IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner,

vs. : Case No. 73,822

ROLAND SMITH, :

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE

On April 22, 1986, the State Attorney for the Sixth Judicial Circuit in and for Pasco County, Florida, in conjunction with the grand jury, filed an indictment against the Respondent/Cross-Petitioner, ROLAND SMITH, charging Mr. Smith with murder in the first degree contrary to section 782.04(1)(a), Florida Statutes (1985), which allegedly occurred on March 6, 1986 (R1089, 1090). From September 2-6, 1986, Mr. Smith had a jury trial with the Honorable Edward H. Bergstrum, Jr., Circuit Judge, presiding (R1, 200, 400, 600, 800). On September 6, 1986, the jury deliberated and returned a verdict of murder in the second degree, a lesser included (R1241, 1022-1024). Mr. Smith was sentenced on November 10, 1986, to seventeen years of imprisonment with credit for 249 days time served. The sentencing guidelines in this case recommended 12 to 17 years imprisonment (R1248-1251). A motion for new trial which had been timely filed, was denied on November 21, 1986 (R1243-1245, 1028-1040). Mr. Smith timely filed his notice of appeal on November 21, 1986 (R1254).

On February 24, 1989, the Second District Court of Appeal rendered an opinion finding reversible error in the jury instructions. The court, however, certified two questions to this court on the jury instruction issue. The Second District Court of Appeal rejected Mr. Smith's other trial issues, and Mr. Smith

raises all of these issues--in addition to the jury instruction issue--before this court.[1]

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[1] Once this court accepts jurisdiction over a case, it does so over the entire case. Savoie v. State, 422 So.2d 308 (Fla. 1982). In addition, Mr. Smith has filed a motion with this brief to have it accepted as a Respondent/Cross-Petitioner Brief on the Merits.

STATEMENT OF THE FACTS

On March 6, 1986, Mr. Smith shot John Cascio in the head. Although Mr. Cascio was still alive when the paramedics arrived, the medical examiner noted that the gunshot wound to the head was so severe that Mr. Cascio would have died even if he had received immediate attention (R365-369, 531). It was noted that the cause of death to Mr. Cascio was a gunshot wound to the head and that the bullet had traveled a straight path from the left temple through to the back of the head (R513-515, 520, 521). Blood drawn from the deceased indicated a blood alcohol level of .1 (R522-524). Inasmuch as there was no question as to who had done the actual shooting, the main issue as trial was the reason for the shooting.

At the time of the shooting, Mr. Smith was living with his seventeen-year-old ex-step daughter from a prior marriage. She had just moved in approximately nine days before the shooting, and they were having sexual relations which had begun approximately a year-and-a-half ago (R537, 542, 546, 550, 551). It was noted that Mr. Smith was thirty-six years old (R543). The step-daughter, Josette Estes, stated that she had first met John Cascio when she came down for a visit about a year-and-a-half ago (R553). She described Mr. Cascio as being a friend of Mr. Smith's (R556). After moving in with Mr. Smith in 1986, the first time she saw Mr. Cascio again was on March 6 at the Moose Lodge (R557).

Josette and Mr. Smith were at the lodge when Mr. Cascio walked in, had a drink, and began speaking with them (R558, 560).

At one point when Mr. Smith went to the restroom, Cascio asked her for a hello kiss; but the kiss was not a friendly kiss but a french kiss (R560-562). Cascio then told her that he wanted her and that she should try to get rid of Mr. Smith (R563). Josette told Cascio that she would try to do so (R563).

Somewhere around 2:30 p.m. the three of them left the lodge and went to the Smith residence in order to pull up carpeting in an upstairs room (R564-566). According to Josette, Cascio offered to do this and was not asked (R565). While at the house Mr. Smith and Cascio had some more alcoholic drinks - approximately one or two; and when Mr. Smith left the room for a moment, Cascio asked her about getting rid of Smith and having sex with him (R572, 574). Josette told him she would try but to keep quiet about it (R573). Cascio also grabbed her in the vaginal area (R577). When Mr. Smith came back into the room, she asked to use the car so that she could make a telephone call (their phone was not working). Mr. Smith said something about wanting to listen in on her phone call, but she indicated that it was personal. Cascio then offered to take her to a phone and Mr. Smith agreed (R577-579). Josette indicated that they left the house about 4:30 and were gone for approximately thirty minutes (R580). During that time Cascio kept stopping the car and trying to get her to have sex with him, but she kept refusing (R647-650). Josette admitted, however, that she had led Cascio on (R646).

When Cascio finally took her home, she walked quickly into the house and stood behind Mr. Smith who was seated at a

dining room chair (R651, 652). Although Josette did not say anything to Mr. Smith, she did not give him the usual kiss, her clothes were mussed, her mascara was running from having cried in the car, and she wasn't smiling (R652-656). When Cascio came into the house he just stood there looking at Mr. smith and Josette without saying anything (R656). According to Josette Mr. Smith started asking Cascio what had happened, but Cascio did not respond. Mr. Smith then asked Cascio to leave several times but Cascio would not go (R593, 656, 657). Then Mr. Smith picked up a gun that had been sitting out all night on the table and grabbed Cascio (R660, 662, 589, 593, 596). The gun was originally pointing at Cascio's chest area, but Cascio said something about putting the gun where his mouth was and motioned towards his face (R597, 598). Mr. Smith told Cascio to get out again, but then Cascio nudged Mr. Smith and the gun went off (R598, 600, 665). Josette saw Cascio fall to the ground and believed him to be dead (R606).

After the shot, Josette ran into the living room and Mr. Smith followed her (R607, 608). She screamed something about "why did you do that" and "I love you," and they grabbed a hold of one another (R608). Josette then ran out of the house, partially because she was afraid and partially because she was in shock; and she kept running until she saw an elderly couple on the street who drove her to the Moose lodge (R613). From the lodge she was able to contact the police (R614, 615). Detective Kinsella came to the lodge, and she told him what had happened (R615). Josette acknowledged that since Mr. Smith's arrest, she had visited him in

the jail and had several phone calls from him (R617-624). Josette denied, however, talking about the case during these phone call conversations (R623). Josette stated that when she spoke to Detective Kinsella on the night of the shooting, he was only concerned with the basics and not in gathering all the facts (R703). When she later told the State Attorney's Office that Cascio had become aggressive before the shooting - a statement that was not in her original statement, the State Attorney threatened her with perjury and told her not to change her story (R705).

On the day after the shooting, Ms. Estes was brought to the State Attorney's Office to make a statement with a court reporter present (R730-736). It was noted that only the Assistant State Attorney, Detective, court reporter, and Josette were present for this statement (R736). This transcript was then read to the jury as substantive evidence (R737-771). Noted differences in the State Attorney invest statement were as follows: Ms. Estes stated that Mr. Smith approached Cascio immediately with a gun when they returned after being gone for half an hour (R756), there was no mention of Cascio nudging or being aggressive to Mr. Smith (R758), there was no mention of Mr. Smith telling Cascio to leave (R757, 758), when Josette ran she stated she did so because she was scared (R760), and Josette was asked about Mr. Smith's use of narcotic drugs which she stated involved marijuana and cocaine but not on the day in question (R762-765).

Mr. Smith testified that he was a musician playing organ and piano (R819-821). He noted that he was married to Josette's

mother from 1970-72 and at that time Josette was just a child. He stated that he did not see much of Josette from the time she was about four years old (R821-823).

Mr. Smith stated that he first met Mr. Cascio when Mr. Cascio moved in next door around Christmas of 1982 (R824). Cascio had an ownership interest in a restaurant called LeCave in Tarpon Springs and invited Mr. Smith and his wife to that restaurant (R825). Mr. Smith noted there was a period of time when he did not see Cascio because Mr. Cascio went to prison (R825, 826). The restaurant in question was an expensive restaurant and was richly decorated (R56, 857).

Mr. Smith got to know Mr. Cascio and Cascio would talk about working for the mafia in Chicago dealing in stolen cars and a chop shop (R859). Cascio indicated that sometimes they would put bodies in the trunks of cars before putting the cars into the crushing machine in order to get rid of bodies. Cascio also stated that one time they put a live person in the back of a trunk of a car and crushed the car while the person was screaming (R860). Cascio also indicated he was involved in the execution of people on at least more than one occasion (R861). Mr. Smith did not, at first, believe these stories because Cascio would be drinking when he talked about them (R861). Eventually, however, Mr. Smith started reading articles about Cascio's criminal involvement in the newspaper which labeled Cascio a reputed mafia figure (R862). Mr. Smith recalled one incident when Cascio attacked him after an evening out together (R865). Cascio's wife tried to stop him, and

he hit her and sent her flying into the air (R866). A friend managed to intervene, and Mr. Smith was able to make it safely back to his house (R866, 867). Mr. Smith could also recall times when Cascio's wife came over to the house with black eyes after having been hit by her husband (R867, 868). Mr. Smith was also aware of the fact that Cascio carried guns around even though he was on probation (R868). Cascio stated to Mr. Smith that he always carried a gun (R868). Mr. Smith was aware that Mr. Cascio was going to federal prison for racketeering (R869), and Mr. Smith appeared at Cascio's state sentencing hearing and learned that much of the Chicago incidents were true (R970, 972). The State Judge declared Mr. Cascio a danger to the community and a habitual offender who had violated his probation by attacking a police officer by pulling a gun and threatening witnesses with death or harm to their families (R872, 873). After the sentencing hearing that took place in '84, Mr. Cascio was sent to prison (R871, 874). Before going to prison Cascio mentioned a Captain Donahue with the Pasco County Sheriff's Department who died under mysterious circumstances (R875). There was a question as to whether or not it was a suicide or an assassination, and Cascio indicated it was an assassination (R875).

On the day in question Mr. Smith stated that while he and Josette were at the Moose lodge, Cascio came in and began talking (R877). When Mr. Smith mentioned that they had to get home in order to be there for a man who was coming over to take out carpeting, Cascio offered to come over and help remove the carpet.

Although Mr. Smith had told him this was not necessary, Cascio insisted (R877). After a short stop at a liquor store, Mr. Smith, Josette, and Cascio arrived at Mr. Smith's house at approximately 4:00 p.m. (R877, 878).

After a bit Josette indicated that she wanted to make a phone call and needed the car to do so. Mr. Smith's insurance had recently expired, and he did not want her taking the car (R879). Josette was insistent, however; and when Cascio volunteered to take her, Mr. Smith thought this was a great idea (R880, 881). Mr. Smith worked around the house a bit and was sitting at the dining room table when the two came back about 25 or 30 minutes later (R881, 882). Josette walked quickly into the house first, and she seemed upset or nervous and wasn't saying anything (R883, 885). Cascio then came running in and also didn't say anything nor did he sit down at the table (R886). When Mr. Smith asked Cascio what was going on, Cascio became a little aggressive and stated "what do you mean what's gong on?" (R886). At that point Mr. Smith decided it would be best if Cascio would leave and asked him to do so (R886, 888). Cascio then said something about "are you going to make me" and that is when Mr. Smith noted that Cascio was wearing a jacket even though it was 82 degrees outside (R888). Mr. Smith got up from his chair again repeating that it was time for Cascio to go; and as he approached Cascio, Cascio shoved him with both fists (R889). Fearing that Cascio was carrying a gun, Mr. Smith picked up his gun that he had placed on the table the night before (R889). Again Mr. Smith asked Cascio to leave, but Cascio

just kept coming towards Smith (R889, 890). Mr. Smith noted a look in Cascio's eye that was similar to the look he had on the night when Cascio attacked Mr. Smith (R890). Cascio then said something about stuffing the gun into Smith's mouth and kept coming closer (R890, 891). Mr. Smith tried to push Cascio off as he came closer, but Cascio just kept coming. At that point Mr. Smith yelled for Cascio to stop and then he fired (R891).

Mr. Smith stated he began to panic (R891). After going to Josette and then going back to Cascio, he looked around for Josette and noticed she was gone (R893). He looked around the yard for her, but then he assumed she had gone for help (R893, 895). As he looked around the yard for her, he realized he was still holding on to the gun. Not wanting any part of it, he just threw the gun over the fence into a wooded area (R894, 895). Because he assumed the police and an ambulance were on their way, Mr. Smith decided to also throw away some drug paraphernalia he had in the house (R895, 896). Mr. Smith moved the cars in the driveway around in preparation for an ambulance, but the ambulance still hadn't come (R897). Mr. Smith then decided he would try to get Cascio into Cascio's car to take Cascio to the hospital himself (R899). Mr. Smith was able to drag Cascio from the dining room into the garage area; but because he had a bad back and was unable to lift Cascio (as was confirmed by Mr. Smith's doctor - R485), he had to stop before he could get Cascio into a car (R899).

Hearing his neighbor's car pull in the driveway, Mr. Smith ran next door to his neighbor Curt Mariani who had paramedic

training (R896, 899). Mr. Smith knocked on Mr. Mariani's door and told Mr. Mariani that he had just shot someone (R371, 372, 900). Mr. Mariani thought Mr. Smith was joking and offered him a drink, but Mr. Smith told him he wasn't kidding and asked him to follow him back to the house (R372, 900). On the way to Mr. Smith's house, Mr. Mariani asked him what had happened. Mr. Smith said something about Cascio trying to rape Josette and then turning on Smith (R385, 901). Once inside the house, they went into the garage, and Mr. Mariani could see the body lying on the garage floor (R375). Mr. Mariani could see blood all over the body and it seemed to him like blood was coming from the skull. At that point Mr. Mariani looked at Mr. Smith and then Mr. Mariani quickly left the house (R376, 901). According to Mr. Mariani as Mr. Mariani was leaving the house, Mr. Smith was asking for help in getting the body into the trunk (R376). According to Mr. Smith, he asked Mr. Mariani for help in getting Cascio into the car (R901). According to William McAteer, Mr. Mariani expressed doubts the day after the incident as to whether or not Mr. Smith had said anything specifically about a trunk. Mr. Mariani, upon further thought, recalled hearing Mr. Smith ask for help in putting Cascio into the car (R990, 991).

When Mr. Mariani left Mr. Smith, he drove to Mr. McAteer's car dealership in order to use the phone (R377, 390, 391). Mr. Mariani admitted that he was scared and in a panic when he made his phone call to the police (R378, 388). He told the police on the phone that he actually heard a shooting when, in

fact, he did not (R378). He admitted the inaccuracy, also, to Mr. McAteer the day after the incident (R990). Mr. Mariani also admitted to erroneously stating that the person had been shot several times including in the chest area (R399, 988). According to Mr. McAteer, Mr. Mariani had told him that the person had been shot in the head, chest and leg areas (R988, 989).

After Mr. Mariani took off, Mr. Smith moved the cars around again with the intent of trying to somehow drag Cascio into Cascio's car in order to take him to the hospital (R902, 903). Before he tried to actually move the body again, he decided to go over to another neighbor's house and try to phone for help (R902). First he called a law office where a friend of his worked, but his friend was not in (R904). Then Mr. Smith dialed zero and began talking to the police dispatcher (R904). While talking on the phone, his neighbor Sam suddenly yelled out "my god, their aiming shotguns at my house" (R904). Sam would not let Mr. Smith go outside until they had received assurances from the police that nothing would happen (R905). Both he and Sam then had to leave the house with their hands behind their backs (R905). Mr. Smith was then made to get down on the asphalt where his hands were handcuffed behind his back (R906). Mr. Smith kept telling them not to shoot, that he was a good guy, and that he did not want to shoot the person (R906). One of the officers asked him what happened, and Mr. Smith stated he shot a guy, The officer then asked where is they guy, and Mr. Smith replied that he was in the garage (R907).

Deputy Cosimi was the officer who handcuffed Mr. Smith (R410). According to the deputy, Mr. Smith said he had to shoot the guy because the guy was going after his daughter (R411). Deputy Kerschner was the second deputy on the scene, and he also heard Mr. Smith say that he shot someone because he was going for his daughter (R495). Deputy Kerschner stated that Mr. Smith said nothing about being frightened of the victim nor did he say anything about the victim having sexually assaulted his daughter (R499, 500). Another officer who arrived at the scene later also testified that Mr. Smith had stated he shot the man because he was trying to steal his daughter (R995, 996).

In regards to Cascio's character, two people testified. Detective Andy Fivecoat of the Tarpon Springs Police Department knew Cascio's reputation in the community for being violent, for carrying a gun, and for being in the mafia (R943, 944, 946, 948, 953). Christopher Verde, a friend and employee of Cascio's, also knew Cascio's reputation in the community and repeated Detective Fivecoat's statements as to Cascio's being violent, carrying a gun and being in the mafia (R959, 960).

In regard to Mr. Smith's character, his second ex-wife, Virginia Smith, testified that Mr. Smith had a reputation in the community for being a very peaceful, nonviolent person (R978, 979). Ms. Smith denied having been hit by Mr. Smith or having had him ground hamburger into her face (R980, 981). In rebuttal the State called Cascio's widow or ex-wife, Barbara Cascio, who testified that Virginia had told her that Mr. Smith had beaten her, had

mashed hamburger in her face, had held her under the jacuzzi and had turned the hot water on high when she was in the shower (R993, 994). It was noted that Ms. Cascio was trying to sue Mr. Smith (R994).

SUMMARY OF THE ARGUMENT

An erroneous and misleading instruction that goes to the heart of the defense is fundamental reversible error. An erroneous and misleading instruction on a one-step lesser crime from that which the defendant is convicted is also fundamental per se reversible error. A new trial is required due to the fact that the trial court only gave the short form of excusable homicide on the manslaughter lesser, and this short form is erroneous and misleading.

Upon retrial, the following evidentiary problems should be corrected: (1) the prosecutor should not have been allowed to have Ms. Estes called as a court witness so that he could impeach her testimony. There were no drastic changes in her testimony that would allow impeachment. In the alternative, the prosecutor should not have been allowed to use Ms. Estes' prior statements as substantive evidence. These statements did not fall under the hearsay exception. Lastly, use of irrelevant collateral crimes in this statement highly prejudiced Mr. Smith. (2) A State witness was improperly asked by the prosecutor if Mr. Smith had tried to claim self defense at the scene, which he did not; and this constituted a comment on Mr. Smith's right to remain silent. (3) Springing autopsy photos on the young Ms. Estes resulting in an emotional outburst also prejudiced Mr. Smith's case. (4) Prohibiting Mr. Smith from having his witnesses corroborate specific acts of violence constituted error. It was for the jury

to weigh witness credibility in determining the claim of self-defense; and the defense witnesses would have assisted the defendant in his defense.

ARGUMENT

ISSUE I

WAS THE FAILURE TO GIVE THE LONG FORM INSTRUCTION ON THE DEFENSE OF EXCUSABLE HOMICIDE FUNDAMENTAL ERROR WHEN THE SHORT FORM EXCUSABLE HOMICIDE INSTRUCTION HAD BEEN GIVEN, WHEN THE DEFENDANT HAD NEITHER REQUESTED THE LONG FORM INSTRUCTION NOR OBJECTED TO THE GIVING OF THE SHORT FORM INSTRUCTION, AND WHEN THAT DEFENSE WAS SUPPORTED BY THE EVIDENCE? (AS CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL)

Restated more simply, the issue here is whether an erroneous and misleading instruction that goes to the heart of the defense is fundamental error. The Second District Court of Appeal rejected its own prior cases and those of this court and other district courts of appeal when it answered the above in the negative. The Second District Court of Appeal decided that jury instructions on a defense should be defense counsel's responsibility as a matter of trial tactics and strategy and should not be the "burden" of the trial court. Mr. Smith respectfully submits that charging the jury properly and correctly is the duty of the trial court, and that any defense counsel who would intentionally not request a proper instruction on the heart of the defense in the name of trial tactics or strategy would have to have his competence as an attorney seriously questioned. It is incomprehensible that a defense counsel would intentionally want to have the jury erroneously instructed on the defense so as to

deny his client the chance of having the jury acquit the defendant. What kind of trial tactic or strategy would that be? More likely defense counsel would inadvertently fail to see a problem with the jury defense instruction. In such a case where this oversight results in an erroneous instruction on the heart of the defense then--if the burden falls entirely on defense counsel--the standards for being effective counsel have not been meet under Knight v. State, 394 So.2d 997 (Fla. 1981), and a new trial should be conducted on that basis.

Contrary to the Second District Court of Appeal's opinion, however, the main responsibility for the giving of proper jury instructions has been declared by this court to be on the trial court. As was pointed out in Yohn v. State, 476 So.2d 123 (Fla. 1985), the approval of standard jury instructions has not relieved the trial judge of his responsibility of correctly charging the jury. It is the trial court's responsibility to charge the jury on every defense which is recognized by the law and sustained by any testimony. Palmes v. State, 397 So.2d 648 (Fla. 1981); and Rodriguez v. State, 396 So.2d 798 (Fla. 3d DCA 1981). In addition; if the trial court attempts to define the crime for which the defendant is accused, it is the duty of the trial court to define each and every element. Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945). Thus, contrary to the Second District Court of Appeal's decision in this case, the burden of proper jury instructions on the defense does and must fall on the trial court.

This conclusion is not only supported by these legal

axioms but by the way they have been applied. The following cases found reversible error where the trial court failed to adequately instruct on an affirmative defense: In Carter v. State, 469 So.2d 194 at 196 (Fla. 2d DCA 1985), the court stated that when "a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant." The court went on to state that "[f]ailure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of a request or objection." Id. Carter dealt with an erroneous "duty to retreat" instruction. In Rodriguez, supra, the court found reversible error where the court did not instruct on a defense to intent to take in a grand theft case. In Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960), the court found fundamental reversible error when the trial court failed to instruct on the defense of justifiable homicide. And in Motley, supra, this court refused to use a harmless error analysis and found fundamental reversible error in an instruction on self defense in a homicide case. The defendant in Motley was convicted of second-degree murder, and the trial court's instruction on self defense was erroneous and misleading. Defense counsel did not object to the erroneous instruction but did ask for a definition of assault. This definition made matters even worse.

In Mr. Smith's case the trial court only gave the short form of excusable homicide (R1212, 1358, 1359). Mr. Smith's

defense in this case was basically grounded in self defense in that he had initially picked up the gun because he was afraid of Cascio (R889). There was also evidence that Cascio had forced himself on Josette to the point where she became very upset, and Mr. Smith was aware that something was amiss (R883-888, 385, 901, 651-656). Obviously, Mr. Smith's state of mind when he pulled the trigger was at issue. Because the theory of defense was excusable homicide, it was incumbent upon the trial court to give a full and accurate jury instruction on excusable homicide. Furthermore, the giving of the manslaughter instruction requires the complete definition of justifiable and excusable homicide. Last but not least, the introductory instruction on the defense of excusable homicide is inherently misleading because it inaccurately suggests that a killing with a dangerous weapon can never be excusable.[2] Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983); Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988).

Although the Second District Court of Appeal acknowledged the fact that a complete instruction on excusable homicide was necessary in this case and the incomplete instruction was misleading, it refused to apply a fundamental error analysis. In footnote 1 the court noted that although Carter, supra, and Rodriguez, supra, speak of fundamental error, their factual situations did not apply the fundamental error doctrine because

[2] In closing the prosecutor argued that a dangerous weapon could not result in an excusable homicide (R1276), and defense counsel was having a difficult time dealing with this (R1309, 1310, 1343).

objections had been made. The Second District Court of Appeal then tried to distinguish Baaley, supra, where the fundamental error doctrine was applied by noting that the trial court gave a misleading instruction on justifiable homicide as opposed to Mr. Smith's situation where "no instruction was read" (footnote 1). Whatever distinction the Second District Court of Appeal is trying to make here escapes undersigned counsel. The trial court gave an incomplete instruction on excusable homicide--a necessary part of the manslaughter instruction which is only one step removed from the second-degree murder conviction Mr. Smith received--and the incomplete instruction was misleading and erroneous. The Second District Court of Appeal does not discuss Motley, supra, which is a situation that not only involves fundamental error but error that was contributed to by defense counsel in regards to the self defense instruction on a second-degree murder conviction. (It is to be noted that Motley's factual situation is very similar to Mr. Smith's in that both involved the defendant using a gun when faced with an aggressive victim and a misleading instruction on self defense that hit the heart of the defendant's case.)

The Second District Court of Appeal and Attorney General also point to this court's opinion in Smith v. State, 521 So.2d 106 (Fla. 1988), as support for not applying the fundamental error doctrine. A careful reading of Smith, however, fails to provide the support desired. Although Smith refused to apply fundamental error to the use of the insanity defense instruction after an earlier case had found the standard instruction not sufficiently

clear as to the burden of establishing sanity when there is evidence of insanity, the Smith case notes that the inadequate instruction on insanity was not so flawed as to deprive a defendant claiming the insanity defense of a fair trial. "Despite any shortcomings, the standard jury instructions, as a whole, made it quite clear that the burden of proof was on the State to prove all the elements of the crime beyond a reasonable doubt." Id. at 108. In Mr. Smith's case the misleading instruction on excusable is so flawed as to have deprived Mr. Smith of a fair trial because it states that a dangerous weapon (which is then later defined as including a gun) can never be used in an excusable homicide defense. Since Mr. Smith's case involved a gun, the erroneous, misleading instruction deprived Mr. Smith of his defense; of an element of the next-step lesser included; and, therefore, of a fair trial. The interests of justice require that the fundamental error doctrine be applied.

ISSUE II

WHEN A DEFENDANT WAS CONVICTED OF SECOND-DEGREE MURDER, WAS THERE FUNDAMENTAL ERROR WHEN THE TRIAL COURT HAD FOLLOWED THE STANDARD JURY INSTRUCTIONS AND GIVEN THE SHORT FORM INSTRUCTION ON EXCUSABLE HOMICIDE AT THE OUTSET OF THE HOMICIDE INSTRUCTIONS AND HAD GIVEN NO FURTHER INSTRUCTION ON EXCUSABLE HOMICIDE IN CONNECTION WITH ITS INSTRUCTION ON MANSLAUGHTER? (AS CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL)

As the Second District Court of Appeal notes in its decision in this case, there is considerable disagreement and lack of clarity in this area. Undersigned counsel would also add "confusion" to the list. Perhaps the main reason for all the difficulties is that several legal axioms are involved and stack up differently depending on slight but important factual deviations. In this case we are concerned with an incomplete/misleading instruction on manslaughter, a one-step lesser included erroneous charge from that which the Appellant was convicted, an initial erroneous instruction as opposed to an incomplete reinstruction, an erroneous instruction that went to the heart of Appellant's defense, and fundamental error. The applicable legal axioms in this case stack up to the conclusion of fundamental reversible error.

The basic ground level cases establish that it is reversible error for a trial court to fail to give an instruction on justifiable and excusable homicide when it gives an instruction on manslaughter. Ortaaus v. State, 500 So.2d 1367 at 1370 (Fla.

1st DCA 1987); Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986); Hedges v. State, 172 So.2d 824 (Fla. 1965).

The next level of cases establish that the short forms of excusable and justifiable that are given at the beginning of the jury instructions are not sufficient in defining manslaughter. Ortagus, supra. The short form of excusable can also be erroneous and misleading if the case at issue involves a dangerous weapon such as a gun. Both Kingery, supra, and Blitch, supra, point out that the short form negates the defense when a gun is involved while the complete version only negates the defense if sudden combat is involved.

The next level of cases note that there is a difference between obtaining a proper initial full and correct instruction but an incomplete re-instruction. If the situation involves a re-instruction as described above, then there must be an objection to preserve the error. If there was no objection, then cases have held that fundamental error does not exist. Castor v. State, 365 So.2d 701 (Fla. 1978); Garcia v. State, 535 So.2d 290 (Fla. 3d DCA 1988); Rojas v. State, 535 So.2d 674 (Fla. 5th DCA 1988). If, however, the situation involves the initial instruction which was incomplete, then fundamental error does exist. Ortagus, supra; Castor, supra. As Castor points out, fundamental error will only be applied to erroneous initial instructions to the jury in order to keep the doctrine of fundamental error a limited exception. Id. at 704.

The trial level of cases deal with the requirement that

the trial court always properly instruct the jury on the next-step (one-step) lesser included and the failure to do so constitutes fundamental per se reversible error. Alejo, supra; State v. Abreau, 363 So.2d 1063 (Fla. 1978); Reddick v. State, 394 So.2d 417 (Fla. 1981); and Wheat v. State, 433 So.2d 1290 (Fla. 1st DCA 1983). The purpose of this rule is to allow the jury "a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime." Abreau, 363 So.2d at 1064. Even if factually the evidence conclusively would eliminate a next-step lesser, the jury is entitled to an instruction on that next lower crime. This is aptly demonstrated by Reddick where there evidence clearly established the use of a gun; but this court found fundamental reversible not to give the next-step lesser of robbery with a weapon. This court rejected the trial court's reasoning that either the object was a gun or it wasn't. It is this case that clearly demonstrates that the language in Rojas and Garcia as to finding it harmless error to not give the complete instruction on the next-step lesser of manslaughter when the defendants were convicted of second-degree murder is wrong. Although the factual situation may not apply to the next-step lesser, it doesn't matter. The jury is entitled to have the charge given. (Mr. Smith, of course, also agrees with the Second District Court of Appeal's reasoning that rejects Rojas and Garcia on the grounds that a finding of second-degree murder does not implicitly reject a possible finding of manslaughter. It is impossible to determine whether or not the jury would have used its

pardon power when it has not been given a full and accurate instruction on the next-step lesser crime.) In our particular case the factual situation required an instruction on excusable homicide as self defense was the issue.

As can be seen from the above, the legal axioms and facts in this case reach the inescapable conclusion that Mr. Smith is entitled to a new trial. The giving of an incomplete, erroneous initial instruction on manslaughter--a one-step lesser from the crime of second-degree murder for which Mr. Smith was convicted--constitutes fundamental per se reversible error.[3]

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[3] Other errors existed in the jury instructions that should be corrected upon retrial: Mr. Smith asked for, but did not receive, an instruction on culpable negligence as part of the manslaughter instruction (R1005). Although the trial court stated that there was no evidence for such an instruction, the jury could have concluded that picking up the gun was reckless act. The issue here was not accidental or unintentional shooting; thus, it was applicable and should have been given. The retreat instruction was confusing and misleading because on one hand the jury is told that Mr. Smith must exhaust "every reasonable means to escape the danger" (R1221) and must retreat if "he could have avoided the need to use [deadly] force" (R1222), and on the other hand the jury was told that Mr. Smith had no duty to retreat if attacked in his own home (R1222). In light of the fact that the incident took place in Mr. Smith's home, he had no duty to retreat; and the two inconsistent instructions were highly misleading and/or confusing (R1264, 1265). The prosecutor argued Mr. Smith's duty to retreat in closing (R1279). The flight instruction in this case was also inapplicable. Taken as a whole, it is obvious that flight goes to the defendant's attempt to hide himself--it does not go to hiding the weapon or the body. This instruction was objected to (R1003, 1004, 1225, 1264), and should not have been given. (The prosecutor also argued flight in closing arguments - R1269, 1352.) There was no question as to Mr. Smith having gone anywhere except to the neighbors' for assistance, and he even called the police himself. No evidence of flight was present to justify this instruction. See Payne v. State, Case No. 87-1303 (Fla. 1st DCA March 28, 1989)[14 FLW 7711, where the court reversed for a new trial when the jury was erroneously instructed on flight. The defendant's act of locking doors and windows to keep the police from coming in to arrest the defendant was not an activity that could "reasonably

ISSUE III

DID THE TRIAL COURT ERR IN DECLARING MS. ESTES TO BE A COURT WITNESS AND ALLOWING THE STATE TO UTILIZE HER PRIOR UNRELATED STATEMENT, COMPLETE WITH COLLATERAL CRIMES COMMITTED BY MR. SMITH, AS SUBSTANTIVE EVIDENCE? (AS STATED BY RESPONDENT/CROSS-PETITIONER)

After the jury was selected but before witnesses were placed on the stand, the prosecutor argued that he should be allowed to have Ms. Estes called as a court witness (R238-257). Although the State argued that Mr. Estes may prove to be a hostile witness and claimed that her testimony had changed dramatically in prior statements (R241-243), these supposed drastic variations in pretrial statements were never borne out by the record. What the State claimed to be drastic testimony changes actually involved additions to Ms. Estes first few statements. In her initial statements on the day of the shooting and the day after, Ms. Estes had placed the gun in Mr. Smith's hands a few seconds earlier and had omitted Cascio's aggressive behavior that had partially exhibited itself by Cascio nudging Mr. Smith. There was also no mention of Mr. Smith asking Cascio to leave (R241, 585-588, 756, 758). Ms. Estes explained these lapses by stating that in her initial statement the police had only wanted the basics (R703). What is really more apparent from the prosecutor's argument is not these "drastic changes" in testimony but Ms. Estes' friendly

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characterized as evading prosecution or avoiding (as opposed to momentarily delaying) capture."

relationship with Mr. Smith. Pointing out to the trial court that Ms. Estes had visited Mr. Smith and phoned him or accepted his collect calls while Mr. Smith was in jail awaiting trial, the prosecutor finished his argument by noting and/or complaining that Ms. Estes would not speak to him the day before trial without the presence of defense counsel (R241, 242, 257, 258). [Defense counsel noted that he had made himself available for this purpose, but the prosecutor would not question Ms. Estes in front of defense counsel - R258]. The fact that Ms. Estes would not speak to the prosecutor alone was justified in that the prosecutor had already threatened her with perjury when she added the fact that Cascio had become aggressive to her statement (R705). Over objection, the trial court declared it would call Ms. Estes as a court witness (R253-257).

In a similar situation the First District Court of Appeal reversed for a new trial where the State was erroneously allowed to have its witness ruled adverse, allowed to impeach the witness with a deposition, and then allowed to argue the deposition as if it were substantive evidence. In Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988), the defendant's girlfriend had witnessed the defendant's shooting of the victim. The victim had been harassing the defendant all night; had been trying to move in on the defendant's girlfriend; and had been drunk, belligerent, obnoxious and obscene. The defendant's defense was self defense. The supposed prior inconsistent statements were in two areas: (1) at trial the witness testified there was only 4 or 5 seconds between

the two shots fired while at her deposition the time was given as 5 to 10 seconds, and (2) at trial the witness stated that the victim was not helpless after the first shot while in her deposition she had indicated that she did not know why the defendant had fired the second shot because the victim was going to be helpless after the first shot. Noting that impeaching one's own witness is proper in only very limited circumstances, the court quoted from Adams v. State, 34 Fla. 185, 195-196, 15 So. 905, 908 (1894), in the criteria to be used:

> It is very erroneous to suppose that, under this statute [§ 1101, Rev. Fla. Stat. (1892), precursor to section 90.608(2), Florida Statutes (1979)], a party producing a witness is at liberty to impeach him whenever such witness simply fails to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. The impeachment permitted by the statute is only in cases where the witness proves adverse to the party producing him. He must not only fail to give the beneficial evidence expected of him but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. When a party's witness surprises him by not only failing to testify to the facts expected of him, but by giving harmful evidence that is contrary to what was expected, then, as is the purpose of this law, he is permitted to counteract the prejudicial effect of the adverse testimony of such witness, by proving that he has made statements on other occasions that are inconsistent with his present adverse evidence. It never was the purpose of the statute to allow a party to gut up a witness for the purpose of endeavoring to aet from him beneficial evidence. and upon his simple failure to testify to the desired facts, to permit him to aet the benefit of those expected facts, as substantive evidence throuuh the mouth of another witness, under the auise of impeachment. Evidence adduced in this manner is nothing more than the veriest hearsay, and

> is inadmissible. Even where a witness is properly impeached by proof of conflicting statements made on other occasions, the conflicting statements as testified by the impeaching witness should not be considered as substantive evidence in sustenance of the party's cause who produced the impeached witness; but has weight only for the purpose of counteracting or annulling the harmful effects of the adverse testimony in the cause given by the impeached witness that is inconsistent with his statements testified to have been made on other occasions. (Emphasis supplied.)

Finding that the witness's trial testimony was not inconsistent with her deposition in any essential respect, the court held that the prosecutor should not have been allowed to impeach its witness and argue the deposition testimony as if it were substantive evidence. Due to the nature of the case the error was not harmless.

In our case the prosecutor was also faced with a witness he did not like -- a girlfriend of the defendant. When he feared he could not get beneficial evidence, he obtained the beneficial facts through the mouth of another witness under the guise of impeachment. The prosecutor in this case, however, went one step further -- he had the trial court call Ms. Estes as a court witness and he actually used the prior statement as substantive evidence as opposed to the limited purpose of impeachment. Yet, just as the witness's testimony was not inconsistent in any essential respect in Kinaery, Ms. Estes' statements were not inconsistent. In Jackson v. State, 498 So.2d 906 at 909 (Fla. 1986), this court noted that court witnesses should be limited to situations where

an eyewitness' veracity or integrity is reasonably doubted. Because Ms. Estes was not inconsistent in her testimony, her veracity or integrity were not in doubt. The trial court erred in declaring her a court witness.

Even if it was not error to declare Ms. Estes a court witness, the State should not have been allowed to use the State Attorney Investigation statement given on the day after the shooting as substantive evidence. Over objection, the statement came in as substantive evidence (R270-274, 711-774, 1002). In addition, the statement made to the detective on the day of the shooting and which was not substantive was put before the jury as if it were substantive evidence with no instruction to the contrary. When defense counsel objected to the prosecutor utilizing this statement as if it were substantive in opening statements and throughout the trial, the prosecutor claimed it had the right to use this statement for impeachment purposes. Yet, the jury was never told that this statement was only for the limited purposes of impeachment; and the prosecutor put on the detective and his secretary to testify as to the way the statement was made and taken down (R268-270, 583-605, 609, 779-811). As in the State Attorney Investigation statement, the first statement made to the detective left out Cascio's aggressive behavior; and, as in Kinsery, the prosecutor made much ado over how many seconds passed between the gun being placed at Cascio's head and it going off -- half a second versus two seconds.

Under Kinsery the use of impeachment testimony without

instructing the jury as to its limited purpose was tantamount to its being substantive evidence, and this constituted reversible error. The statement Ms. Estes made on the day of the shooting falls into this same category. The way the statement to the detective was presented to the jury it was as if it was substantive evidence when, in fact, it was not.

The statement made the following day to a prosecutor with a court reporter poses a slightly different problem. The trial court allowed this statement in as substantive evidence over objection under section 90.801(2)(a), Florida Statute (1985). The issue here is whether such a statement falls with this statute section and can be used as substantive evidence. In Delgado-Santos v. State, 471 So.2d 74 (Fla. 3d DCA 1985), approved and adopted in State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986), the court examined what kind or type of "proceeding" fell under section 90.801(2)(a), Florida Statutes (1985), when it declared testimony given at a trial, hearing, or other proceeding or in a deposition to be non-hearsay. Looking to legislative history, the court noted that "other proceeding" covered statements before a grand jury but must be no less formal than a deposition and no more so than a hearing. In that case the issue was whether an investigative interrogation by the police qualified, and the court held it did not. In so holding the court stated:

> Investigative interrogation is neither regulated nor regularized; it contains none of the safeguards involved in an appearance before a grand jury and does not otherwise even remotely resemble that process; and it has no quality of formality and convention which could

> arguably raise the interrogation to a dignity akin to that of a hearing or trial.

Delgado-Santos, 471 So.2d at 78. Although the court was not faced with a State Attorney investigation interrogation, it did note in footnote 6 that such a related question existed and cited a few cases that seemed to be decided in favor of using it as substantive evidence. Mr. Smith disagrees with this footnote.[4]

As pointed out in the record, only the prosecutor, detective, court reporter and witness were present for this investigative statement (R736). Defense counsel was not present, the witness had no counsel made available to her, and no judge or equivalent presided over the interview. If the "other proceeding" must be no less formal than a deposition, then at the very least someone representing the opposing side should have been present to clarify or delve into areas. In light of the fact that this young seventeen-year-old witness who was still upset after having witnessed someone she loved kill a man was claiming not to have changed her story but to only be adding to it, the prosecutor's claim of drastic changes would have or could have been laid to rest if opposing counsel had been present in order to draw the witness out. Obviously, the prosecutor was not interested in any activity that could have constituted self defense -- that would have been

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[4] Mr. Smith also disagrees with the case cited by the Second District Court of Appeal: Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983). There the court allowed the defense to use as substantive evidence a statement made under oath to the state attorney. The case does not go into any great legal analysis, but points to recent changes in section 90.801, Florida Statutes (1981).

defense counsel's job; and this young, naive, distraught, uneducated girl could not be expected to recall every detail or point out defensive activity without some assistance. In addition, there were no safeguards of the presence of an unbiased/neutral/nonadversary individual or body to ask questions or evaluate the proceeding. This State Attorney investigative statement was no better than the police investigative statements rejected in Delgado-Santos. The addition of an Assistant State Attorney to the proceeding did not cure the type of defects addressed in Delgado-Santos. The statement should not have been used as substantive evidence.

There is also the problem in this case that the State Attorney statement contained unrelated statements about Mr. Smith's drug use. Even if this statement could be placed before the jury either as substantive evidence or as impeachment, the final two pages that discussed Mr. Smith's general drug use had absolutely nothing to do with the case and served no purpose except to put Mr. Smith's bad character before the jury. Evidence of defendant's bad character is not admissible unless he first puts his character in issue and only then if it is relevant to an issue of material fact. Straight v. State, 397 So.2d 908 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1980); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Hodges v. State, 403 So.2d 1375 (Fla. 5th DCA 1981). As was aptly stated in Hodges, id. at 1376, 1377;

> Evidence of particular bad acts to show the accused's character as evidence of his commission of an act is inadmissible because of: (1) the undue prejudice from the

> overstrong tendency of a jury to believe an accused guilty because he is a likely person to have done such an act, (2) the undue prejudice from the tendency to condemn because the accused may have escaped unpunished from other offenses and (3) the unfair surprise and injustice in charging one with one offense and then collaterally attacking him with other wrongs for which he may be unprepared to defend. Over the last three centuries this policy of exclusion of bad character evidence has received judicial sanction more emphatic with time and experience.

Because the drug references had no relevance to the shooting in this case (no one alleged drug involvement as either a motive or a mind altering factor), it was error for the trial court to allow its admissibility. Mr. Smith's motion for mistrial should have been granted (R771-772, 1007-1012), and nothing could be done to cure this type of error.

In light of the close nature in this case where self defense is asserted and the only eyewitness outside the defendant is a young girl who is severely impeached when she adds pieces to her testimony favorable to the defense, it cannot be said that the above errors did not contribute to the verdict beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), requires a new trial. The prosecutor's extensive use of these inconsistent statements in his closing argument clearly demonstrates the damage these statements caused and the need for a new trial (R1289-1301, 1355).

ISSUE IV

DID THE TRIAL COURT ERR IN NOT GRANTING A MISTRIAL WHEN A STATE WITNESS WAS ALLOWED TO COMMENT ON MR. SMITH'S RIGHT TO REMAIN SILENT? (AS STATED BY RESPONDENT/CROSS-PETITIONER)

In order to attack Mr. Smith's defense of self defense, the prosecutor asked one of the deputies at the scene at the time of Mr. Smith's arrest the following questions over objection:

> PROSECUTOR: Deputy, at the time you heard these statements being made to Deputy Cosimi, what, if anything, did this defendant say of being frightened of the victim of this case?
>
> A: None.
>
> MR. MANDER: I would renew the objection just made in its entirety.
>
> THE COURT: Thank you. The same ruling.
>
> Q: (By Mr. Miller) Deputy Kerschner, at the time you heard these statements being made to Deputy Cosimi, what, if anything, was said by the defendant about the victim being sexually aggressive or assaulting his daughter?
>
> MR. MANDER: Objection. Leading.
>
> MR. MILLER: I phrased it, what, if anything.
>
> THE COURT: Well, all right. I'll overrule the objection.
>
> Q: (By Mr. Miller) What, if anything, did you overhear the defendant say at that time about his daughter being sexually assaulted by the victim in this case?
>
> A: None.
>
> Q: What --
>
> MR. MANDER: I will make the same objection that I made at the bench previously, Judge. He's doing indirectly what he is not allowed

to do directly, violating my client's constitutional rights.

THE COURT: Same ruling.

Q: (By Mr. Miller) Deputy, the same time you overheard these statements of Deputy Cosimi, what, if anything, did you hear this defendant say to Deputy Cosimi at that time that he was acting in self-defense?

A: None.

MR. MANDER: Same objection, Judge.

THE COURT: Same ruling (R499, 500).

These comments were objected to on the grounds that they commented on Mr. Smith's right to remain silent (R495, 496, 499).

Failure to protest your innocence at the scene of the crime or to volunteer an explanation for your activity or to set forth your defense immediately at the scene is a comment on the right to remain silent. In Starr v. State, 518 So.2d 1389 (Fla. 4th DCA 1988), the defendant's defense was that he found a magazine and did not know that drugs were inside. The prosecutor discredited this defense by asking witnesses if the defendant had told them how he came to have possession of the magazine and its contents (the defendant had not said anything) and by arguing in closings that logic and human nature and common sense seemed to demand that the defendant explain his unique discovery of the contraband yet he never mentioned this to the police. This constituted reversible error. In Hosper v. State, 513 So.2d 234 (Fla. 3d DCA 1987), the defendant's defense at trial was that he was nervous when initially approached by the police because he had

marijuana on his person but he was unaware of the cocaine in the suitcase. The prosecutor asked the defendant why he waited til trial to tell anyone about the excuse, and the court held this to be reversible error.

In Mr. Smith's case the prosecutor's questions commented on Mr. Smith's right to remain silent. Mr. Smith was under no obligation to volunteer any information after being forced out of a neighbor's home at gunpoint and handcuffed on the ground. The Second District Court of Appeal opinion states that the voluntary statements Mr. Smith made at the scene made Mr. Smith open for attack, but in both Starr and Hosper statements were made. In Starr the defendant answered some questions at the police station, and in Hosper answers were given at the scene. The cases cited by the Second District Court of Appeal [Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986); and Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980)] applied to statements made after Miranda warnings. If a defendant chooses not to invoke his right to remain silent after being given Miranda warnings, then there is no comment-on-the-right-to-remain-silentproblem. In our case, however, Mr. Smith made his statements spontaneously as he was being arrested and before he was given Miranda (Mr. Smith was asking that a particular police officer be called, he was stating that he had just shot someone who was in the garage who had been

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[5]The prosecutor also argued Mr. Smith's failure to raise self defense or his stepdaughter's being attacked immediately at the scene as evidence of guilt in closing argument (R1287, 1288).

going for his daughter, and he kept telling the police that they had the wrong guy because he hadn't done anything--R410, 411, 495, 500, 995, 996). Thus, the cases of Watson and Anderson can be distinguished. It was error for the witnesses to comment on Mr. Smith's right to remain silent; and as noted above, such an error cannot be held to be harmless error in light of the facts in this case. A new trial is required.

ISSUE V

DID THE TRIAL COURT ERR IN DENYING MR. SMITH'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR SHOWED MS. ESTES AUTOPSY PHOTOS? (AS STATED BY RESPONDENT/CROSS-PETITIONER)

In spite of the fact that the deceased had been identified by the medical examiner as John Cascio (R513) and there was no dispute as to the deceased's identity, under the pretext of having Cascio's body identified, the prosecutor 'sprang' three autopsy photos of Cascio on the unsuspecting Ms. Estes (R553, 626). Ms. Estes had never seen these photos before, and she became very upset and began to sob out loud (R553, 626). Noting that the deceased had already been identified, the trial court would not allow the prosecutor to show Ms. Estes any more photos (R554, 555). The motion for mistrial on the basis that the only purpose for showing Ms. Estes these photos was to upset her was denied (R554, 555).

Gruesome photos of dead bodies are admissible as long as they are relevant. Grossman v. State, 525 So.2d 833 (Fla. 1988). Here there was no objection to the photos themselves as they were relevant in describing and demonstrating the wounds. There was absolutely no relevancy, however, in showing these photos to a seventeen-year-old girl who was already upset over the entire episode. Showing her these photos without warning and without prior preparation for no valid reason could only have one result -- upset the witness and have her fall apart before the jury. This act was uncalled for and highly prejudiced Mr. Smith's

case.

The cases that discuss gory photos of the deceased and identification go to family members. The rule is that the prosecutor cannot use family members to identify the deceased if someone else is available because sympathy for the victim must not be interjected into the trial. See Randolph v. State, 463 So.2d 186 (Fla. 1984); and Lewis v. State, 377 So.2d 640 (Fla. 1979). The purpose of this rule is "to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." Welty v. State, 402 So.2d 1159 at 1162 (Fla. 1981). Such "matters not germane" include sympathy for the victim.

Although Ms. Estes was not related to the deceased, the prosecutor's manipulation of her in this manner had the same end result -- to cause a prejudicial outburst that interjected sympathy for the victim into the trial. This activity on the part of the prosecutor was not relevant and was highly prejudicial. In light of the closeness of the case as to the issue of self defense and in light of the cumulative errors in this case, a new trial is required. DiGuilio, supra; and Duuue v. State, 498 So.2d 1334 (Fla. 2d DCA 1986).

ISSUE VI

DID THE TRIAL COURT ERR IN PROHIBITING MR. SMITH'S WITNESSES FROM TESTIFYING AS TO SPECIFIC ACTS OF VIOLENCE ON THE VICTIM'S PART? (AS STATED BY RESPONDENT/CROSS-PETITIONER)

Although the trial court allowed Mr. Smith to testify as to specific acts of Cascio's violence (Captain Donahue's death was a murder as witnessed to and related by Cascio - R875; Cascio's attack on Mr. Smith during which Mrs. Cascio was hit - R865, 866; Cascio's prior record and dangerousness as brought out at a sentencing hearing - R870-873; and Cascio's attack on an officer with a gun and threats to witnesses - R872, 873), his witnesses were not allowed to corroborate this information. Detective Fivecoat was not allowed to state that Captain Donahue was involved with Cascio and Trafficante and others convicted of a federal racketeering incident and that Donahue died in a suspicious shooting incident (R953-955). Detective Fivecoat was also not allowed to testify that he arrested Cascio for an aggravated assault involving a firearm at LeCave Restaurant against a police officer (R955, 956). The trial court would not allow Mr. Verde to testify to Cascio's displaying of the gun against the officer, to the threats he made against witnesses, to the heavy drinking Cascio did, and to the tough people Cascio had around him (R957, 958). Ms. Smith was not allowed to testify as to the altercation between Cascio and Mr. Smith in which Mrs. Cascio was hit nor was she allowed to state what she had heard at Cascio's sentencing in

regards to prior felonies and various illegal activity (R964-977).

As pointed out in Burk v. State, 497 So.2d 731 at 733 (Fla. 2d DCA 1986):

> When a defendant pleads self-defense in a prosecution for murder and a proper foundation is laid at trial, evidence of the deceased's violent character is admissible if an issue exists as to either the deceased's conduct, i.e., whether he was the first aggressor, or the reasonableness of the defendant's belief concerning imminent danger from the deceased.

Specific acts of the victim's violence can be used as long as the defendant was aware of these specific acts prior to the altercation. See Hager v. State, 439 So.2d 996 (Fla. 4th DCA 1983); and Taylor v. State, 513 So.2d 1371 (Fla. 2d DCA 1987). There is nothing in section 90.404, Florida Statutes (1985), however, that dictates such information can only come from the defendant. In Hawthorne v. State, 377 So.2d 780 at 787 (Fla. 1st DCA 1979), the facts are not clearly set forth; but the opinion does state that the trial court erred in "improperly limiting the testimony of [defendant's] witnesses as to prior threats and acts of violence" made by the deceased toward the defendant, her children and third persons. Citing from an old Florida Supreme Court case, the court notes that the weight of such threats considered with the alleged overt acts and the credibility of the witnesses testifying to either the acts or threats were for the jury to consider in either accepting or rejecting the defendant's claim of self defense.

Mr. Smith was allowed to testify as to these specific acts, so it is impossible to imagine how the State would be prejudiced by having other witnesses verify these acts. As pointed out in Burk and Hawthorne, it is for the jury to decide if the defendant's belief concerning imminent danger from the deceased was reasonable; and for this reason the jury must weigh the credibility of the witnesses testifying in either accepting or rejecting the defendant's claim of self defense. Mr. Smith's credibility was under strong attack in this case--he obviously had an interest in the outcome of the case. To have witnesses who were either impartial (Detective Fivecoat) or friends of Cascio (Mr. Verde) corroborate the specific prior bad acts of Cascio would have greatly assisted the jury in evaluating Mr. Cascio's claim of self defense. The jury convicted Mr. Smith of a lesser-included offense and the evidence was extremely close on this issue. The error, therefore, was harmful; and a new trial is required.

CONCLUSION

Based on the foregoing arguments and authorities Mr. Smith is entitled to a new trial. The Second District Court of Appeal's answer to the second certified question should be upheld, but the answer to the first certified question should be reversed. The Second District Court of Appeal's remaining opinion as to the other evidentiary issues should also be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 21st day of April, 1989.

Deborah K. Brueckheimer

DEBORAH K. BRUECKHEIMER

DKB/tll