Case Law Update
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Supreme Court of Florida

In Re: Standard Jury Instructions in Criminal Cases, Report 2008-12, SC18-1860 (May 30, 2019)

The Supreme Court approved for publication and use amendments to numerous drug trafficking and possession offenses, as well as affirmative defenses related to those offenses.

First, the instructions revise the definition of "possession," in accordance with other amendments to the jury instructions that the Court approved and published in 2018.

Next, the Court amended the "table of lesser-included offenses for instructions, 25.17, 25.18, and 25.21 to reflect that possession of a controlled substance is not a necessarily lesser-included offense of contraband in either a county detention facility, a juvenile detention facility or commitment program, or a state correctional facility, respectively."

"Lastly, instructions 25.9, 25.10, 25.11(a), 25.11(b), 25.12, 25.13, 25.13(a), 25.13(b), 25.13(c), 25.13(d), and 25.13(e), which individually pertain to trafficking of a specifically named controlled substance, are hereby deleted. In their place, new instruction 25.7(a) is authorized, which provides for the insertion of the name of the particular drug charged."

The following instructions were also deleted: 25.9, 25.11, 25.11(a), 25.11(b), 25.12, 25.13, 25.13(a), 25.13(c), and 25.13(e).

First District Court of Appeal

Magbanua v. State, 1D19-1875 (May 31, 2019)

During pretrial proceedings in a pending murder case, Magbanua sought certiorari review of an order prohibiting her from deposing the victim's ex-wife who was a material witness. The First District dismissed the petition for lack of

jurisdiction, as the petitioner did not demonstrate "material injury that cannot be corrected on direct appeal." The ex-wife had moved for a protective order, "stating that she intended to assert her Fifth Amendment privilege in response 'to any substantive questions' asked during the deposition." She acknowledged that she would testify at trial if subpoenaed by the State because she would be granted immunity. The trial court granted the protective order.

Magbanua argued "that her inability to depose Adelson [ex-wife] results in a material injury that cannot be corrected on appeal because a reviewing court could not determine how Adelson would have answered questions posed to her during the deposition. Nor could the impact of her answers on Magbanua's trial preparation be measured." The Court disagreed, relying on prior appellate court decisions holding that any material injury from orders barring pretrial discovery could be reviewed and remedied on direct appeal.

The opinion of the Court was accompanied by a concurring opinion from one judge and a dissenting opinion from another. The dissent addressed the majority's contention that any alleged error could be corrected on direct appeal after any conviction by emphasizing the importance of the witness in this case: "But the analysis is different when the discovery at issue is the deposition of a material witness. . . . Irreparable harm exists here because the trial court precluded in its entirety the deposition of a uniquely central, material witness."

Williams v. State, 1D18-5337 (May 30, 2019)

The First District denied a petition for writ of mandamus which sought "to compel the trial court in her pending criminal case to hold an adversary preliminary hearing." There was no "clear legal right to the hearing under rule 3.133(b)."

Williams was arrested in September 2018, posted bail and was released with conditions. In November 2018, an information was filed for three drug offenses. Later in November, Williams filed the motion for an adversarial probable cause hearing.

Under Rule 3.133(b) if a defendant is not charged in an information or indictment within 21 days from the date of arrest, there is a right to an adversary preliminary hearing. Under Rule 3.133(b)(5), after the hearing, if the court finds probable cause does not exist, the defendant "shall be released on recognizance." The First District held that "no adversary preliminary hearing is required where a defendant has posted bail and is already on pretrial release." Williams argued that

"the pretrial release conditions amounted to a restraint on her liberty" and that the rule therefore entitled her to an adversarial probable cause hearing. The Court disagreed.

Cooley v. State, 1D17-4001 (May 28, 2019)

Colley appealed convictions for two counts of lewd and lascivious molestation of a child. The First District affirmed and addressed two claims.

With respect to an argument that post-arrest statements to a Child Protective Investigator constituted custodial interrogation requiring Miranda warnings, the First District concluded that it did not have to decide whether the admission of the statements was error as any possible error was harmless. The jury had seen a video of an earlier interview which was consistent. Second, while the victim's mother testified that Cooley confessed, the CPI investigator said he did not confess to her; the defendant neither denied nor admitted the conduct to the CPI. Finally, the most damaging points from the interview with the CPI were "duplicative of other, properly admitted evidence."

Next, there was no abuse of discretion in permitting the victim to testify about uncharged acts of molestation that took place outside Florida. There was sufficient similarity between the out-of-state acts and charged conduct, and the victim, the defendant's daughter, was the same in both. (The Court's opinion does not set forth the facts of the out-of-state charges.).

Second District Court of Appeal

Murphy v. State, 2D17-731 (May 31, 2019)

A Rule 3.800(b) motion challenging the inclusion of 14 points for a prior conviction the defendant claimed did not exist was reversed for an evidentiary hearing. When a defendant challenges the accuracy of points for prior convictions, the State has the burden of producing competent evidence of the disputed conviction. An evidentiary hearing was required in this case as the State did not make such a demonstration and the motion was denied without a hearing.

Weitz v. State, 2D18-72 (May 31, 2019)

The Court partially granted a petition alleging ineffective assistance of appellate counsel. Weitz challenged dual convictions for unlawful use of a two-way

communications device, and transmitting material harmful to minors via electronic mail as a double jeopardy violation, because "the elements of the former are subsumed in the elements of the latter." This was referred to as an "issue of first impression."

Based on the allegations in the charging document, the Court, pursuant to Lee v. State, 258 So. 3d 1297 (Fla. 2018), deemed the offenses to have arisen out of the same criminal episode, notwithstanding the allegation in both counts as to conduct occurring "on one or more occasions" during the same time period.

As neither statute at issue, s. 934.21 nor s. 847.0138(2), explicitly authorized multiple punishments, the Court engaged in Blockburger analysis and compared the elements of the offenses. The elements of s. 847.0138(2) "are that the defendant (1) knowingly sent an image, information or data that he or she knew or believed to be harmful to minors; (2) sent the image, information, or data to a specific individual who was either actually known by him or her to be a minor or believed by him or her to be a minor; and (3) sent the image, information or data via electronic mail." "The elements of section 934.215 are '(1) the use of a two-way communications device (2) for the purpose of facilitating or furthering the commission of any felony offense.'"

Here, the elements of the lesser offense were subsumed by the greater. Section 934.215, the lesser offense, was a necessarily lesser included offense. Although "two-way communications" device was not defined in Chapter 934, the Court concluded "that transmitting an image, information or data via electronic mail – a mechanism for communication by which images, information, and data can be both sent and received and which includes emails, instant messages, and text messages, . . . – necessarily involves the use of a 'two-way communications device.'"

Lee v. State, 2D19-1154 (May 31, 2019)

Lee filed pleadings in the Florida Supreme Court which were transferred to the Tenth Judicial Circuit for consideration as a habeas corpus petition. Lee sought to compel corrections officials to provide him with a bland diet. The circuit court dismissed the petition based upon a failure to demonstrate exhaustion of administrative remedies. The Second District affirmed the lower court's order without prejudice to exhaust administrative remedies and then, if necessary, seek review in the circuit court.

Newby v. State, 2D17-228 (May 2, 2019)

Newby appealed a conviction for burglary with a battery of a woman inside the home. His defense was that he was not the intruder. On appeal, he argued that the trial court "erred by refusing to admit so-called reverse Williams rule evidence that another person had committed a burglary with a battery in the same area in a strikingly similar manner." The Second District agreed and reversed for a new trial.

The evidence of the charged offense was that the victim returned home from her job at a restaurant around 11:30 p.m., locked the front door and went to sleep. A loud bang around 3:00 or 3:30 a.m. woke her. After another loud bang she "saw a man wearing a dark ski mask running through her half-open bedroom door." The intruder jumped on the victim who was in bed. She fought back and the intruder tried to push her head to the side. The intruder put his hands around her neck while she struggled. After about five minutes, their eyes met, the attacker jumped off the victim, and exited. She saw him leave, turning south on the street in front of her home.

Officers responded to the 911 call and encountered Newby jogging in the area, wearing only boxer shorts, a T-shirt, and dress socks with no shoes, at a time when the temperature was in the forties. Newby explained that he had been drinking, had just returned home and started undressing outside, when he saw a car drive by with people he knew and he jogged towards their house to meet them; he then decided to keep jogging and said his clothes would be in a backpack in front of the home where he was residing. A police search at the time yielded a gray hooded sweatshirt, with stripes in a trash can near the victim's home. Upon inquiry, Newby admitted owning such a sweatshirt. No ski mask or gloves or other materials connected to the crime were found. Officers did find the backpack described by Newby in front of the residence, and it contained dress pants and a white shirt. A deputy also showed the sweatshirt to Newby's sister, who also lived at the residence, and she identified it as Newby's.

At trial, the defense focused on discrepancies between he victim's description of the perpetrator and Newby's physical appearance. The defense sought to introduce evidence of another burglary, nine months later, in which a woman was attacked. It occurred several miles away, and the description of the perpetrator's height and weight – 5'9" and 160 pounds – was consistent with the description provided by the victim in the charged offense – "skinny" or "thin." Newby was 5'9" but weighed 225 pounds.

In the subsequent incident, the perpetrator was described as wearing a ski mask, although it was later found to have come from a ninja costume. The victim was assaulted in her bed and put his hands around her throat to prevent her from seeing him. He ran his hands over the victim's clothing and groin area and tried to bind her writs. After 20-30 minutes, when the eyes of the two "locked," the perpetrator fled. The perpetrator was identified as Nicholas Nardelli. The mask was tossed into a nearby dumpster.

The Second District found sufficient similarities between the two incidents to warrant admitting the evidence: each occurred around 3:00 a.m.; the victim in each was a middle-aged woman living alone in the Dunedin area; each involved the use of a ski mask and gloves; each perpetrator was described as having hazel-colored eyes; each perpetrator was described as thin; each wore dark clothes; each jumped on the victim in bed; each perpetrator moved the victim's head to prevent identification; each incident appeared to have a sexual motive; and in each, the perpetrator fled when his eyes met the victim's.

The Court rejected the State's argument that differences between the two were sufficient to justify exclusion: one involved entry through a front door, one the back door; one lasted five minutes, one 20-30; in one the attacker spoke, in the other he did not; and in one the perpetrator tried to bind the victim's hands, in the other he did not.

Franklin v. State, 2D17-2958 (May 29, 2019)

The State's motion for rehearing and certification of conflict were denied. Although the Court's denial does not have a written opinion, an opinion concurring in result only includes a lengthy discussion regarding the meaning and distinctions between two Florida Supreme Court opinions addressing errors in the manslaughter by act jury instruction: Dean v. State, 230 So. 3d 420 (Fla. 2017), a plurality decision addressing the question of whether the failure to give a requested jury instruction on a necessarily lesser included offense one step removed from the charged offense is subject to a harmless error analysis and no longer per se reversible error, and Roberts v. State, 242 So. 3d 296 (Fla. 2018), holding that if the giving of an incorrect instruction on a necessarily lesser included offense constitutes fundamental error, then giving no instruction at all constitutes fundamental error.

Tharp v. State, 2D17-4513 (May 29, 2019)

Tharp appealed convictions for two counts of lewd and lascivious exhibition. The Second District reversed the sentences for resentencing before a new judge because the court considered impermissible evidence of uncharged subsequent conduct.

A lewd act was committed in the children's section of the library on May 10th. Tharp was captured on a video in the children's section of a different library on May 11th and, on May 12th, was identified as the perpetrator of the May 10th incident from videos from the two prior days. No improper conduct was captured on the May 11th video.

At the sentencing hearing, the State introduced the May 11th video into evidence even though no criminal conduct was charged from that. The State argued that it showed Tharp "was unable to conform his conduct to what society would expect because he went to the Lakeland library the day after the incident at the Winter Haven library." The court entertained it "on the theory that it was relevant to rebut any argument that Tharp did not pose a danger to the community and to establish that Tharp was not amenable to supervision or treatment." Although the lowest permissible sentence was any nonstate prison sanction, Tharp, who had no prior record, was sentenced to ten years in prison plus 15 years of probation.

The Second District rejected the State's argument that the video from May 11th did not depict any criminal conduct and was therefore admissible. "However, the law precludes consideration of subsequent misconduct or bad acts; not just subsequent criminal conduct." The State tried to use the May 11th video to show that Tharp was likely to reoffend again if not imprisoned."

Third District Court of Appeal

Wade v. State, 3D18-2078 (May 29, 2019)

Evidence of value in excess of $100 for first-degree petit theft was insufficient. The State failed to present evidence of the value of stolen liquor.

Fourth District Court of Appeal

Carn v. State, 4D17-1834 (May 29, 2019)

Carn appealed convictions for attempted armed burglary, aggravated assault with a firearm and shooting into a building. The Fourth District affirmed and rejected challenges to several evidentiary rulings.

The trial court excluded an alibi video as a sanction for a discovery violation. The Fourth District found that the exclusion was harmless. It was a video of a video on someone's phone, of poor quality, from which "no person is identifiable without explanation from a witness." It did not prove an alibi on its own. The actual alibi witness was permitted to testify.

Testimony regarding $20,000 of settlement monies that the victim received was relevant to the State's effort to propose a motive for the robbery. It "showed the victim had a large sum of money in his home, and the State argued this fact may have been common knowledge within the neighborhood."

The Court also found that there was sufficient evidence that the shooter "intended to enter the home and commit a crime within." "Here, the defendant falsely identified himself as someone the victim knew to gain entry to the victim's home. The use of this false name shows the defendant intended to gain entrance by trickery or deceit." This was sufficient to permit an inference of an intent to commit an offense within the home.

Jones v. State, 4D18-656 (May 29, 2019)

A conviction was reversed on direct appeal because the court erred by interfering with the defendant's right to retain counsel of his choice. Jones was transported to the county five days prior to trial and became aware of the trial date only a few days before trial. Counsel of choice appeared on the day of trial and requested a 2-3 day continuance, which the court denied.

While a trial court can consider interests of judicial administration when ruling on requests for substitutions of counsel on the eve of trial, the request cannot be arbitrarily denied. The only claim of prejudice by the State was that one witness would not be available on one day; the State did not assert the witness would not be available on other possible dates. And, with respect to the court's scheduling interests, the court "had already agreed to a continuance if the public defender was

not 'prepared' to proceed to trial." The court proceeded because the public defender announced that he or she was prepared. The lower court abused its discretion by denying the motion for continuance and request for substitution.

Farrell v. State, 4D18-683 (May 29, 2019)

Farrell appealed a conviction for first-degree murder. The Fourth District reversed. The sole defense was self-defense and the trial court erred "in excluding evidence of the victim's prior act of violence which was known to the defendant." The defendant proffered testimony that he had witnessed the victim beating a friend, Bazini, three days before the murder. Farrell stated that he had to stop the victim of the murder from kicking Bazini on the floor, and that "ever since the victim started smoking Flakka, he had seen him threaten and pull guns on people." Farrell was permitted to testify only as to the "victim's reputation for violence in the community."

When a defendant asserts self-defense, prior specific acts of violence by the victim are admissible if the defendant "knew about the prior violent act at the time he committed the crime against the victim," and "the victim made some overt act at or about the time of the crime which may be reasonably regarded as placing the defendant in imminent danger." In addition to the above proffer as to the defendant's knowledge of the prior violent incident, the overt act was established by the defendant's testimony that "the victim took the defendant's loaded Smith and Wesson 40-caliber automatic handgun and approached the defendant while brandishing it."

Ellison v. State, 4D18-1754 (May 29, 2019)

The Fourth District reversed a conviction for armed robbery with a mask. The trial court erred in admitting an out-of-court statement of identification of Ellison by a witness, "who was not present at the scene of the robbery, after viewing a surveillance video."

This witness's out-of-court statement "was not based on her own 'visual memory of the event,' but rather on her recognition of appellant from viewing a surveillance video." Statements of identification after perceiving the person are not hearsay if the declarant testifies at trial and is subject to cross-examination. The reason for this rule is that "'such statements bear the mark of reliability because they are usually made in close temporal proximity to the actual event while the witnesses' visual memory of the event is fresh.'"

The testimony in question in this case came from a store employee who was not present during the robbery, but who identified the defendant as one of the robbers from the video, based on the way the person moved, skin tone, height and build. She and the defendant had been dating for almost a year. The non-hearsay rule refers to an identification of a person after perceiving the person in the criminal episode. It is not intended to "'allow other out-of-court statements by a witness to others naming the person that the witness believes committed the crime.'"

The Court also noted, "with respect to evidence that appellant hung up the phone in response to the detective's statement that he was investigating a robbery, "Florida law differs from federal law on the issue of the admission of comments on a defendant's right to silence. Under federal law, a defendant's pre-arrest, pre-*Miranda* silence may be used as substantive evidence of a defendant's guilt where a defendant has not expressly invoked the privilege against self-incrimination." Under the Florida Constitution, there is a violation when "pre-arrest, pre-*Miranda* silence is used against the defendant at trial as substantive evidence of the defendant's consciousness of guilt."

Fifth District Court of Appeal

Boffo v. State, 5D18-15 (May 31, 2019)

The Fifth District reversed an order revoking community control. The trial court abused its discretion in denying a motion for a continuance.

One week prior to the revocation hearing, assigned counsel advised the defendant that "he would be leaving the country due to military service and would be unable to represent him at the evidentiary hearing." A new assistant public defender was appointed and requested a continuance on the day of the scheduled hearing, as she was unprepared and had not yet spoken to the defendant about his defenses. The trial court denied the requested continuance, "remarking that any public defender could 'stand in' to represent the defendant on what it considered to be an uncomplicated case."

The lower court did not consider any of the multiple factors that must be considered and balanced when ruling on a motion for continuance. Counsel did not have sufficient time to prepare; the defendant was not responsible for the continuance; and the possibility of prejudice from the denial of the continuance was

great, as counsel had not spoken to any defense witnesses and one potential witness had not been subpoenaed.

Hayes v. State, 5D18-1110 (May 31, 2019)

Evidence as to driving while a license was permanently revoked was insufficient and the conviction was reversed. The evidence showed that Hayes had a Class E license, a learner's permit, from June 1975 to June 1976, and it was suspended in 2008 due to numerous convictions for driving under the influence and driving while license suspended. The defendant never had a license to permanently revoke, only a learner's permit, which had expired in 1976.

Jenkins v. State, 5D18-2706 (May 31, 2019)

Jenkins filed a Rule 3.800(b) motion arguing that the trial court, when imposing sentence, "failed to understand that it had the discretion not to impose the entire suspended sentence once it revoked her community control." The trial court denied that motion. On appeal, the Fifth District held that because the lower court acknowledged Jenkins' argument from the Rule 3.800(b) motion, but nevertheless declined to reconsider and modify the sentence, it appeared "that the trial court was aware of its authority and discretion to have imposed less than the full suspended sentence, but simply declined to do so."

C.T.A. v. State, 5D18-3330 (May 31, 2019)

The trial court is not "required to set forth findings justifying departure from Department of Juvenile Justice (DJJ) recommendation in deciding whether to commit juvenile even when DJJ recommended probation; findings are required only when court departs from recommended restrictiveness level of commitment."