IN THE SUPREME COURT OF FLORIDA

ROBERT LEWIS MILLER,

Petitioner,

vs.

Case No. 74,955

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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T B F

TABLE OF CITATIONS

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OTHER AUTHORITIES

STATEMENT OF THE CASE

On January 7, 1986, the Polk County state attorney charged the appellant, ROBERT LEWIS MILLER, with three counts of second degree murder, three counts of vehicular homicide, one count of culpable negligence, and one count of fleeing to elude. (R21-27) On January 12, 1987, a jury reduced the murder charges to manslaughter but otherwise found Miller guilty as charged. (R1038-45) Miller had been on probation for two burglaries and a grand theft. (R13) The court revoked his probation and, on May 4, 1987, sentenced him to a total of sixty-two years in prison. (R1217-19) This combined sentence was a departure from the guidelines recommendation of seventeen to twenty-two years in prison. (R1244)

In an opinion dated September 29, 1989, the district court found that Miller had been improperly convicted of both vehicular homicide and manslaughter for the same deaths. Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989). The court found that the scoresheet was incorrectly calculated and that the judgment incorrectly showed convictions for second degree murder rather than manslaughter. The court approved one of the reasons for departure from the guidelines but rejected the rest. The court did not agree with Miller's other arguments on the merits.

On October 20, 1989, Miller mailed a notice to invoke discretionary jurisdiction. On December 5, 1989, this court stayed further proceedings in the trial court pending disposition of Miller's petition for review. This court accepted jurisdiction on March 14, 1990.

STATEMENT OF THE FACTS

In October, 1985, the petitioner, ROBERT LEWIS MILLER, 19, lived with his aunt, Clydie Powell, and her fiance, Wesley Thomas, in Lakeland. (R154, 160, 167-68) Powell let Miller use her blue 1971 Maverick, which had a license tag on the back bumper. (R155-57, 172) She did not keep car batteries in the car. (R163, 178)

Ernest Carnegie owned a Haines City laundromat. (R180-81) On October 21, around 8 a.m., a man asked Carnegie at the laundromat if he wanted to buy car batteries. (R181-82) Carnegie said he did not. (R182) The man walked to his car -- which Carnegie testified was a small gray Chevrolet -- and drove away. (R183)

At 8:20 a.m., according to Captain Wayne Cook, Carnegie called the police to report that a black male driving a blue Maverick was selling batteries. (R185, 189, 209) Carnegie initially wanted to remain anonymous but later gave his name. (R190) Cook broadcast the report over the police radio. (R191, 210) Selling batteries without a license violated a Haines City ordinance. (R579-80)

Patrolman Jeffrey Sauro saw a car matching the broadcast description going south on Alternate 27, a two lane road. (R204, 441) Sauro noticed that the Maverick did not have a license tag and, at 8:29 a.m., told his dispatcher that he would stop the Maverick. (R211, 441)

Inez Locke was driving a school bus southbound on Alternate 27 when a Maverick passed her on a double yellow line. (R763, 766, 770) The next instant, a police car also passed her. (R764) Both

cars turned right on Highway 544 and passed Alta Vista School. (R764) Neither car slowed for the school zone and instead passed traffic on the right. (R764, 773) Locke did not hear a siren or see emergency lights on the police car. (R766) Officer Sauro, however, testified that, as he passed the bus, he turned on his emergency flashers and siren. (R443) At 8:30 a.m., he told his dispatcher that the Maverick was fleeing from him on 544. (R211)

Douglas Gibson, Doug Elam, and Frederick Walker were surveyors driving west on 544 past the school. (R263-64) They heard a siren, but Gibson, the driver, did not see any emergency lights flashing and thought at first the siren was playing over the car radio. (R266, 275, 281, 300) A blue Maverick traveling about fifty miles per hour then passed them on the right or left side of the road in a thirty-five mile per hour speed zone. (R264-65, 282-83, 300-01) The road was two lanes wide but had paved areas on the right side for parking. (R264, 278) A few seconds later, a police car passed them on the left side, without its emergency lights on. (R266, 283-84, 289, 301) Officer Sauro testified that he remained about five or six car lengths behind the Maverick and that both were traveling about fifty-five to sixty-five miles per hour. (R447)

As the surveyors approached US 27, they saw the cars heading south on 27. (R268) The police car was only a few car lengths behind the Maverick but still did not have its lights on. (R269, 277, 287, 292, 302) The surveyors' estimates of the cars' speed varied from forty to seventy miles per hour. (R269, 287)

Sauro testified that the Maverick went through a parking lot on the southeast corner of 544 and 27 and then went south on 27 in the northbound lanes. (R449) At that point, 27 was a four lane divided highway with a grassy median. (R450-51) Every two tenths of a mile, the median had turn lanes where cars could turn around. (R451) Sauro followed the Maverick about ten car lengths behind, because he wanted to warn oncoming traffic. (R451-52) Sauro, however told his dispatcher that he was right on the Maverick's tail and that he was headed north on 27 rather than south. (R233, 236, 251-52, 460) Until Sauro later gave the right direction, his supervising officers were unaware that he was chasing the Maverick on the wrong side of the road. (R233, 251)

The distance from Alternate 27 to US 27 was 1.8 miles and from the intersection of 544 and 27 to the eventual crash site was 2.3 miles. (R207) Sauro and the Maverick stayed in the passing lane on 27, and Sauro estimated at trial that fifty cars swerved to the slow lane to avoid being hit. (R453) After the accident, however, Sauro told his chief, Kenneth Thompson, only that "several" cars moved to the slow lane; Thompson did not think that "several" meant fifty. (R583-84) Sauro also testified that he went fifty-five to sixty miles per hour and that the Maverick did not exceed the speed limit. (R482-83) He told Thompson and Sergeant Lyle Jagnizack, however, that his speed was fifty to fifty-five and wrote in his report that it was only forty-five to fifty. (R485, 529-30, 581)

Bobby Casteel, Charles Reynolds, and William Fellerhof were splicing phone cable on the west side of 27. (R309-10, 324-25, 335-36) They heard a siren and then saw a blue Maverick heading south in the northbound lane, followed thirty to one hundred fifty yards later by a police car. (R311-12, 326-27, 338) The cars were traveling between sixty and eighty miles per hour. (R312, 327, 338) The police car's lights were off. (R313, 329) Traffic was light. (R313, 337) Two northbound cars moved to the slow lane, and the Maverick swerved into the median once or twice to avoid hitting others. (R315, 340, 344)

James Aycock, Bob Hurst, and Robert Ward were installing optic cable on the east side of 27. (R347-48, 373) A bulldozer was running, and Aycock and Hurst did not hear a siren, but Ward did. (R348, 352, 360, 373) A blue Maverick went past them the wrong way southbound at a speed of between fifty and seventy miles per hour. (R350-51, 360-61) Aycock and Ward thought that a police car was seventy-five feet behind the Maverick, but Hurst thought that it was only six inches behind. (R351, 364, 380) Hurst waved to the Maverick; the driver waved back and smiled. (R363, 377-78) Hurst waved because he thought the police officer should not have pursued so closely without having lights or a siren on. (R367-68) Hurst saw the Maverick slow down to allow a Camaro to swerve into the median. (R362)

A northbound car then pulled out to the passing lane to pass a truck. (R350-51, 361, 365) Neither the Maverick nor the northbound car had a chance to avoid hitting each other. (R351-52, 355,

366) Afterwards, Hurst heard a woman complaining to officer Sauro that the accident was Sauro's fault. (R370)

Lola Pletch was driving northbound on 27 in the passing lane when she saw the blue Maverick coming towards her. (R396) She moved to the slow lane and then saw the police car chasing the Maverick, about two car lengths behind. (R397-98) She did not hear a siren or see any emergency lights. (R403-04) The two cars passed her at a speed of forty-five to fifty miles per hour. (R399) She saw the collision and went back to the scene, because she thought the police should not be chasing someone on the wrong side of the road in the face of oncoming traffic. (R403, 410)

Don Land was driving his Camaro on 27 in the passing lane when he saw a blue car coming towards him and flicking its lights in warning. (R413, 425) As Land spun in to the median to avoid being hit, he saw the blue car hit the car behind him. (R415-17) Land did not see a police car until after the collision and never heard a siren. (R418, 420) Land was more unhappy with the policeman than with the driver of the blue car, because Land thought the policeman should not have been pursuing on the wrong side of the road. (R426)

Wesley Bracken was driving a box truck on 27 in the slow lane when he heard an explosion next to him. (R338) He had not noticed any vehicles heading south towards him before the explosion and had not heard a siren. (R388-89, 391) He stopped the truck and saw that an accident had occurred. (R389)

William Allen was riding on 27 in a Ford LTD with Bob Nivens, Ray Auer, and Jack Guthrie. (R549-50) Allen heard someone yell to watch out. (R550) As Allen looked up, a car hit their car. (R550-51) Allen suffered several injuries, including a broken hip bone and four fractured ribs. (R551-52) The defense stipulated that Nivens, Auer, and Guthrie died from this accident. (R572)

At 8:33 a.m., Sauro told his dispatcher about the accident. (R212) Captain Cook arrived and found seven car batteries in the Maverick but found no evidence later that they were stolen. (R199, 222) Police investigators determined that the Maverick's left front had hit the LTD on the left side just before the driver's door. (R432, 517, 546-47) Tire marks showed that the LTD had moved to the slow lane but the Maverick had not. (R518, 546)

The petitioner, Robert Miller, drove the Maverick. (R331) Robert Gilmore, a paramedic, testified that Miller became unconscious and had a fractured left ankle and multiple face lacerations. (R258) Doctor Thomas Brackett treated Miller's head injury for ten days in the hospital. (R616) Miller suffered a concussion and could not remember the accident. (R616-18) Brackett testified that permanent loss of memory was a common result of head injuries. (R617-19)

Cook, Lieutenant Caterino, and Chief Thompson agreed that officer had done nothing wrong. (R231, 252, 587) The officers knew that their police department was facing several civil lawsuits alleging that Sauro had acted with a wanton and willful disregard for the lives of others. (R230, 473, 591)

James Vardalis, an expert in police instruction and procedure, agreed that Sauro acted properly by attempting to stop the Maverick, because it did not have a tag, and its driver may have tried to sell car batteries. (R785-86) Passing the school bus on a yellow line, passing other traffic on the right side of the road, and not stopping for the police siren compounded the problem. (R786-87) When the Maverick went south in the northbound lanes on US 27, Sauro's first concern became the safety of the other drivers on 27. (R789) According to Vardalis, Sauro acted properly by turning on his emergency equipment to warn oncoming traffic and by staying behind the Maverick. (R789-91, 794) Vardalis did not think that Sauro should have tried to ram the Maverick off the road or moved to the southbound lane and attempted either to keep the Maverick in sight or to move ahead of the Maverick. (R792-95)

Dr. Erik Beckman, however, an expert in police pursuits, testified that if, as in this case, the police only suspect criminal activity or if the offenses are minor traffic violations, the police should end the pursuit at the first sign of hazard to the public, because the risks of the pursuit outweigh the benefits. (R678-79) In the instant case, Sauro should have ended the pursuit when he saw the likelihood of danger to others. (R679, 682) Beckman criticized the Haines City police for not supervising Sauro during the chase and for having no written policies on pursuits. (R680-83) Sauro violated professional standards by not having his emergency lights on; the siren was insufficient because

people often will not hear a siren or know where it is coming from. (R687-88) Beckman thought that Sauro should at least have moved to the right side of US 27. (R690) According to nationally recognized standards, he could then possibly have gone back to the wrong side of 27 in front of the Maverick and put on his brakes to slow down the violator. (R690-91, 726-27, 730) Beckman said that anything would have been better than what Sauro actually did. (R733-34)

SUMMARY OF THE ARGUMENT

I. The trial judge failed to give any instruction on justifiable and excusable homicide at the time he read the manslaughter instruction to the jury. The judge also failed to read the long form instruction on excusable homicide. These errors were fundamental because the evidence supported the long form instruction and because the manslaughter charge without the instructions on justifiable and excusable homicide was incomplete.

II. The trial court refused to instruct the jury on Miller's theory that officer Sauro's actions could have been the proximate cause of the accident if he was not acting with due care. The court instead misleadingly instructed the jury only that Sauro was not responsible for Miller's acts if Sauro was acting with due care and that the negligence of the officer was not a defense to criminal charges against the defendant.

III. The departure from the guidelines of more than one cell was improper because the trial court was sentencing Miller in part for his violation of probation. In addition, a great risk to others was inherent in the crime of manslaughter. By acquitting Miller of second degree murder, the jury implicitly found that Miller did not create a risk so great that it would warrant increasing the penalty assessed against Miller. If the prosecution wished to use great risk to others as part of the sentencing decision, it should have charged Miller with multiple acts of culpable negligence.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY FAILED TO GIVE COMPLETE INSTRUCTIONS ON MANSLAUGHTER AND ON THE THEORY OF THE DEFENSE THAT THE CRIME WAS AN ACCIDENT.

The trial judge in this case read the short version of the standard jury instruction on justifiable and excusable homicide but not the long version. (R993-94) In addition, when defining the crime of manslaughter for which the defendant was ultimately convicted, the judge failed to refer to the defense of justifiable and excusable homicide. (R995) Although the defendant did not object to these instructions, they constituted reversible error for two reasons.

First, the 1985 amendment to the standard jury instructions and this court's decision in Rojas v. State, 552 So.2d 914 (Fla. 1989) required that the instruction on manslaughter make some reference to justifiable and excusable homicide. Absent a reference to these defenses, the manslaughter instruction was incomplete. Id. Reference to these defenses was necessary even if the evidence did not support them. Id. at 916 n.3. Failure to refer to these defenses as part of the manslaughter instruction was fundamental error. Id.

In its opinion below, the second district decided that the error was not fundamental because Miller was convicted of manslaughter rather than second degree murder. Petitioner has no

idea why an incomplete instruction on the offense for which he was convicted would be a less fundamental error than an incomplete instruction on an offense for which he was not convicted. Petitioner thinks just the opposite is true.

Second, as discussed in Issue 11, some evidence supported petitioner's theory that the deaths were the result of an accident not his fault. Accordingly, petitioner was entitled to the long form instruction on excusable homicide in support of his theory of his defense. Id. at 916 n.3; Armstrong v. State, 15 F.L.W. D653 (Fla. 5th DCA March 8, 1990). This error was fundamental. Id.

Remand is necessary for a new trial.

ISSUE II

THE COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON MILLER'S DEFENSE THAT THE ACCIDENT WAS IN FACT AN ACCIDENT PROXIMATELY CAUSED BY THE PURSUING OFFICER.

Miller presented substantial evidence in support of his theory that the accident was in fact an accident not his fault and that the actions of officer Sauro were the proximate cause of the accident. Certainly, this accident would not have happened if Sauro had not chased Miller on US 27. One witness said that Sauro's car was only six inches away from Miller's car during the chase. (R364) Three eyewitnesses, Pletch, Land, and Hurst, testified that officer Sauro was the person at fault in this incident. (R367-68, 403, 410, 426) Dr. Beckman testified that Sauro should have ended the pursuit long before the accident occurred and that anything would have been better than what Sauro actually did. (R679, 682, 733-34) The eyewitnesses unanimously testified that Sauro did not have his emergency flashers on, and most of them did not hear a siren. Dr. Beckman strongly criticized Sauro's failure to activate his warning devices. (R687-88)

The state's evidence suggested that Miller panicked when officer Sauro chased him. When Miller came to Highway 27, he drove onto what appeared to be the right side of a two lane road. Because Sauro was pursuing him so closely, he may never have had the time or chance to realize that the road was actually four lanes wide. The jury could have concluded that Miller's mere inattention or mistake of judgment about whether US 27 was two or

four lanes wide did not constitute culpable negligence. Miller v. State, 75 So.2d 312 (Fla. 1954).

Furthermore, Miller stayed in the passing lane and did not weave in and out of traffic. He did not drive at an excessive speed. Traffic was light. (R313, 337) Eyewitnesses said he tried to avoid oncoming traffic by swerving to the median, (R315, 340) slowing down, (R362) and flashing his car lights in warning. (R413) The accident -- which occurred when a car pulled out from behind a box truck to pass -- happened so quickly that he had no chance to avoid it. (R351, 366) See Scarborough v. State, 188 So.2d 876 (Fla. 2d DCA 1966) (defendant driving the wrong way on a narrow road was not guilty of manslaughter because he had no time to avoid the accident). These circumstances provided a basis for a jury decision that the accident was in fact an accident and that officer Sauro's decision to pursue closely without his emergency warning devices on was the proximate cause of the accident.

As discussed in Issue I, however, the trial court failed to give the long form instruction on excusable homicide. This instruction would have given the jury some of the law relevant to Miller's defense that the collision was an accident not his fault.

The court likewise denied Miller's requested jury instructions which would have further explained the law on this subject. (R889-90) The court refused to instruct the jury on Miller's defense that he was innocent if his acts were not the proximate cause of the accident and instead were superseded by the independent intervening acts of another person. (R889, 1102) The court

also denied an instruction that drivers of emergency vehicles have the duty to exercise due care for the safety of others. (R890, 1101) Both of these requested instructions were accurate statements of the law. J.A.C. v. State, 374 So.2d 606 (Fla. 3d DCA 1979); City of Miami Beach v. Horne, 198 So.2d 10 (Fla. 1967).

The court instead accepted the state's misleading instructions on this subject. Based on **State v. Redden**, 269 So.2d 415 (Fla. 2d DCA 1972), the court instructed the jury that the alleged negligence of another person was not a defense to the criminal charges against the defendant. (R1000, 1104) This instruction was misleading because, if the other person's negligence was the proximate cause of the accident, then it would have been a defense to the charges. J.A.C.; **Peel v. State**, 291 So.2d 226 (Fla. 1st DCA 1974); **Filmon v. State**, 336 So.2d 586 (Fla. 1976).

Based on Reed v. City of **Winter Park**, 253 So.2d 475 (Fla. 4th DCA 1971), the court also instructed the jury that an officer operating his vehicle with due care was not responsible for the acts of a pursued offender, although the pursuit may have contributed to the reckless driving of the pursued. (R1000, 1105) This instruction was misleading because it only told the jury what to do if it found that Sauro acted with due care. The issues in this case, however, were (1) whether Sauro did in fact act with due care when he followed too closely and did not put on his siren and (2) whether this negligence was the proximate cause of the accident. These were the same questions as those in Reed, which held that an officer pursuing without a siren might not be acting with

due care and that this negligence could be causally related to the accident.

According to Reed, these questions were questions of fact for the jury and not questions of law for the judge to decide. Yet in the present case, by rejecting the defense instructions and giving only the prosecutor's instructions, the trial court effectively decided these questions as a matter of law. The court told the jury what to do if it accepted the prosecutor's theory that Sauro acted with due care, but the court misleadingly refused to tell the jury what to do if it accepted the defense theory that Sauro acted without due care and that his negligence proximately caused the accident. Miller therefore had no opportunity to make his defense, and the jury convicted him on the prosecutor's theory, the only theory it was allowed to use.

All defendants have the basic due process right to have the jury instructed on the theory of their defense if any evidence in the record supports it, no matter how weak and improbable the defense might be. Solomon v. State, 436 So.2d 1041 (Fla. 1st DCA 1983); Palmes v. State, 397 So.2d 648 (Fla. 1981) In the present case, the court refused to instruct the jury on Miller's defense that Sauro did not act with due care and that Sauro's acts were the proximate cause of the accident. The eyewitness testimony that the accident was Sauro's fault, the eyewitness testimony that he followed too closely and did not have his emergency flashers on, the eyewitness testimony that Miller made numerous efforts to avoid an accident and was not driving too fast, and the expert

testimony that anything would have been better than what Sauro did was substantial evidence to support this theory of defense. Accordingly, reversible error occurred, and remand is necessary for a new trial.

ISSUE III

THE GUIDELINES DEPARTURE REASON OF GREAT DANGER TO OTHERS WAS INVALID, BECAUSE (1) MILLER'S PROBATION WAS REVOKED, (2) EXTREME DANGER TO OTHERS WAS INHERENT IN THE CRIME OF MANSLAUGHTER, (3) HE WAS NOT CHARGED WITH CULPABLE NEGLIGENCE FOR CAUSING DANGER TO OTHERS, AND (4) HE WAS ACQUITTED OF SECOND DEGREE MURDER.

The district court upheld as a reason for departure that the defendant "knowingly created great risks of injury or death to a large number of persons." (R1245) This reason for departure was invalid on several grounds.

First, the trial court sentenced Miller not only for new substantive offenses but also for offenses for which the court had revoked his probation. (R1217-19) Consequently, the court could not depart from the guidelines more than one cell. Ree v. State, 14 F.L.W. 565, 565 (Fla. Nov. 16, 1989) ("even if the defendant has been convicted of the offense, departure is ... impermissible because it constitutes double-dipping.. .. the trial court erred in imposing any departure sentence greater than the one-cell upward increase").

Second, as the first district found in Mayo v. State, 518 So.2d 458, 460 (Fla. 1st DCA 1988), flagrant disregard for the safety of others was inherent in the crime of manslaughter for which Miller was convicted and therefore was not a valid reason to depart. Mayo was based on the definition of culpable negligence,

a statutory component of manslaughter. According to the standard instruction of culpable negligence read to the jury in this case,

> [c]ulpable negligence is a course of conduct showing reckless disregard of human life or of the safety of persons exposed to its dangerous effects or such an entire want of care as to raise a presumption of a conscious indifference to consequences or which shows wanton negligence or recklessness or a grossly careless disregard of the safety and welfare of the public or such an indifference to the rights of others as is equivalent to an intentional violation of such rights. The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily harm.

As this standard instruction shows, "a great risk of injury or death to a large number of persons" was part of the definition of manslaughter and therefore was not a valid reason to depart.

The second district distinguished Mayo by claiming that Mayo involved acts against the victim while Miller flagrantly disregarded the safety of persons other than the victims. This distinction was invalid because the number of persons involved was part of the evidence which the jury used to determine whether the defendant's actions demonstrated a "reckless disregard of human life or of the safety of persons." If US 27 had been deserted except for the LTD which Miller eventually hit and Miller's acts endangered no one but those who died, the jury might have concluded that he was not guilty of manslaughter because he did not recklessly disregard human life or the safety of persons.

Third, the second district's distinction ignored the principle that guidelines departures cannot be based on factors relating to offenses for the defendant was not charged. Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1989) (high speed chase and the resulting fatal accident were circumstances surrounding the offense of robbery for which convictions were not obtained); McIntyre v. State, 539 So.2d 603 (Fla. 3d DCA 1989) (defendant's reckless driving while fleeing the crime scene and creating a safety risk to others not a valid departure reason because the defendant was not charged with reckless driving). In the present case, Miller's alleged disregard of the safety of others could have been charged as numerous acts of culpable negligence. Because he was not charged with these offenses, they could not be used as reasons to depart. Id. Flagrant disregard for the safety of others can be a valid reason for departure, but only if it does not involve other chargeable offenses.

Fourth, the second district concluded that, because flagrant disregard for the safety of others is a valid reason to depart in second degree murder cases and because second degree murder is more serious than manslaughter, this reason for departure must also be valid for manslaughter cases. Petitioner disagrees that this departure reason is valid in second degree murder cases, but, even if it is, the second district's conclusion from this assumption was incorrect. The jury in this case acquitted Miller of second degree murder, an offense which required a showing of a "depraved mind regardless of human life." § 782.04(2), Fla. Stat.

(1985). This acquittal meant that Miller's disregard for the safety of others was not so flagrant that it warranted a conviction for second degree murder. Indeed, absent some showing of extreme risk to many other persons, the prosecutor probably could not even have charged Miller under the circumstances of this case with second degree murder, much less convicted him of it.

The second district effectively but erroneously reasoned that, because the jury acquitted the defendant of a flagrant, extreme, and extraordinary disregard for the safety of others (i.e., second degree murder), this disregard for safety could then be used as a reason to depart from the lesser offense of manslaughter. This consideration of the greater offense as a reason to support departure for the lesser offense was plain error. Vanover v. State, 498 So.2d 899, 901 (Fla. 1986) (trial court improperly used the higher crime -- for which there was no conviction -- as a significant element in the decision to depart).

Because none of the reasons for departure from the guidelines was valid, remand is necessary for entry of a guidelines sentence.

CONCLUSION

Miller asks for a new trial or, as a lesser alternative, resentencing.