to pentobarbital, the Georgia Department of Corrections moved to quash the subpoena. The federal district court quashed the subpoena, pursuant to Georgia's Lethal Injection Secrecy Act and the plaintiffs appealed.

The Eleventh Circuit affirmed the quashing of the subpoena based on the Lethal Injection Secrecy Act.

First District Court of Appeal

Calhoun v. State, 1D16-4812 (Nov. 20, 2018)

Calhoun was convicted of sexual battery by multiple perpetrators. On appeal, he argued that the trial court "erred in failing to give the jury instruction for the offense of unnatural and lascivious act, which he characterizes as a permissive lesser included offense of sexual battery by multiple perpetrators.

The First District concluded that the claim was not preserved for appellate review. During a break in the trial, defense counsel indicated that the defense might request this instruction, but noted that it was not a category 1 or 2 offense. As a permissive lesser is one which must be a category 2 offense, counsel's statement during those discussions amounted to an acknowledgment that the defendant was not entitled to such a lesser instruction. Although the defendant argued in a motion for new trial that it was a permissive lesser-included offense, that argument differed from the one prior to instructing the jury and was insufficient to preserve the issue for appeal.

Huckaba v. State, 1D17-502 (Nov. 20, 2018)

The defendant appealed convictions and sentences for vehicular homicide and reckless driving causing serious bodily injury. The First District affirmed, and addressed two issues: whether the information and instructions were "fundamentally defective, as they were based on an incorrect version of the vehicular homicide statute," and whether trial counsel was ineffective.

The original charge of vehicular homicide referred to the killing of a "viable fetus." In an amended information, one of three counts of vehicular homicide used the language "unborn child."

The "viable fetus" language was consistent with the 2013 statute on vehicular homicide; the "unborn child" language tracked the 2014 version of the statute. Both charging instruments alleged that the conduct was "contrary to Florida Statute 782.071(1)."

Defense counsel "accepted a jury instruction that the element of vehicular homicide included the killing of an unborn child, and defining unborn child as a human carried in the womb, at any stage of development."

The statute in effect at the time of the offense was the 2013 statute and that was the one which applied; it used the phrase "viable fetus." Because the body of the amended information alleged both the date of the offense and that the conduct was contrary to section 782.071(1), appellant "could therefore have read the referenced statute and found that the charged offense required proof of viability." Therefore, "the charging instrument in this case did not wholly fail to state a crime and was not fundamentally defective." Absent objection, the argument was waived.

Furthermore, "[w]here an essential element of an offense is never disputed at trial, failure to instruct on that element is not fundamental error." The defense in this case was that the defendant did not operate his vehicle in a reckless manner and that his actions did not amount to "homicide "regarding any of the victims."

As to the related claim of ineffective assistance of counsel, had there been an objection, the State could have amended the information to include the correct language, and the defendant therefore could not establish prejudice. As to the failure of counsel to argue viability as part of the motion for judgment of acquittal, the Court found enough evidence such that the trial court could have denied such a motion.

"As to Appellant's claim that defense counsel failed to object to evidence about alcohol consumption below the legal limit, and inferences drawn therefrom, such evidence is not inadmissible, as it is probative of recklessness."

Cooper v. State, 1D17-1622 (1st DCA Nov. 20, 2018)

At a trial for armed robbery, the only issue was whether the defendant used a gun. The teller said he did; he denied it. When his girlfriend testified, the prosecutor "sought to have her identify Cooper's Facebook page. The night before trial, Cooper posted a statement saying, 'Tomorrow I will be taking a very long, forced hiatus. To be specific, very likely ten years." The defense objected that the statement had not been disclosed, but the court permitted the girlfriend to identify the page and for the post to come in during the defendant's testimony.

As to the alleged inadequacy of the trial court's Richardson inquiry, the First District found any error to be harmless.

During his own testimony, Cooper was explaining that he was thanking his friends and family for their support. During the course of this, he said: "You [prosecutor] wouldn't even come off a plea bargain; so, of course, I'm walking in here talking about I'll likely get ten years." The trial court struck this, as it referenced the prosecutor's plea offer. The First District agreed that references to plea agreements are inadmissible, and found that even if the trial court erred in striking the remainder of the response, the error was harmless. The Facebook post did not reference the use of a gun and Cooper was admitting to the underlying robbery, apart from the gun.

Floyd v. State, 1D18-1157 (Nov. 20, 2018)

Florida's habitual traffic offender statute, section 322.264, Florida Statutes, applies only if a "driver license has been revoked." Floyd argued that he had only a learner's permit, not a driver's license.

Floyd's use of the phrase "learner's permit" was colloquial. The actual statutory language is "learner's driver's license." Thus, what is commonly referred to as a learner's permit does qualify as a driver's license, and the habitual offender statute was applicable.

Third District Court of Appeal

Wilson v. State, 3D15-2653 (Nov. 21, 2018)

Wilson was permitted to represent himself during pretrial proceedings and the trial. Upon his conviction for burglary and other offenses, he challenged the sufficiency of the trial court's Faretta inquiries. The Third District disagreed and affirmed the convictions and sentences:

> Our review of the proceedings in this case demonstrates that the trial court conducted multiple inquiries prior to and throughout trial that complied with both rule 3.110(d) and Faretta. On each occasion, the trial court emphasized that a lawyer could be of assistance with discovery, direct-examination, cross-examination, raising objections, introducing evidence, as well as providing counsel during plea hearings and/or sentencing hearings. Despite the trial court's numerous promptings, questioning, and warnings, Wilson continued to

> affirmatively insist on representing himself. The likelihood that a defendant would incompetently represent himself is not a valid reason to deny his unequivocal request for self-representation.
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> . . .
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> Further, when a defendant waives his right to appointed counsel, rule 3.111(d)(5) requires a court to renew its offer of assistance of counsel at each subsequent stage of the proceedings where the defendant appears without counsel. Specifically, rule 3.111(d)(5) provides, "[i]f a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel." "Each subsequent stage" is construed as each crucial stage that may affect the outcome of the proceedings. . . . In Wilson's case, the trial court went out of its way to make multiple inquiries into Wilson's decision to proceed pro se; each time the court offered him the assistance of counsel, and each time Wilson declined and affirmatively decided to proceed to represent himself. . . .

Towns v. State, 3D17-686 (Nov. 21, 2018)

A revocation of probation was reversed because the evidence was insufficient to support findings that Towns violated conditions of probation as to possession of a firearm and possession of cannabis with intent to sell.

While on probation, Towns was driving his car and stopped for a traffic infraction. There were three passengers in the car – one in front and two in the back seat. The officer smelled marijuana. During a search, the officer "found two clear baggies each containing multiple packages of marijuana and a handgun with an extended magazine all tucked under the middle of the back seat." Towns denied knowledge of the gun or drugs. "The arresting officer testified that there was no evidence that Towns exercised dominion or control over the gun or bags of marijuana under the back seat, other than the fact Towns owned the car and the officer observed the driver's seat was reclined in such a way that the driver could have reached into the back seat area."

The State did not prove actual possession of the contraband, as neither of the items was in Towns' hand or within his ready reach. Nor did the State establish constructive possession. Towns, as the driver, did not have "exclusive control over the backseat area where the contraband gun and marijuana were located, nor could he have reasonably reached under the back seat from his position in the driver's seat." The presence of two backseat passengers made this even more significant. Nor was control over the weapon or marijuana established, as the items may have been "placed there by the backseat passengers. The mere smell of marijuana is not proof that Towns had dominion and possession of the drugs."

One other condition of probation was upheld. The Third District reversed and remanded with instructions to the trial court to determine whether probation would have been revoked solely on the basis of the one remaining violation, because "the record does not make clear whether the trial court would have revoked Towns' probation and imposed the same sentence based on the sole remaining probation violation."

M.P. v. State, 3D18-344 (Nov. 21, 2018)

An adjudicatory order as to criminal mischief was reversed due to the admission of collateral offense evidence. The order was affirmed as to trespass.

M.P. lived in one of two units of a trailer. During an ongoing dispute, the tenants of the other unit would turn off the air conditioning thermostat, which controlled both units. M.P. testified that after one such incident, her codefendant broke into the other unit to gain access. "There was no evidence M.P. participated in the breaking open of the locked door. M.P. admitted to entering the trailer after R.H. had forced open the door solely for the purpose of turning on the air conditioning unit." M.P. denied involvement in a burglary of the other unit that occurred two weeks prior.

Over objection of the defense, the court permitted the State to introduce evidence of the burglary that had occurred two weeks earlier. That burglary was not charged. The State argued that the earlier burglary was intertwined with the charged offenses "to the extent it adequately described the events leading up to the charged crimes, i.e., the animosity between the tenants and the fact that in both the prior and current offenses the air conditioning was turned off. However, it is only when it is impossible to give a complete or intelligent account of the charged crime without reference to uncharged crimes that evidence of those uncharged crimes is admissible. . . . In this case, there is absolutely no evidence connecting M.P. with the prior

burglary, M.P. affirmatively denied any participation in that offense, there was no contrary evidence, and the charge of trespass could be explained and completely proven without any reference to the prior break-in. The testimony was simply not relevant to either of the charges against M.P. and should not have been admitted into evidence."

As to the criminal mischief offense, the evidentiary error was not harmless.

Fourth District Court of Appeal

Ferrari v. State, 4D14-464 (Nov. 21, 2018) (on motion for rehearing)

The Court granted the State's motion for rehearing, vacated its prior opinion, and substituted the current opinion in its place.

Ferrari appealed convictions for first-degree murder and conspiracy to commit first-degree murder. The Fourth District reversed for two reasons. "First, the trial court denied appellant's motion to suppress historical cell-site location information (CSLI). In *Carpenter v. United States*, 138 S.Ct. 2206, 2217 (2018), the United States Supreme Court held that accessing historical cell phone location information constitutes a search under the Fourth Amendment requiring a warrant and probable cause. Here, because the state acquired the CSLI without a warrant issued on probable cause, the court erred in denying the motion to suppress."

The cell-site location search in this case occurred in 2001, long prior to the decision in *Carpenter*. The State argued that reversal was not required based on the "good faith" exception to the exclusionary rule. The Fourth District disagreed. In 2001, "no binding decisional law existed determining that CSLI data was not within Fourth Amendment protection and thus exempt from the warrant requirement. In fact, CSLI data is never mentioned in reported decisions in that time period."

"Second, the court held that a mid-trial revelation of discovery that the State failed to disclose did not amount to a *Richardson* violation. We hold that the State's failure to comply with its obligations under Florida Rule of Criminal Procedure 3.220, by neglecting to disclose the substance of a codefendant's statements as well as the existence of exculpatory statements by another witness, constituted a discovery violation."

During the trial, defense counsel was cross-examining a witness, Nicholson, who had previously worked for Ferrari and had learned of the murder. During this

cross-examination, "Nicholson mentioned that he had worn a wire during one of his conversations with Fiorillo [a codefendant]. This relation surprised both the prosecutor and defense." During the ensuing Richardson hearing, Nicholson discussed the police wiring of his van and said that the recording with Fiorillo occurred only once.

The next day, the court learned that Fiorillo's former attorney had stated that he had ordered "'all of the tapes of all of the statements' from the Ft. Lauderdale Police Department five or six years before the trial." That attorney still had the tapes and Ferrari's counsel brought nine of the approximately 75 tapes to court. Several involved Nicholson's contacts with Fiorillo, and police reports had not alerted defense counsel as to that.

Other tapes were produced, and "one consisted of a statement by a Curtis Jackson, who said that he came down from Detroit to help kill Boulis. Jackson said a man in Gainesville paid to have Boulis killed. On another tape, Orlando Torrens, who worked for Fiorillo, said that Fiorillo confessed to him that he killed Boulis."

The State argued that there was no discovery violation because the tapes had been produced to Fiorillo's former defense counsel. The trial court agreed, finding that that attorney had been "the 'point person' for distributing discovery to the other defense attorneys." This was based on documentation from 2009. However, the 75 tapes at issue now had been produced to that attorney in 2006, prior to the existence of any such distribution agreement.

> The State failed to abide by its obligation under the rules in responding to discovery. Thus, it committed a discovery violation. The court, however, found no discovery violation, because the tapes of the statements were provided to the attorney for Fiorillo, a codefendant. Similar to what occurred in *Blatch[v. State]*, this was insufficient to satisfy the State's obligation, as the substance of the statements was never revealed so that any defendant would know of the relevance or importance of the statements. Just as *Blatch* concluded that it was not the defendant's obligation to depose an officer to determine whether the defendant had made any statements, here, it was not the defendant's obligation to depose Torrens to discover Fiorillo's confession to the murder. It is the

State's affirmative obligation to inform the defense of the substance of those statements.

And, producing the tapes to Fiorillo's counsel in 2006 was not sufficient because that pre-dated any agreement that may have existed among counsel for the codefendants starting in 2009.

Telisme v. State, 4D17-2320 (Nov. 21, 2018)

On direct appeal from a conviction for first-degree murder, the Fourth District affirmed and addressed a claim of ineffective assistance of counsel for failing to call an expert witness.

At trial, defense counsel sought to call the expert only on the issue of diminished capacity. Telisme argued on appeal that counsel should have called the expert "to testify regarding appellant's susceptibility to influence during the police interview."

As to diminished capacity, that is not a viable defense in Florida and counsel could not be ineffective as to that. As to susceptibility to influence during the police interview, that was found to be a strategic decision on the part of defense counsel.

Naeser v. State, 4D18-803 (Nov. 21, 2018)

"'[A]bsent the execution of an arrest warrant, a defendant who is in jail in a specific county pursuant to an arrest on one or more chares need not be given credit for time served in that county on charges in another county when the second county has only lodged a detainer against the defendant.'"

State v. Thomas, 4D18-1369 (Nov. 21, 2018)

A few days after sentencing the defendant to one year of probation, the court granted the defendant's motion to convert the probation to administrative probation. The State appealed and the Fourth District reversed: "Because only the Department of Corrections can transfer a probationer to administrative probation and only upon the satisfactory completion of half the term of probation, we reverse and remand with instructions to resentence the defendant."