FLW Summaries for July 2024

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Florida Supreme Court

Cox v. State, SC2022-1553 (July 11, 2024): Appeal of a death sentence imposed after *Hurst* resentencing. One issue raised is that the prosecutor made inappropriate comments rising to the level of fundamental error because the arguments included demands for justice for victims and an argument that suggested a juror who votes for life would be motivated by making the "easy decision" to "just go home." The Florida Supreme Court writes that the focus of the prosecutor's remarks was on the responsibility of the jury to weigh the relevant factors, and the prosecutor did not invoke a direct, unambiguous appeal for the jurors to give weight to the fact that the State had decided to seek the death penalty. The prosecutor did not dwell on justice for the victim as a theme for the case. There were a small number of improper remarks, but they were not so prejudicial as to call into question the jury's verdict. Appellant raises several constitutional arguments which were all rejected, including that offenders with brain damage should be ineligible for the death penalty, as are individuals with intellectual disabilities. His argument that Florida's death penalty scheme risks the arbitrary and capricious application of the death penalty in violation of the Eighth and Fourteenth Amendments is "well-worn" and has been repeatedly rejected. Appellant's Eighth Amendment argument that the death penalty categorically violates the Eighth Amendment given evolving standards of human decency is not convincing. Affirmed.

Johnson v. State, SC2023-0055 (July 11, 2024): Appeal of a death sentence, raising seven issues; all are rejected, and the court discusses three. Affirmed. Labarga concurs in result but continues to maintain that the court should not have abandoned its practice of comparative proportionality review in the direct appeals of sentences of death.

Herard v. State, SC 2015-0391 (July 3, 2024): Appeal of a death sentence. Jury recommended death 8-4 for one victim, and a majority of the jury recommended life for the other victim—sentencing occurred in January 2015. He was sentenced under the statutory scheme that the USSC partially invalidated in *Hurst v. Florida*. Here, though, Appellant's death sentence satisfies the constitutional requirements explained in *Poole* because the jury that found him guilty of murder was the same jury that found him guilty of committing many other violent felonies (and his case included the prior violent felony aggravator). The contemporaneous and prior violent felony convictions amply satisfy the Sixth Amendment requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. Appellant argues that the court should recede from *Poole* but offered "no good reason for us to do so, and we decline the invitation." Affirmed.

First DCA

Spillers v. State, 1D2022-3363 (July 24, 2024): Review of *Anders* brief. JOA was properly denied. Fines were properly imposed—the trial court asked the clerk to *report* the fines, not to *determine* the fines. The trial court did not impermissibly "round up" the sentence. Affirmed.

State v. Rogers, 1D2023-0506 (July 24, 2024): State appeal from an order of suppression, where the trial court suppressed evidence derived from a wiretap. The wiretap application was made by the Statewide Prosecutor, who argued that he is the principal prosecuting attorney of a political subdivision. The trial court determined that the Statewide Prosecutor is not a principal prosecuting attorney of any political subdivision and could not authorize the application for the wiretap at issue. On motion for rehearing, the State argued for the first time that the Statewide Prosecutor is Florida's principal prosecuting attorney. On appeal, the State's primary argument also was that the Statewide Prosecutor is Florida's principal prosecuting attorney. However, this argument was not made during the suppression hearing and is not properly before the district court in the appeal. The only issue properly before the district

court is whether the trial court erred in determining that the Statewide Prosecutor is not a principal prosecuting attorney of a political subdivision. The State maintains that the Statewide Prosecutor's political subdivision is the combination of two or more judicial circuits implicated by multi-circuit crimes falling within his investigatory and prosecutorial jurisdiction. This argument is rejected. Affirmed.

Hicks v. State, 1D2022-0701 (July 17, 2024): Appeal of judgment and sentence for two counts of second-degree murder, robbery with a firearm, and burglary. JOA was properly denied because the jury could have reasonably inferred from the facts that the defendant intended to murder the victims in order to take their property. For robbery, the use of force, violence, or putting in fear, can occur prior to, contemporaneous with, or *subsequent to* the taking. Additionally, a written competency order was not required because there were no reasonable grounds to doubt the Appellant's competency to stand trial. See this court's recent decision in *Awolowo* (holding that when a motion to determine competency is granted, and an expert then determines a criminal defendant is competent, the absence of a hearing on the motion and a written order as to competency do not constitute fundamental error where there is no evidence that a defendant is not competent, defense counsel provides no further argument or presentation to the contrary, and review of the record does not reveal any reasonable grounds to find a defendant was not competent to stand trial.) Bilbrey concurs because he disagrees with the majority opinion in *Awolowo*, but believes he is bound by it.

Smith v. State, 1D2022-1259 (July 17, 2024): Jury found Appellant guilty of burglary with assault or battery, and in a separate count, guilty of simple battery. He raises a double jeopardy issue, arguing that double jeopardy bars dual convictions for burglary with assault and/or battery and simple battery when it is unclear whether the jury convicted the defendant of burglary with assault *or* burglary with battery. The jury's verdict that Appellant committed simple battery did not require proof of any additional fact from the charge for burglary with assault or battery. Reversed/remanded with instructions that an amended judgment should be rendered.

Ridgeway v. State, 1D2022-2275 (July 17, 2024): Reversal of denial of motion to suppress where Appellant was asleep in her car at a gas station when an officer approached after a citizen indicated that there was a concern about Appellant's behavior. She rolled down her window and the officer asked her to step out of the car, and she accidentally put the car in reverse but stopped it (twice). The officer could see no medical emergency, so he did not call EMS. The officer did not smell alcohol or marijuana. Appellant was not swaying or slurring. The officer could not see anything suspicious in plain view or notice any furtive movements. Appellant said she was embarrassed about being detained at a gas station and paced around near her car, which she said was occupied by her child. The officer asked for consent to search, which was denied. The officer then called the K-9 unit, who arrived about 10 minutes later. A subsequent search after the K-9 alert led to Appellant's arrest. Although the citizen's tip provided the basis to approach Appellant, after the officer's initial investigation revealed no indication of a medical emergency or drug use, there was no reasonable suspicion to hold the Appellant for 10 minutes to wait for the K-9 to arrive. The trial court should have granted the motion to suppress. Reversed.

Awolowo v. State, 1D2022-2062 (July 10, 2024): Appellant argues that he had a constitutional right to a competency hearing and a written order of competency, once the trial court ordered an evaluation of his competency. Question raised is whether there is a *constitutional* right to a competency hearing and determination. DCA says that it is the violation of the right not to be tried when there are reasonable grounds to question the defendant's competency—not the right to have a hearing and competency determination—that deprives a defendant of due process. So, when the record does not show reasonable grounds for the trial court to have believed that the defendant was not competent to proceed, the trial court does not fundamentally err by failing to hold a competency hearing and failing to enter a written order of competency, even if the trial court had previously ordered an expert evaluation of the defendant's competency. Certified question of great public importance: does a trial court's decision to order a psychological evaluation create a constitutional entitlement to a subsequent competency hearing, regardless of whether the information

available to the trial court met the evidentiary threshold for invoking the rule 3.210 competency procedures in the first place, such that a trial court's failure to conduct a competency hearing and enter an order on competency amounts to fundamental error? Bilbrey dissent: due process requires compliance with adequate procedures as given in rules 3.210 through 3.212. A trial court's failure to comply with the Fla. R. Crim. P. on competency deprives a defendant of his due process right to a fair trial.

Farris v. State, 1D2022-2360 (July 10, 2024): Appellant correctly argues that the trial court erred in denying his motion to correct sentencing error as to certain costs, fines, and surcharges. The $2 cost imposed under section 318.18(11)(d) must be stricken because Appellant was not convicted for a traffic infraction. Further, the $342.86 fine and $17.14 surcharge must be stricken because the trial court did not orally pronounce them. On remand, they may be reimposed if the trial court follows the proper procedure. Also stricken is a $100 misdemeanor cost under section 938.05, because the trial court also imposed a $225 felony cost under that provision. Section 938.05 allows imposition of court costs per case, not per count. Reversed in part and remanded.

Smith Jr. v. State, 1D2023-0626 (July 10, 2024): State concedes that trial court erred in imposing a $201 domestic violence trust fund cost and a $151 rape crisis fund on count 4, armed kidnapping, because neither of those costs are authorized for that crime. The trial court also erred in imposing a $151 crimes-against-minors cost because the victim was not a minor. Reversed in part/ remanded.

Thomason v. State, 1D2023-1339 (July 10, 2024): Reversal of order summarily denying 3.850 motion for postconviction relief. It is not enough for the postconviction court to conclude that the evidence of Appellant's guilt was strong. The postconviction court's order and attachments did not conclusively refute Appellant's claims. Reversed/remanded for the trial court to attach records that conclusively refute the claims or to hold an evidentiary hearing.

Talkington v. State, 1D2023-1344 (July 10, 2024): Review of *Anders* brief finding no good-faith claim of reversible error. Affirmed.

Blackmon v. State, 1D2022-2943 (July 3, 2024): The *Anders* brief is insufficient and is stricken. Appointed counsel did not identify the arguments that may be advanced on appeal, and only stated that an appeal would be frivolous. Counsel has 30 days to file a brief that complies with the mandate of *Anders v. California*.

Burns v. State, 1D2023-0257 (July 3, 2024): Judgment and sentence for first-degree murder affirmed without comment but reversed/remanded for fine and costs for a $151 cost imposed pursuant to section 938.05 to be stricken.

State v. Gibson, 1D2023-0617 (July 3, 2024): At VOP sentencing, Appellee moved for a downward departure sentence. The State argued that he did not prove any ground for departure, and the trial court agreed, but nonetheless granted the motion and departed from the lowest permissible sentence. DCA reverses, holding that the trial court did not simply fail to articulate what legal ground existed for the downward departure, but specifically found that there was not an appropriate downward departure reason, nonstatutory or statutory, to depart from the LPS. Accordingly, the trial court abused its discretion and the imposition of a sentence below the LPS was erroneous. Reversed/Remanded for resentencing.

Second DCA

Oliver v. State, 2D2022-1085 (July 31, 2024): Appellant argues that his due process rights—specifically his right to cross-examine his accuser—were violated when the trial court admitted child hearsay statements made during unrecorded interviews by law enforcement based on a policy of the Pasco County Sheriff's Office not to record child sexual abuse victims. The DCA rejects the argument, holding that the trial court made findings sufficient to establish that the source of the hearsay statements was trustworthy and that the circumstances of the statements provided the necessary safeguards of reliability. There was no fundamental denial of due process not to record the interviews. While testimony at trial indicated that recording interviews with child sexual abuse victims is

"best practice," the court did not find that the evidence in this case—which consisted of no recordings—suggested any lack of trustworthiness in the circumstances of the interviews. Both the interviewers and the victim testified at trial regarding how the unrecorded interviews were conducted. The trial court did not abuse its discretion in admitting the hearsay statements. Affirmed.

Ferrell v. State, 2D2023-0521 (July 19, 2024): Appeal of a denial of a motion to suppress. Appellant was stopped on his bicycle for failing to stop at two stop signs. An officer observed a pocketknife clipped to a phone case on Appellant's waistline and removed the knife for safety. Upon taking the knife, the officer saw what he believed to be a small baggie with white powder inside the phone case. Appellant responded, "It's not powder, it's a pipe." The officer considered the pipe to be drug paraphernalia and arrested the Appellant. The search incident to arrest discovered narcotics. The trial court found that there was probable cause to stop him for traffic violations, the officer reasonably and in good faith believed he viewed contraband in plain view, and consequently, the officer was justified in seizing the pipe and making the arrest. The arrest justified the search, which resulted in the lawful seizure of other contraband. The trial court properly denied the motion to suppress. Affirmed.

Muhammad v. State, 2D2023-0502 (July 17, 2024): A chaotic drive-by shooting occurred, and police responded in an unmarked Jeep. The Appellant fled on foot, leaving his running car unattended in violation of Florida law. That gave officers authority to open the door and shut the car off. In doing so, they saw in plain view what they believed to be controlled substances. Opening the door to shut off the vehicle was not unreasonable and did not constitute an illegal search. A person has no reasonable expectation of privacy in abandoned property. The officers' discovery of fentanyl in plain view while turning off the car's engine does not violate the Fourth Amendment. Affirmed.

Franklin v. State, 2D2023-0710 (July 10, 2024): Appellant was charged with dealing in stolen property and fraudulently obtaining money from a pawn broker, based on certain items of jewelry stolen from the victim's

home. He was ordered to pay restitution in the amount of $5,445. There was also a jug of cash, totaling approximately $2,500, that was missing. But no mention of the $2,500 in cash contained in the jug appears in the affidavits or the information. The jug was never mentioned until the restitution hearing. Critically, Appellant was not charged with burglary or theft. Accordingly, the inclusion of the amount of the stolen cash in the restitution order constituted fundamental error. Reversed/remanded to enter an amended restitution order, reducing the amount of restitution owed by $2,500.

Lopez v. State, 2D2023-0809 (July 10, 2024): Appeal of a restitution order, where State concedes error. At a plea hearing, the Assistant State Attorney said there was no restitution to be ordered because "it's being handled civilly." Five days later, the State filed a motion seeking restitution because it learned that insurance was not going to cover all of the victims' damages. The trial court imposed restitution. The DCA reverses because the trial court inquired about restitution at sentencing, and the State waived it, and the court imposed the sentence. The trial court's subsequent award of restitution after sentencing constituted a violation of Appellant's double jeopardy rights. *Kittelson*, 980 So. 2d at 535. Reversed.

Quintero v. State, 2D2023-1153 (July 31, 2024): At a restitution hearing, the victim testified that his vehicle was in "great to excellent condition" with "little wear and tear" before its theft, but upon recovery, body damage was evident. The victim had repairs made but a short time later, the vehicle experienced mechanical malfunction. The victim ultimately sold the vehicle to CarMax for significantly below the book value. The court ordered restitution in the amount of $17,424.45, including body repairs, mechanical repairs, and depreciation damages. Appellant contends that the award as to mechanical repairs and depreciation undermine the causal link between the crime and the asserted damage. The DCA disagrees, finding that Quintero wrongfully possessed the vehicle for approximately nine months, and the victim's observations about the pre-theft condition, coupled with the testimony about the purchase price and book value, the repairs made, and general condition

after the theft adequately demonstrate a causal relationship between the criminal episode and both the mechanical repairs and depreciation in value. Competent, substantial evidence supports the award. Affirmed.

Third DCA

Bregman v. State, 3D2024-1175 (July 24, 2024): Petition for writ of mandamus to compel the appointment of a circuit court judge to rule on his 3.850 motion. Petition maintains that he placed his rule 3.850 motion into the hands of correctional officials for filing with the circuit court on February 26, 2024. The docket does not show any such motion was ever filed. The trial court allowed Petitioner to send a copy of the motion to the court and it would ensure that the motion was docketed and addressed, but he did not do so. Petition is dismissed without prejudice to allow him to file a copy of the motion with the trial court.

State v. Miller, 3D2022-2180 (July 17, 2024): Office of Statewide Prosecution charged Appellee with voter fraud based on his allegedly false affirmation on his voter registration that he was eligible to vote and then subsequently voting. Trial court granted motion to dismiss, finding that statewide prosecutor lacked the authority to charge because the offense did not "occur in two or more judicial circuits as part of a related transaction." Question presented: does the act of filling out a voter registration in one jurisdiction, and voting in that same jurisdiction, constitute an offense occurring in two or more judicial circuits as part of a related transaction? DCA reverses, holding that registration in Miami-Dade County, processing of the voter registration in another jurisdiction, Leon County, with approval conveyed back from Leon to Miami-Dade County, voting in Miami-Dade County, and conveying of the votes to Leon County constitutes an offense which "occurred in two or more judicial circuits as part of a related transaction." Miller would not have been able to register to vote, and ultimately vote, without his filling out the form in Miami-Dade County, the processing and approval of his voter registration in Leon County, and the conveyance of such approval back

to Miami-Dade County. Reversed/remanded with instructions to reinstate the information.

Aldama v. State, 3D2022-2189 (July 17, 2024): Appeal of a denial of a motion to suppress after the search of a vehicle during a traffic stop. Appellant contends that the trial court erroneously concluded that odor of marijuana alone is still sufficient for probable cause to justify the warrantless search of a vehicle. The DCA does not reach the issue of whether plain smell of marijuana alone supports probable cause to search an automobile because in this case, the troopers' questioning of Appellant eliminated the only lawful explanations for the smell prior to the search when they asked him, "Do you possess a medical marijuana card?" and "is there any hemp inside the vehicle?" Affirmed.

Simmons v. State, 3D2023-0666 (July 10, 2024): Appellant's probation was violated for absconding and for committing three new-law offenses (first-degree murder x3). He was "forced" to testify against himself at his probation violation hearing. The DCA finds no error, holding that a probationer "may assert only a qualified privilege against compulsory self-incrimination at a probation violation hearing." A probationer's agreement to accept the terms of probation effectively waives a Fifth Amendment privilege, except as to conduct and circumstances concerning a separate criminal offense. The State asserted that it would not use Simmons' testimony in its prosecution of the new crimes against Simmons. Affirmed the order revoking probation.

Arcamone v. State, 3D2022-1836 (July 3, 2024): The trial court imposed a monthly probation supervision fee in excess of Florida Statutes section 948.09(1)(b)'s forty-dollar fee without any accompanying oral pronouncement explaining the deviation. Reversed and remanded to enter a corrected sentencing order, reducing the probation supervision fee to forty dollars per month.

Fourth DCA

Marotta v. State, 4D2023-0448 (July 31, 2024): Police arrested a co-defendant who told detectives he could get the Appellant to confess if they

put the co-defendant in the same room as Appellant. The co-defendant was the "architect" of this plan and the lead detective "allowed it to be done." The co-defendant asked for three things: to make sure the Appellant went to jail, to see his wife before he went to jail, and to make sure his dog was not taken to a kill shelter. The detective agreed to these conditions. The detective placed Appellant in a room with the co-defendant after telling Appellant that the co-defendant wanted to speak with him. Appellant had not yet received *Miranda* warnings. Appellant made incriminating statements to the co-defendant about a double homicide, burglary, and robbery. The lead detective entered the room and brought Appellant into a different room without the co-defendant. He was given *Miranda* warnings and did not invoke his rights. He eventually made incriminating statements. Before trial, he moved to suppress his statements, contending that they were the product of an illegal detention and coercion. The trial court held that "although the co-defendant told Marotta that their conversation would not be recorded, nothing in the record indicates that this was done at the lead detective's behest." And, because the statement to the co-defendant was not obtained in violation of his constitutional rights, his statement to the lead detective is also admissible. He argues on appeal that police were required to have read *Miranda* before he was subject to custodial interrogation by the co-defendant with the lead detective's approval. The State argues that it was not a custodial interrogation. The DCA holds that Appellant had no reason to believe the co-defendant was acting on behalf of the police. The police did not recruit or direct the co-defendant to be a "false friend" and coerce a confession. Rather, the co-defendant volunteered to speak with Marotta, who in turn, volunteered a confession. As such, the co-defendant did not "interrogate" Appellant; they just shared a casual conversation. Appellant did not have a reasonable expectation of privacy in the police interview room with the co-defendant, because the police did not actively assure him of privacy.

Flores v. State, 4D2023-1837: Appellant argues that the trial court fundamentally erred when it instructed the jury on the law of sexual battery based on an incorrect statutory year, which used a more expansive definition of sexual battery, which was enacted after the

charged offenses were committed, that affected a disputed element (penetration.) The trial court instructed the jury based on the amended statute defining sexual battery as "female genital penetration" and defining female genitals as encompassing all female genital parts. However, because the crime occurred between 2019 and 2020, the jury should have been instructed on the law in effect at the time of the crime, constraining sexual battery to *vaginal* penetration. The record demonstrates that the essential element of what part of the victim's anatomy the Appellant penetrated (or did not penetrate) was in dispute. The use of the incorrect jury instruction expanded the definition of vaginal penetration to female genital penetration and permitted the jury to convict Appellant if the jury found that Appellant penetrated the victim's female genitals as defined in the instruction, but under the version of the statute in effect at the time of the offense, the definition was different. Accordingly, the State did not have to prove that Appellant specifically penetrated the vagina—this was fundamental error.

Roberts v. State, 4D2022-0689 (July 17, 2024): Appellant's sentence on Count 1 was a twenty-five-year minimum mandatory term of imprisonment for actual possession or discharge of a firearm. However, he was not charged with actual possession or discharge of the firearm, and the jury did not make specific findings in this regard. Vicarious liability does not substitute for actual possession or discharge for sentencing. There was no question here that the accomplice was the party who had actual possession and discharged the firearm. State conceded error and remanded with instructions to delete the twenty-five-year mandatory minimum sentence.

Perkins II v. State, 4D2022-3276 (July 17, 2024): Appellant appeals from convictions for first-degree murder and attempted escape. Appellant argues the trial court failed to make an independent finding of the defendant's competency to proceed despite having ordered a mental health expert to examine the defendant's competency to proceed. The State conceded this error. Citing *Dougherty v. State*, 149 So. 3d 672 (Fla. 2014), the DCA holds that once a trial court has reasonable grounds to believe that the defendant is not competent to proceed, the trial court has

no choice but to conduct a competency hearing. Remanded for a hearing to determine whether a *nunc pro tunc* competency evaluation is possible. **[This is in conflict with the 1st DCA in *Awolowo*]**

State v. Hubbard, 4D2022-3429 (July 17, 2024): Statewide Prosecutor charged Appellee in 2020 with false affirmation in connection with an election, and voting by an unqualified elector. He moved to dismiss the charges, arguing that the OSP lacked authority to prosecute him under section 16.56 of the 2022 Florida Statutes. The circuit court dismissed the charges, finding that his actions did not affect two or more judicial circuits. The DCA concluded that the amendments to Florida Statute 16.56 apply retroactively, and the allegations fall within 16.56's scope. Reversed the dismissal and remanded for further proceedings. Dissent: The majority decision is that the OSP can extend its reach to a single-circuit crime, which contradicts the Florida Constitution and applicable statutes.

Gutierrez v. State, 4D2023-0106 (July 17, 2024): Appellant appeals convictions and sentences for grand theft. The State presented evidence of Appellant's alleged fraudulent actions during her bankruptcy case, by calling the Chapter 7 bankruptcy trustee who said Appellant had failed to indicate in her bankruptcy documents that she had transferred ownership of her house to an entity in which she had an ownership interest to avoid liens from creditors. Appellant argues admission was error because any fraudulent actions during the bankruptcy proceeding were not relevant, as they were not similar to the theft offenses at issue. DCA says this was collateral crime evidence that was not relevant or probative of a material fact in issue. The alleged fraud in the bankruptcy proceedings appears more akin to a fraudulent transfer rather than the theft offenses charged by the State. Improper admission of collateral crime evidence is presumed to be harmful. Reversed and remanded.

Harris v. State, 4D2023-0860 (July 17, 2024): Appellant appeals her convictions and sentences for kidnapping and interference with child custody, arguing that she was entitled to a twelve-person jury under the Sixth and Fourteenth Amendments. DCA says "This challenge lacks merit." Appellant raises three sentencing arguments, and the DCA

agrees with all three. First, the trial court expressly stated that, despite the jury having acquitted the defendant on the aggravated battery charge and the lesser included offense of battery, the sentence on the two charges for which the defendant was convicted nevertheless relied in part upon the injuries which the aggravated battery victim allegedly sustained at the hands of a co-defendant. It is a violation of due process for the court to rely on conduct of which the defendant has actually been acquitted, when imposing the sentence *Doty v. State*, 884 So. 2d 547 (Fla. 4th DCA 2004). Remanded for *de novo* resentencing. Second, kidnapping is not a capital felony, which would preclude downward departure consideration. The trial court erred in finding the defendant was ineligible for downward departure consideration. Third, the court erred by imposing a $746 prosecution cost exceeding the $100 statutory minimum, without the State having presented any evidence and the circuit court making any factual findings. Convictions affirmed; sentences vacated; remanded for resentencing with directions.

Surit-Garcias v. State, 4D2022-3368 (July 10, 2024): Appeal of convictions and sentences for DUI manslaughter, DUI causing serious bodily injury, and DUI causing property damage. Defense moved for a mistrial because the prosecutor told the jury in opening that the toxicologist would testify that the defendant's blood alcohol level was 0.17 at the time of the crash, but no such evidence was presented to the jury. The prosecutor responded that he had a good faith basis to mention the 0.17 calculation in opening statement because the expert testified to that calculation in deposition, and that the expert was subject to cross-examination by the defense. On appeal, the Appellant argues that the trial court abused its discretion in denying the motion for mistrial. The DCA rejects this argument, holding that, in an opening statement, a prosecutor may outline the facts which he in good faith expects to prove and which are competent for him to prove. *Paul v. State*, 209 So. 2d 464 (Fla. 3d DCA 1968). Failure to present evidence of a fact mentioned in opening statement warrants a mistrial if the reference prejudices the defendant's right to a fair trial. This may occur when the factual reference suggests additional evidence of the defendant's guilt that is never subjected to cross-examination and evaluation by the jury (for

example: if State makes reference to an incriminating statement made by the defendant to an officer, and then the state never calls the officer to testify.) Suggesting that there is other evidence in support of its case, but then failing to offer it and subject it to cross-examination and evaluation by the jury, prejudices the defendant's right to a fair trial. Where the defendant's right to a fair trial is prejudiced, a mistrial is warranted even when the State's failure to present the evidence referenced in opening statement is through no fault of its own. On the other hand, the State's failure to present evidence promised in the opening statement does not require a mistrial if the reference is not so prejudicial as to vitiate the trial. Here, the expert's testimony was more favorable to the defendant than the testimony the prosecutor described in opening, and the expert was fully available for cross-examination at trial. The expert's testimony became a key theme of the defense's closing argument because it was overall favorable to the defense. Finally, the jury acquitted the defendant of all counts that required the jury to find as an element that he had blood alcohol of .08 or higher; it was not necessary for the jury to rely on a specific blood alcohol level to find that the defendant was impaired at the time of the crash. At least ten witnesses observed the defendant showing signs of impairment by alcohol at the scene of the crash. Affirmed. (Also, a claim that the statutory provision for victim injury points is unconstitutional for vagueness and the jury instructions fail to give adequate guidance to the jury in determining when an injury is severe, moderate, or slight. DCA says the terms have a plain an ordinary meaning that may be understood by a person of ordinary intelligence, so they are not vague.)

Fifth DCA

Donovan v. State, 5D2022-2978 (July 26, 2024): Jimmy Ryce appeal of an annual review order that found probable cause did not exist to believe Appellant's condition has so changed that it is safe for him to be at large, and that he will not engage in acts of sexual violence if released. Defense expert testified that Appellant's condition had changed and that he would not reoffend if released, because a substantial amount of time had

elapsed since the offenses, and he has "done a bunch of the programs… that would help him become a better person." The trial court found that Appellant's personality disorder continues to drive his actions and that his behavior has not changed in positive ways. The DCA finds no reversible error. Affirmed.

Newman v. State, 5D2023-2639 (July 26, 2024): Appellant seeks a new trial because a State witness improperly commented on his right to remain silent when he said that Appellant was initially hesitant to agree to a DNA swab, but then agreed to it. Appellant's DNA was found in the victim's vagina and at trial, Appellant denied having sex with the victim. The DCA holds that the privilege against self-incrimination does not apply when a witness voluntarily cooperates with police inquiries— "The problem with Appellant's right-to-remain-silent claim is that he chose not to remain silent." While he initially balked in response to the question of consenting to the buccal swab, that did not transform his willing cooperation with police into the exercise of his right to remain silent. Further, comments on right to remain silent are in the class of errors subject to harmless error analysis. Appellant makes much of the brief comment about his initial hesitant to give a DNA sample, but the "far more pressing problem for Appellant was what his DNA sample ultimately revealed, which was the presence of his semen inside a fourteen-year-old victim." The State did not violate his constitutional privilege against self-incrimination. Even if it had done so, it would not have changed the outcome of the case. Affirmed.

State v. Hanberry, 5D2023-3322 (July 26, 2024): State appeal of the withhold of adjudication for Appellee's crime of fleeing or attempting to elude law enforcement. The State argues that withholding adjudication on the fleeing charge constitutes an illegal sentence because it is expressly prohibited by that statute. Appellee's counsel "commendably and rightly" concedes the trial court erred in withholding adjudication. Reversed and remanded.

Piechota v. State, 5D2023-0448 (July 12, 2024): The written final judgment directed Appellant to pay $50 in agency investigative costs under section 938.27 Fla. State. This cost was not requested by the

prosecutor on behalf of the agency, as required by section 938.27(1). Accordingly, reversed and remanded with directions that the court enter an amended judgment and sentence that strikes or deletes the investigative costs, without the State being entitled to have those costs reimposed. Reversed (in part).

Sixth DCA

Xolo v. State, 6D2023-0846 (July 26, 2024): Trial court denied a motion to suppress statements. The State argues that it was not preserved because, after the trial court had denied the motion to suppress and the statements were sought to be introduced at trial, defense counsel said, "no objection." Florida Statutes suggest that the issue may have been preserved; a Florida Supreme Court case holds otherwise. Thus, there is a tension between section 90.104(1) and *Carr v. State*, 156 So. 3d 1052 (Fla. 2015). In *Carr*, the supreme court said that the defendant had abandoned her pretrial objections and did not preserve them for review when she failed to object to the admission at trial, after the court had made a pretrial ruling that the evidence at issue was admissible. Section 90.104(1) states it is unnecessary to preserve the claim of error. "The most we can do here is flag the tension between the statute and the precedent for another look by the Florida Supreme Court in an appropriate case." Affirmed.

Brannon v. State, 6D2023-2765 (July 26, 2024): Appellant argues trial court erred in dismissing his motion to withdraw plea without first offering him the assistance of counsel. He was pro se throughout the relevant proceedings. After he pled and was sentenced, he filed four documents: a motion to correct sentence under Fla. R. Crim. P. 3.800, a motion for jail time credit, a motion to withdraw from plea agreement, and a notice of appeal. The only motion docketed before the NOA was the motion to correct sentence. The trial court entered an order dismissing the motions, finding it had no jurisdiction over the case because Appellant had filing a NOA. The trial court further found the motion legally insufficient and dismissed all three "without prejudice to

Defendant's right to re-file the motions upon the Sixth District Court of Appeal issuing a mandate in the appeal." DCA says Appellant's motion to correct sentence tolled rendition of the final order for purposes of appeal. Rule 9.020 (h)(2) explains that if a notice of appeal is filed before the rendition of an order disposing of [certain enumerated motions in the rule], the appeal must be held in abeyance until the motions are either withdrawn or resolved by the rendition of an order disposing of the last such motion." At the time he filed his notice of appeal, the trial court had not yet rendered an order disposing of his rule 3.800(b)(1) motion. Therefore, the NOA did not divest the trial court of jurisdiction. Nonetheless, he is not entitled to reversal. The trial court's purported lack of jurisdiction was not the sole reason it dismissed the motions, having also found that each motion was legally insufficient. Appellant does not address this additional finding on appeal. However, Appellant's argument that the trial court erred in failing to inform him of his right to the assistance of counsel in preparing and presenting his motion to withdraw plea requires reversal, because a motion to withdraw plea is a critical stage of the proceedings. Therefore, when a motion to withdraw plea is filed by an unrepresented defendant, trial courts are obligated to renew the offer of counsel prior to addressing the merits of the motion. The trial court diligently offered counsel at each critical stage prior to accepting the plea, but it did not renew the offer before dismissing the motion to withdraw plea. Reversed/remanded.

Espichan v. State, 6D2023-0921 (July 19, 2024): Appellant argues that the trial court committed reversible error when it refused to include in the jury instruction on the justifiable use of deadly force the offense of aggravated assault as a possible felony which he could have been justified in using deadly force to resist. The State objected to the defense's request to include aggravated assault as one of the applicable felonies Appellant could have been justified in using deadly force to resist, arguing that "they did not present a scintilla of evidence of the aggravated assault." The defense argued that a witness' testimony supported the inclusion of aggravated assault in the instruction because she thought [the victim] had a gun when he approached the vehicle. The trial court agreed with the State and did not include aggravated assault in the self-defense

instruction. Florida law has consistently held that a criminal defendant is entitled to have the jury instructed on the law applicable to his theory of defense where there is *any* evidence to support it, no matter how weak or flimsy or slight. Though the evidence clearly suggests that the victim was not armed at the time of the shooting, a witness testified that when he was approaching her vehicle, he was holding his waistband and it looked like he was holding a gun, though she did not actually see a weapon. In light of the testimony, the trial court should have included aggravated assault in the self-defense instruction. There was at least *some evidence*. The error went to Appellant's sole defense, so it cannot be said to be harmless. Reversed/remanded.

Loveland v. State, 6D2023-0057 (June 17, 2024): DCA reverses the denial of a 3.850 motion, where the State "commendably and professionally concedes" that the postconviction court erred when it declined to address an amended motion that was timely filed.

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Mrs. Niles has been licensed as an attorney since 2013. She has litigated every stage of the criminal legal process, from first appearance through certiorari petition to the United States Supreme Court, providing zealous advocacy for individuals accused of misdemeanor, felony, and capital offenses. In addition to first-chair representation at the trial court level, Mrs. Niles has represented clients as appellate counsel, having briefed hundreds of direct appeals, as well as final orders from postconviction petitions. Mrs. Niles has argued in the Florida Supreme Court and is admitted to practice in all state courts of Florida and the United States District Court for the Northern District of Florida.

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