

Case Law Update
July 20, 2020
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Eleventh Circuit Court of Appeals

[United States v. Chalker](#), 18-15102 (July 13, 2020)

Chalker appealed convictions for multiple healthcare fraud charges. On appeal, he raised several evidentiary issues and challenged the denial of a motion for continuance. The Eleventh Circuit affirmed the convictions and sentence.

Chalker was the pharmacist for an independent pharmacy that had recently obtained a new owner. The new owner was under investigation for healthcare fraud and arranged with Chalker to keep his name off correspondence with pharmacy benefit managers (PBM's), such as Caremark. Eventually, an investigator for Caremark noticed unusual billing practices from the pharmacy, such as the submission of bills at times when the pharmacy did not have sufficient stocks of particular drugs to fill prescriptions for which the pharmacy sought reimbursement. There were also unauthorized prescriptions, and prescriptions which exceeded doctors' orders. Some patients started complaining about receiving prescriptions that they did not know anything about. There were also billing discrepancies between drugs the pharmacy billed and supplies from wholesalers.

The evidence was sufficient to prove conspiracy to commit healthcare fraud under 28 U.S.C. s. 1347. Chalker was effectively managing the pharmacy and "filled medically unnecessary prescriptions for patients who neither wanted nor needed them." Evidence included a dramatic spike in the number of prescription drug event records, and the records related processing of claims for an unusual mix of drugs for the type of pharmacy that Chalker was operating. Patients were also receiving these same drugs and, unusually, in the same quantities. It was also unusual that three quarters of the pharmacy's Medicare patients lived outside Florida. A pharmacist, testifying as a government expert, stated that these factors were consistent with other fraudulent schemes she had investigated.

Additionally, an audit by a Caremark investigator was triggered by increased billing by the pharmacy, from a few hundred dollars a week to \$40,000 a week. Pre-printed prescription pads were being used and the pharmacy was typically waiving copayments. In some instances, the pharmacy was unable to provide Caremark with

documentation showing that the prescriptions had, in fact, been delivered to patients. Audits from other companies resulted in similar findings.

Another co-conspirator admitted conspiring with Chalker in this scheme. Chalker admitted being responsible for running the pharmacy. Chalker started using telemarketing and provided telemarketers with scripts to use. The owner of the pharmacy acknowledged that Chalker kept the owner's name off correspondence with companies like Caremark to conceal his criminal conviction and other legal problems. While Chalker testified at trial and essentially denied the multiple allegations, his denials were a matter of a credibility determination for the jury.

The Eleventh Circuit further found that the evidence of substantive healthcare fraud was sufficient. The evidence demonstrated that the defendant knew that false claims were submitted. One witness, who was a patient for heart disease and kidney disease, testified that she never needed any type of "topical compounded medication," the type for which the pharmacy was submitting claims. Pharmacy personnel kept pursuing her to order the medication, and she eventually gave in and told them to go ahead. A New York doctor purportedly wrote the prescription, but the patient had never heard of that doctor.

Motions to dismiss the indictment were properly denied because the indictment tracked the statutory language for the charged offenses.

The district court did not err in permitting a forensic accountant to testify as a lay witness. The witness had bachelors degrees in business management and accounting, and a masters degree in forensic accounting, but was not being proffered as an expert witness by the government. The witness was involved in the investigation, testified briefly, and only summarized Chalker's bank and wage records.

On August 8, 2018, the government listed an expert witness and the scope of the anticipated testimony was disclosed. On August 31st, after an objection to one aspect of the anticipated testimony, the government agreed that that aspect would not be included in the testimony, and further announced that a different expert would be used for the same purpose. The defendant argued that the notice of the new expert was too late. The Eleventh Circuit disagreed, as the scope of the testimony had previously been disclosed; only the identity of the expert testifying changed.

[United States v. Stein](#), 18-13762 (July 13, 2020)

Stein was convicted of multiple charges of mail fraud, wire fraud, securities fraud, and other offenses. In a prior decision, the Eleventh Circuit remanded the case to the district court to recalculate the amount of loss for purposes of sentencing and restitution. After further proceedings in the district court, the current appeal ensued and the Eleventh Circuit affirmed.

The Court's prior opinion had found that the "record contains no direct, individualized evidence of reliance for each investor," and that "the circumstantial evidence in the record is far too limited to support a finding that" every investor "relied on the fraudulent information Mr. Stein disseminated."

On remand, the government presented an expert who "conducted statistical analyses which provided evidence of investor reliance." His testimony also covered an additional area on remand – that certain intervening events did not affect stock price.

In the current appeal, the Court rejected Stein's effort to reopen and relitigate issues that were adjudicated in the prior appeal. The Court also refused to entertain a challenge to a forfeiture ruling, as that issue was beyond the scope of the prior remand.

The Court found that the evidence adduced on remand was sufficient to demonstrate the losses that were attributable to Stein's conduct. The evidence is detailed in the Court's opinion and focuses on the returns for the Signalife stock at key points in time – when the company issued a fraudulent press release; when it made order cancellations public; at the time of a conference call when it failed to produce promised information on pending orders. The district court's restitution amount also cut the government's request in half, due to its refusal to consider investors who sold their stock before the date on which the cancellations of orders were made public.

With respect to a proximate cause argument advanced by Stein, the Court found that the government expert's analysis adequately accounted for the market downturn in 2007-2008.

[Bates v. Secretary, Department of Corrections](#), 17-14960 (July 14, 2020)

The district court's dismissal of a habeas corpus petition under 28 U.S.C. s. 2254 as untimely was reversed. The district court's dismissal and calculation of the one-year limitations period had erroneously concluded that the limitations period "was not tolled until the date Bates filed a motion for postconviction relief that complied with all procedural requirements of law, see Fla.R.Crim.P. 3.850, despite his earlier filing of a noncompliant motion." The Eleventh Circuit's decision was based on its own decisions which were issued after the district court's dismissal.

A "properly filed" postconviction motion challenging a conviction or sentence in state court tolls the one-year federal limitations period for the filing of the federal habeas corpus petition. In this case, a postconviction motion was filed on March 17, 2015, but it was dismissed without prejudice on May 4, 2015, because it lacked a signed oath. It was refiled on June 4, 2015, with the signed oath, and trial and appellate court litigation on that motion then continued in the state court until the issuance of the appellate court's mandate on January 26, 2017.

The timeliness of the federal petition hinged on the question of whether the motion, as filed without an oath, had a tolling effect for the period of March 17th until June 4th. Although the original motion, when filed on March 17th, lacked a required signature and oath, it was nevertheless deemed to be "properly filed" because of two recent Eleventh Circuit decisions which held that that was so when the state court granted leave to file a compliant motion, and the federal petitioner complied with the state court mandate.

[Dallas v. Warden, et al.](#), 17-14570 (July 13, 2020)

The Eleventh Circuit affirmed the denial of a federal habeas corpus petition challenging a state court conviction and the death sentence for capital murder. The Court addressed two issues: whether trial counsel was ineffective due to a conflict of interest; and whether counsel was ineffective for failing to investigate and present mitigating evidence.

The alleged conflict was based on Dallas's counsel also having been appointed as a Special Deputy Attorney General to represent a state government agency "in a civil class action relating to conditions of confinement in Alabama's mental health institutions." That case was unrelated to Dallas's criminal case. Furthermore, the state agency at issue did not have any adverse interests to those of

Dallas. Its involvement in contracting for the psychological evaluation of Dallas by a competent expert did not create an adverse interest.

The claim of ineffective assistance with respect to penalty phase mitigation failed because Dallas did not demonstrate prejudice. The Court looked at the evidence adduced at the original penalty phase proceeding and concluded that the subsequent evidence that Dallas relied on was largely cumulative. The evidence related to Dallas's assertions of childhood abuse, violence, poverty, substance abuse and similar matters. The Court viewed the new evidence as adding "some details," or "explaining" aspects of Dallas's life that "had already been graphically presented, and in detail at trial."

One noteworthy point in the opinion is that there was an issue as to the existence of a procedural default for this claim, based on postconviction counsel's purported abandonment of the claim in state court. Affidavits regarding the additional mitigation were then presented in federal court. Rather than decide whether there was a procedural default, the Eleventh Circuit relied on the principle that a federal habeas claim may be denied on the merits, in lieu of reliance on a procedural default.

[United States v. Martinez](#), 18-12950 (July 14, 2020)

The Eleventh Circuit affirmed a sentence and rejected an argument that a Guidelines enhancement was incorrectly applied.

The sentencing guidelines increase a defendant's guideline range if he unlawfully possessed a firearm and he did so "with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." U.S.S.G. s. 2K2.1(b)(6)(B). The issue here is whether the section 2K2.1(b)(6)(B) enhancement applies if the defendant plans to swap his firearm for drugs in a future, but hasn't-happened-yet, trade. We conclude that it does if the government proves by a preponderance of the evidence that the defendant knew, intended, or had reason to believe (rather than hoped, wished, or dreamed) the gun was going to be used to buy drugs, and the sale would have (rather than may or might have) happened but for the defendant's arrest or something else getting in the way.

The appellate court then proceeded to find that the district court did not err in finding the evidence sufficient under this standard, as Martinez “intended that his stolen gun would be bartered for a pound of dope.”

[United States v. Gumbs](#), 18-13182 (July 15, 2020)

Gumbs challenged convictions for two counts of “using a deadly weapon to forcibly assault, resist, oppose, impede, intimidate, or interfere with a federal officer.” On appeal, he challenged the district court’s denial of his requested instructions defining “forcibly,” and addressing the use of “deadly force.” He also challenged the denial of an instruction on the lesser included offense of simple assault.

The request to define forcibly was properly denied because the instructions as given were sufficient. The jury was instructed that a forcible assault “includes any intentional display of force.” Similarly, requested instructions on the use of deadly force were adequately covered by other instructions. After giving the first portion of the requested instruction, that a “motor vehicle is a deadly or dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury,” it was not necessary to further instruct that the car must not be simply used “as a mode of transportation.”

As to simple assault, a defendant in a criminal case is entitled to an instruction on a lesser included offense “if the evidence would permit a rational jury to find him guilty of the lesser offense and not the greater.” Simple assault, under 18 U.S.C. s. 111(a), “does not involve physical contact or the intent to commit another felony.” The offense under s. 111(b) is enhanced based on the use of a deadly or dangerous weapon or the infliction of serious bodily injury.

If the jury were to find the elements of the lesser, simple assault, it would also have to find the elements of the greater, forcible assault with a deadly weapon. The only action that could form the basis for an assault was the gunning of the defendant’s car. As a result, a rational jury could not find the defendant guilty of simple assault but not forcible assault.

[United States v. Deason](#), 17-12218 (July 17, 2020)

The Eleventh Circuit affirmed convictions for attempted online enticement of a minor and six counts of attempted transfer of obscene matter to a minor. A federal agent was acting the role of a minor during the communications with Deason.

Deason was interviewed in his home without Miranda warnings. The Eleventh Circuit concluded that he was not “in custody” and that warnings were not required. After the special agent obtained a warrant for the search and seizure of Deason’s cell phone at his house, a total of eight agents went to the house in separate vehicles, without lights or sirens. Deason stepped out onto his porch, while all of the agents approached with guns drawn, but pointed down towards the ground. Only one officer was in uniform; the others were in civilian clothes, “wearing body armor with law enforcement markings.”

Special Agent Ring told Deason about the warrant and holstered his gun; Deason told him where the gun was and other agents retrieved it from the house. Ring offered to tell Deason about what was going on, either inside or outside the house, and Deason chose to go in to talk. Ring told Deason he was not under arrest or in custody. Deason was also advised that he could tell the officers to leave at any time. The conversation between them then continued for more than an hour and eventually became more confrontational, as Deason was questioned about his communications with the minor. At one point, Deason was permitted to talk to his wife, alone for 15 minutes.

The evidence was sufficient to prove the charges of attempted transfer of obscene matter. The government presented screenshots from several videos, plus testimony from Ring describing the videos. Based on Supreme Court case law addressing obscenity, Deason argued that the jury could only make that determination by considering the work “as a whole,” which would require the entire video.

The Eleventh Circuit disagreed. “The ‘taken as a whole’ language in Miller ensures (1) that the matter is placed in context so that the jury can properly determine whether the work as a whole appeals to the prurient interest, and (2) that any serious literary, artistic, political, or scientific value present in the matter as a whole is not lost because only select portions are viewed.” Works not presented in their entirety may still be found obscene. Ring’s description of the works in their entirety provided sufficient context from which it could be concluded that the sexual acts portrayed were devoted exclusively to the depiction of sexual practices; that they appealed to

prurient interest and depicted sexual conduct “in a patently offensive manner,” and that they were “devoid of serious value, aside from its intended commercial purpose to cater to a prurient interest in sex.”

In a related argument, Deason asserted that screenshots were insufficient under the best evidence rule; that the entire video was required. As this claim was not preserved, it was reviewed under the plain error standard, and the Court found that even if Deason’s argument were correct, it did not qualify under the plain error standard. Had Deason objected, any meritorious claim would have resulted in the district court admitting the videos in their entirety. Thus, Deason could not demonstrate that his substantial rights were affected.

First District Court of Appeal

[Johnson v. State](#), 1D18-4914 (July 13, 2020)

The First District affirmed three convictions for battery on corrections officers.

The defendant sought to discharge counsel, prior to trial, for refusing to file a notice of intent to rely on a mental health defense other than insanity. At a hearing, the attorney explained that she had considered the prior competency evaluation, which referenced an “explosive disorder diagnosis,” and she did not believe that it provided the basis for a defense. The court denied the motion to discharge counsel. At a subsequent pretrial hearing, the defendant further argued that counsel failed to appeal that order, and counsel responded that she did not believe the order was appealable. Upon request of the defendant, the court conducted a Faretta inquiry, and found that the defendant was competent to represent himself and that he was knowingly and willfully waiving his right to counsel. He then represented himself at trial and sentencing.

Although the trial court’s initial inquiry when the defendant sought to discharge counsel was brief, it was sufficient. Defense counsel responded to the allegations that she was ineffective. While counsel and the defendant clearly had differences of opinion as to strategy, the decisions in question were for counsel to determine.

Although the trial court failed to advise the defendant that replacement counsel may not be appointed if the defendant chose to dismiss counsel after the denial of the motion for discharge, that omission was subject to harmless error

analysis. The record was sufficient to demonstrate that the defendant was aware that he would proceed either pro se or with private counsel if he subsequently chose to discharge counsel.

[Bradford v. State](#), 1D19-230 (July 13, 2020)

A petition alleging ineffective assistance of appellate counsel was granted. Bradford was sentenced to terms of 20 years for a second- and third-degree felony. Appellate counsel from the direct appeal was found to be ineffective for not filing a Rule 3.800(b) motion to correct sentence during the pendency of the direct appeal. The sentence imposed constituted an unlawful general sentence and it was illegal since the 20 years exceeded the statutory limit for the third-degree felony.

[Goss v. State](#), 1D19-2210 (July 13, 2020)

Goss and his codefendant were charged with multiple felonies, including carjacking, kidnapping, robbery and burglary. Goss was also charged with committing a sexual battery; the codefendant was not. The convictions were affirmed and the appellate court found that the trial court did not err in denying a motion to sever the cases of the defendant and his codefendant.

The motion to sever was based on Confrontation Clause concerns. The female victim was going to testify at trial that the codefendant told Goss to stop the sexual assault by saying, “No, man, don’t do it to her. . . .” The trial court properly denied the motion to sever because there was no Confrontation Clause violation: “the codefendant’s statement was admissible as an admission by acquiescence or silence insofar as the statement was made in Appellant’s presence and elicited no denial or protest from Appellant.”

Furthermore, the Confrontation Clause applies only to “testimonial” statements, and the statements by the codefendant was not “testimonial” in nature, as it was not made in anticipation of being used in the investigation or prosecution of the case.

[Rembert v. State](#), 1D19-2499 (July 13, 2020)

The First District had previously reversed and remanded for resentencing based on the imposition of a life sentence with the possibility of parole for a juvenile offender who had been convicted of first-degree murder. While the resentencing was pending in the trial court, the Florida Supreme Court receded from its own

precedent and concluded that a sentence of life with parole eligibility after 25 years was not an unlawful sentence under Graham v. Florida or Miller v. Alabama. Notwithstanding the First District's mandate for a resentencing, the trial court concluded that a different result was appropriate in light of the Florida Supreme Court's intervening decision in Michel v. State, in which the Supreme Court concluded that life in prison with parole eligibility after 25 years was not unlawful.

The trial court therefore refused to conduct a resentencing. In a new appeal, the First District held that the intervening decision of the Florida Supreme Court constituted justification for the trial court to deviate from the First District's prior mandate to conduct a resentencing.

[Newman v. State](#), 1D19-2855 (July 13, 2020)

The First District affirmed a conviction for lewd and lascivious molestation of a child and found that the trial court did not err in admitting collateral offense evidence.

The alleged offense occurred in a "familial" context, and a relaxed standard of similarity was therefore applicable. The evidence in question was found to be relevant "to show absence of mistake or accident, to the extent Appellant would claim that he acted without the requisite intent in touching the victim because he was asleep, in that it showed that he possessed and acted on urges to engage in inappropriate sexual conduct with young girls." It was further relevant to corroborate the victim's testimony and show the defendant's propensity for criminal conduct.

The primary argument on appeal was that the probative value was outweighed by the prejudice from the evidence because there were substantial differences between the incidents. The First District found that there were sufficient similarities under the relaxed standard: both children were prepubescent; the defendant was the adoptive father of both; the molestations both occurred at night, while others in the residence were asleep; the defendant touched the vaginas of both victims with his fingers and did so over the next few days and then ceased doing it. While there were notable distinctions, given the relaxed standard for the familial context, these similarities sufficed.

[Hampton v. State](#), 1D19-4022 (July 13, 2020)

A resentencing during collateral review proceedings did not establish a new two-year limitations period for the filing of a Rule 3.850 motion challenging the conviction. The two-year period to challenge the conviction still commenced with its finality upon issuance of the mandate from the direct appeal.

[Cotton v. State](#), 1D19-153 (July 15, 2020)

In postconviction proceedings, as a result of decisions from the Supreme Courts of Florida and the United States regarding juvenile life sentences, the State agreed to a resentencing hearing. The trial court agreed to the resentencing hearing, but did not reduce the oral order to a written order. Prior to the actual resentencing, the Florida Supreme Court receded from some of its prior holdings regarding juvenile life sentences, and the trial court concluded that it would not conduct the resentencing hearing.

On appeal, the First District concluded that because the order for a resentencing hearing had not been reduced to writing, it was not final, and the ultimate denial of a resentencing hearing was affirmed by the First District.

Second District Court of Appeal

[Grant v. State](#), 2D18-2874 (July 17, 2020)

The Second District reversed a conviction for burglary of a dwelling for a new trial. The trial court erred by refusing to give the requested standard jury instruction on burglary.

The standard jury instruction on burglary includes the following language regarding intent: “At the time of entering . . . [defendant] had the intent to commit [(the crime alleged)] [(an offense other than burglary or trespass)] in that [structure]. . . .” During the charge conference, the defense expressly sought the inclusion of the language “an offense other than burglary or trespass.” After extensive argument over the issue, the court ultimately instructed the jury that the State had to prove that the defendant “had the intent to commit an offense other than trespass in the structure.” The omission of the relevant language from the standard instruction left open the possibility of a jury convicting the defendant for burglary based on the existence of an intent to commit the burglary of the structure. Burglary, however,

requires proof that the defendant had the intent to commit some offense other than the burglary when entering the premises.

[Mack v. State](#), 2D18-3113 (July 17, 2020)

The defendant was granted a resentencing hearing based on juvenile life sentencing issues. The resentencing hearing was conducted pursuant to the 2014 juvenile sentencing statutes. The sentence imposed after that hearing was reversed on appeal, as it resulted in a violation of the Eighth Amendment.

After the resentencing hearing, Mack was sentenced to concurrent terms of life in prison for murder and burglary, with a consecutive life sentence for sexual battery. He was granted judicial review of the sentence on the murder conviction after 25 years, and 20 years on the other convictions.

Mack argued that the imposition of the consecutive life sentence for the sexual battery resulted in the Eighth Amendment violation, because even if he prevailed at a judicial review proceeding and obtained earlier release on the murder and burglary sentences, he would still not be entitled to any further judicial review for the sexual battery for another 20 years. That would be true even if, at the judicial review for the murder and burglary, the court determined that the defendant had demonstrated maturity and rehabilitation entitling him to early release.

The Second District agreed with Mack's argument and ordered that on remand, the sentence for sexual battery run concurrently with the other sentences.

[Blair v. State](#), 2D18-4526 (July 15, 2020)

On appeal from a revocation of probation, the Second District reversed the revocation order, because the trial court's written order failed to state which conditions of probation had been violated.

Additionally, the trial court had reserved ruling on a Rule 3.800(b) motion, filed during the pendency of the appeal, seeking credit for jail time served. As that motion had been timely filed during the pendency of the appeal, and prior to the filing of the initial brief of appellant, the trial court should not have reserved ruling, but ruled on the motion. The trial court was directed, on remand, to grant the 52 days of jail time that had been sought.

Third District Court of Appeal

[Lopez v. State](#), 3D17-2362 (July 15, 2020)

The trial court conducted a stand your ground evidentiary hearing and the trial court denied the motion. Lopez filed a prohibition petition, which the Third District denied, based on its conclusion that the statutory amendment, shifting the burden of proof from the defense to the State, did not apply retroactively. Lopez sought review in the Florida Supreme Court, which, after its decision in Love v. State, held that the statutory amendment to the burden of proof applied to all stand your ground hearings conducted after the effective date of the statutory amendment. The Supreme Court remanded the case to the Third District for further proceedings. After supplemental briefing, the Third District remanded for a new immunity hearing.

[Ferguson v. State](#), 3D18-758 (July 15, 2020)

Ferguson, a juvenile at the time of the offenses he committed, was serving concurrent sentences of 35 years for second-degree murder, armed robbery and burglary. The trial court granted post-conviction relief, in part, for resentencing solely on the armed robbery and burglary, finding that the murder did not require resentencing. Ferguson and the State both appealed.

Prior to the Third District disposition of the case, the Florida Supreme Court issued its decision in Pedroza v. State. As a result of that decision, the trial court's ruling as to the sentence for the murder was affirmed, as the 35 year sentence was not a life sentence or its functional equivalent.

The trial court erred, however, in order resentencing for the armed robbery and burglary, as the 35-year sentences did not violate the United States Supreme Court's decision in Graham v. Florida.

[Guillen v. State](#), 3D19-0435 (July 15, 2020)

The Third District affirmed the denial of a Rule 3.850 motion, which was denied after an evidentiary hearing. The Third District's opinion does not set forth any facts of the case. It cites several decisions for their holdings regarding the trial court's ability to make factual and credibility determinations and the deference that should be accorded to those determinations.

[B.B. v. State](#), 3D20-93 (July 15, 2020)

The Third District affirmed a finding of delinquency for the offense of resisting an officer without violence.

B.B. argued that the State’s evidence was insufficient – that he got into a vehicle with people he did not know, and ran after bailing from the vehicle because he feared for his safety. An officer had stopped the vehicle in response to a call regarding a stolen vehicle. The officer pursued the vehicle in an unmarked car, with standard siren and flashing lights. After the pursued vehicle stopped, the officer got out, in uniform, and the occupants of the vehicle, including B.B., exited and B.B. ran out. The officer had previously ordered the occupants, several times, to exit the vehicle and get on the ground.

“In the instant case, Lieutenant Gabriel was entitled to conduct an investigatory stop of the vehicle, which had been reported as stolen. . . . If the occupants of the vehicle would not have bailed and fled, Lieutenant Gabriel would have been entitled to detain the occupants, including B.B., to investigate their participation, if any, in the theft of the vehicle. . . . Thus, Lieutenant Gabriel was engaged in the lawful execution of a legal duty when he commanded B.B. to stop, and B.B.’s actions constituted an obstruction or resistance of that lawful duty.”

Fourth District Court of Appeal

[Johnson v. State](#), 4D15-4452 (July 15, 2020)

In a prior appeal, the Fourth District ruled that the trial court failed to comply with the third step of Melbourne v. State, when addressing a challenge to a peremptory strike of a prospective juror. The Florida Supreme Court quashed the Fourth District’s opinion and, on remand, the Fourth District affirmed the convictions and sentences because Johnson “failed to make a specific objection to the State’s proffered race-neutral reason for the strike.” The Florida Supreme Court had held that such an objection was required to preserve a claim that the trial court erred in concluding that a race-neutral reason was genuine.

[Williams v. State](#), 4D19-1504 (July 15, 2020)

The Fourth District reversed a conviction for attempted first-degree murder for a new trial. The trial court erred in admitting evidence comparing the shooter’s

height to the defendant's, and the court erred in permitting the State to use demonstrative exhibits.

During closing argument, the prosecutor put on a pair of sunglasses and a hoodie sweatshirt to give the jury an understanding of the points being made in the closing argument. These items were neither the actual items worn during the offense, nor similar to those that were worn. Additionally, the items were displayed by a female prosecutor, and there was nothing in the record to show whether there were body similarities to account for how the items would have appeared to the victim, based on factors such as body frame, facial features and hair.

A detective gave testimony regarding the defendant's height based upon observations the detective made from a photograph and/or surveillance video.

It appears that the detective arrived at his opinion of the heights of the shooter and the defendant were the same by going to the crime scene and measuring the height of the black line on a sign posted on one of the doors, watching both surveillance videos, getting still images of the shooter and the defendant from the videos and applying red arrows to them, an obtaining the height of the defendant from two sources.

This was a practice known as "photogrammetry." While some of the detective's observations were admissible as they were based on his own observations, others crossed the line and constituted opinions requiring expertise. The detective's "opinions of his perceptions that the shooter was five feet ten inches tall and that the photos show that the defendant and the shooter were the same height were not based on being an eyewitness, having prior knowledge of the defendant, or using some knowledge or skill developed from on the job training."

One judge dissented, in part, and would have concluded that the testimony regarding height qualified as permissible lay opinion testimony.

[State v. Bishop](#), 4D19-3443 (July 15, 2020)

The trial court erred in granting a Rule 3.850 motion which alleged that trial counsel was ineffective.

The case revolved around the defendant hitting his ex-girlfriend in the head with a sledgehammer, before being interrupted by his mother and fleeing. During the trial, there were multiple references to the defendant's request for counsel, with no objection. In a prior appeal, the Fourth District reversed the summary denial of the 3.850 motion and directed that an evidentiary hearing be held.

At the evidentiary hearing, trial counsel testified that he failed to seek suppression based on the request for counsel and that it was not a strategic decision. Counsel believed that the defendant was prejudiced at trial because the testimony about the request for counsel was inconsistent with the defense of insanity that was presented.

On appeal, the Fourth District found that the defendant was not prejudiced by counsel's failure to object and seek the suppression of the references to the requests for counsel. There was substantial evidence that the attack was pre-planned; the defendant bought a sledgehammer and thought about the attack for several weeks; the defendant attempted a similar attack one week earlier. The defendant admitted these facts. The defendant also texted friends and family about the attack, and indicated that he knew he would be imprisoned for it. Based on the totality of the facts, there was no reasonable probability "that the jury would have believed Defendant suffered a 'psychotic break' when he attacked the victim."

[Mitchell v. State](#), 4D20-860 (July 15, 2020)

The Fourth District affirmed the denial of a motion to correct illegal sentence. The motion was moot, as the defendant had already served the sentence.

Fifth District Court of Appeal

[Rettley v. State](#), 5D18-4002 (July 17, 2020)

A conviction for robbery by sudden snatching was reversed because the evidence was insufficient.

The offense of robbery by sudden snatching requires proof that the property taken from the victim was on the victim's person. In this case, the victim was attacked in her apartment, and about \$800 was stolen. Although the victim stated that the defendant "took" the money, there was no testimony as to where it was located at that time. The defendant had been charged with robbery, and the jury had returned the verdict for robbery by sudden snatching as a lesser included offense.

[Weiker v. State](#), 5D19-2478 (July 17, 2020)

The denial of a Rule 3.850 motion was reversed for further proceedings on three claims. The State conceded the need for the reversal on two of the claims.

In another claim, the defendant alleged counsel was ineffective for failing to object or stipulating to the amount of restitution. This claim was reversed for a restitution hearing. The amount of restitution appeared to have been determined from corporate bankruptcy schedules. However, those schedules included many items that were unrelated to the defendant's convictions.

[Brockhaus v. State](#), 5D19-2918 (July 17, 2020)

An order revoking probation was reversed because the evidence was insufficient.

The conditions of probation required that the defendant successfully complete a drug treatment program. The violation report charged that the defendant tested positive for drugs while in the program and violated the program's rules. While there was evidence as to those charges, the affidavit of violation, however, charged a violation of a condition that required only that the defendant return for her next appearance in drug court. The affidavit charged the wrong violation. While such an error may, at times, be deemed a harmless scrivener's error, it was not in this case, as the defendant never admitted to failing to return for the next appearance in drug court and there was no evidence adduced as to that.

[Freeman v. State](#), 5D19-3407 (July 17, 2020)

Freeman was civilly committed as a sexually violent predator in 2009. In 2019, he filed a petition for discharge, alleging that his condition had changed and that he should be discharged. The trial court conducted a limited probable cause hearing on the issue, and found Freeman's evidence sufficient to warrant a trial. The Fifth District concluded that the trial court erred in denying discharge after the trial.

The State's only witness at trial, a psychologist, "opined that Freeman's condition had so changed that it was safe to release him and that he was not likely to engage in acts of sexual violence." The trial court, nevertheless, concluded that Freeman's condition had not changed sufficiently.

The State bore the burden of proof at the trial. A trial court “cannot arbitrarily reject un rebutted expert testimony.” “If it does so, it must offer a reasonable explanation for doing so, such as impeachment of the witness or conflict with other evidence.” That was not done in this case.