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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,134

THE STATE OF FLORIDA,

Petitioner,

-vs-

RAFAEL FONSECA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The respondent, Rafael Fonseca, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

(A) Introduction

Because the state has omitted a substantial amount of the record evidence, respondent supplies a complete version of the facts.

Rafael Fonseca was charged, by information, with second-degree murder and unlawful possession of a firearm during the commission of that murder. (R. 1-2A). The State alleged that he shot his ex-wife, Alicia Vallea, with whom he was living. (R. 1-2A; T. 181).

(B) Williams Rule Hearing

Prior to trial the State filed two notices of intent to rely on evidence of other crimes, wrongs, or acts. (R. 23-24, SR. 1-3). The first notice indicated an intent to rely on the following incidents: (1) that on August 17, 1985, the defendant beat the victim in front of Officer F. Marrero; (2) on April 10, 1986, the defendant broke into the home of the victim; and, (3) that on October 9, 1987, the defendant broke into the victim's home and battered her. (R. 23-24). The second notice indicated intended reliance upon two incidents: (1) that in 1983 or 1984 the defendant, while on top of the victim and choking her, pointed a gun her; and, (2) that in April 1986, the defendant beat the victim and, while armed with a machine gun, threatened the victim and her mother, Emiliana Vallea, if they called the police. (SR. 1-3).

At the hearing on the notices to rely on other crimes, the

State argued that the evidence was admissible to show that the shooting of the victim was not an accident or suicide. (T. 108-09). The defense objected that the evidence was remote and designed only to show propensity and bad character. (T. 109-113). The trial judge decided to admit the evidence outlined in paragraphs (1) and (3) of the first notice and to admit the evidence in both paragraphs of the second notice, excluding any threats against the mother of the victim. (T. 113-114).

(C) Opening Statement

The prosecutor began his opening statement by telling the jury that Alicia Vallea began to die the day she met Rafael Fonseca because the pattern of threats and beatings preordained that he would kill her. (T. 144). He then outlined the evidence of prior threats or batteries against the victim. (T. 144-45).

(D) The Evidence

Rafael Fonseca and Alicia Vallea were married on March 19, 1985. (R. 136). They were divorced in October 1985, but afterwards continued to live together. (R. 143, T. 181, 410).

On June 29, 1988, they were living together at 421 S.W. 89th Ct. (T. 410). On that date, in the early morning hours, Rafael Fonseca ran out of the house, setting off the burglar alarm[1], and ran to a neighbors house, screaming that he needed help because

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[1] There was a stipulation that the alarm was activated on that date at 2:56 a.m. (T. 297). Detective McCully, the lead investigator in the case, testified that when he was at the residence the alarm went on and off intermittently. (T. 331).

Alicia had been shot. (T. 172-75, 273-74). Two neighbors, Barbaro Diaz and his son, Fernando, came out of the house to help Fonseca. (T. 175, 275).

Barbaro Diaz characterized Fonseca's emotional state as desperate (T. 179, 181-82). Fonseca told them that Alicia had been shot through a window and led them back into his house, Fernando carrying a bat. (T. 175-76, 275-76). Both witnesses also testified, however, that Fonseca repeatedly said he did not know what had happened. (T. 181, 281). Fonseca showed them to the master bedroom, where they saw Alicia wounded. (T. 176, 276). Fonseca spoke to Alicia about turning the alarm off, but according to the Diaz', Alicia did not respond. (T. 175, 176-77, 276).

Both witnesses testified that Fonseca was searching the house as if looking for someone, and Fernando heard him say, "There must be someone here". (T. 175, 276-77). Barbaro testified that they then left the house and he told his son to go call 911. (T. 177). Fernando testified that he called 911 before he had left the Diaz residence for Fonseca's house. (T. 278). Both recalled that it took Fire Rescue a long time to arrive. (T. 181-82, 279-80). Barbaro testified that Fonseca kept saying he wanted Fire Rescue and a doctor to come. (T. 181-82). Fernando testified that once the police arrived Fonseca said that they were not real police and asked to get more police. (T. 277).

The police were dispatched to Fonseca's residence at 2:58 a.m. (T. 190, 230). Metro-Dade Officers Milian and Trabazo responded and arrived at 3:03 a.m. (T. 190, 230). Both officers testified that they spoke with Fonseca in Spanish. (T. 191, 231-

32). Both indicated that Fonseca said his wife had been shot through a window, but then told them the shooter or shooters might still be in the house. (T. 191-92, 231). The officers drew their revolvers and searched the house, but found no intruders or sign of forced entry. (T. 192-93, 232, 234).

The officers found Alicia in the master bedroom. (T. 193, 232). Officer Trabazo felt for a pulse and testified that Alicia'a body was cold to the touch. (T. 232-33). He also testified that he was familiar with lividity and rigor mortis and that Alicia's body showed signs of both; that is, the upper part of her body was pale and the lower part darker, and her body was stiff. (T. 232-34). Trabazo indicated that he did not know how long the body had been there, but the lividity indicated to him that it had been there "quite a while". (T. 233). Trabazo also testified that rigor mortis does not occur immediately after death. (T. 240-41). Finally, Trabazo testified that the blood on the bedspread appeared to be dry. (T. 234).

Office Milian left the house and attempted to speak to Fonseca. (T. 193-94). Fonseca kept backing away from Milian and saying he wanted the real police to come. (T. 193-95). When Milian told his Sergeant, in English, that Fonseca was not answering his questions and kept backing up, Fonseca turned and ran. (T. 195-97). There was testimony that Fonseca ran past the house of a doctor who lived in the neighborhood and was overtaken, and subdued after a struggle, about two blocks away. (T. 195-204).

Samuel Jones of the Metro-Dade Fire Department was dispatched to Fonseca's residence at 2:58 a.m., on June 29, 1988. (T. 185-86). He arrived on the scene at 3:14 a.m. and was directed to the body of a female in a bedroom. (T. 186). Jones testified that the body was very cool, which indicated to him that she had been dead for some time, though he acknowledged that he was not qualified to estimate the amount of time. (T. 186).

The State presented the testimony of Emiliana Vallea, Alicia's mother. (T. 393-429). The very first substantive testimony from Ms. Vallea was that when Alicia met Fonseca and began living with him, he began to threaten her. (T. 393-94). She testified that in 1983 she heard Alicia scream in the bedroom and, upon going to the bedroom, saw Fonseca on top of Alicia, choking her with one hand and pointing a gun at her head with the other. (T. 394). In August 1985, Ms. Vallea witnessed Fonseca beating Alicia on the top of the head. (T. 394-95). In April 1986, Ms. Vallea saw Fonseca beat Alicia when she was pregnant and testified that he held a machine gun and told Alicia that if she moved or called the police, he would kill her. (T. 396).

When Ms. Vallea was asked if the police were ever called, she indicated that they were called on almost all of the occasions, and "he [Fonseca] has gone to jail for that". (T. 396). Defense counsel objected and moved for a mistrial, noting that Fonseca was never convicted in any case charging violence against Alicia. (T. 398-401). The prosecutor indicated that he believed that the motion would normally be well-taken, but that it was not prejudicial here given the many references to the defendant's

legal troubles, including his own statement which was admitted without objection and referred to his being on probation. (T. 396-97). The trial court denied the motion for mistrial, but gave a curative instruction which, paraphrased, told the jury that the witness made a statement which the defense attorney thought was improper, that Fonseca had been arrested and gone to jail as a result of the prior incidents with Alicia, but no determination of guilt had been made and Fonseca had not gone to jail as a punishment for those offenses, and the jury was not to make any judgment on his guilt or innocence. (T. 404-07).

Ms. Vallea then testified that Alicia dropped the charges on the incident she had testified to because Fonseca "begged her. Apparently, because of his daughter that he was going to be sent back to Cuba." (T. 407-08). Defense counsel's objection was overruled and his motion for mistrial was denied. (T. 459-60).

On cross-examination, Ms. Vallea acknowledged that Alicia always dropped the charges and continued to live with Fonseca. (T. 410). When asked to acknowledge that Alicia was living with Fonseca on the date of her death, she responded, "Well, he had no other home to live in, and he was on probation." (T. 410). Defense counsel's motion for mistrial was denied, and the trial court instructed the jury that he had allowed the evidence about Fonseca committing a battery on his wife on the issue of Fonseca's state of mind or the absence of mistake or accident and that the jury should "not let the evidence become the dominant theme of your conscience". (T. 417-19).

Ms. Vallea testified that Alicia was happy, but acknowledged that a number of years ago, in New Orleans, Alicia had swallowed pills when she learned that her boyfriend was seeing other women. (T. 409). On cross-examination, Ms. Vallea denied that the taking of the pills was a suicide attempt, testifying that "maybe she thought they were for nerves". (T. 419-20). When confronted with her affirmative response to a deposition question regarding whether the pills were taken to commit suicide, Ms. Vallea denied ever using the word suicide. (T. 421-22).

Ms. Vallea also denied that her daughter suffered from depression during the five (5) years preceding her death. (T. 424). Ms. Vallea testified that Alicia's financial situation was fine, and admitted that she did not know that Alicia's house was being foreclosed on and that she was behind in her car payments. (T. 426). The trial court sustained the State's objections to questions regarding Ms. Vallea's knowledge of Alicia's drinking and drug use. (T. 425-26, 427).

Emiliana Vallea also testified that Fonseca called her the day after Alicia's funeral and said, "he was very sorry about it. It was that the two of them were struggling with the weapon." (T. 428).

The State also presented the testimony of Nilda Reyes, Alicia's sister. (T. 430-34). Ms. Reyes testified that in October 1987 she saw Fonseca grab Alicia around the neck. (T. 431). On cross-examination, she admitted finding out about Alicia's financial problems after her death, noting that she discovered that Alicia had problems with credit card debts. (T.

433). Ms. Reyes did not know that the house was being foreclosed on or that Alicia was behind in her car payments. (T. 434). She also indicated that she did not know whether Alicia had ingested cocaine in the week prior to her death. (T. 434).

Metro-Dade Police Officer Felix Marrero testified Marrero testified that on August 17, 1985 he was dispatched to 421 S.W. 89th Ct. regarding a violent domestic dispute. (T. 477). Marrero knocked on the door and Fonseca answered it and, using profane language, told the officer to get out of the house. (T. 478). Marrero told Fonseca that he was there regarding a violent domestic dispute and wanted to see his wife. (T. 478). When Marrero saw Alicia she complained of a broken finger and had numerous bruises about her body. (T. 479). When Alicia presented herself to Officer Marrero, Fonseca yelled at her, called her a liar, and struck her two (2) or three (3) times about the head. (T. 479). Marrero acknowledged that he did not know whether Fonseca was ever charged with battery. (T. 479-80).

Metro-Dade Officer Jose Garcia responded to Fonseca's residence on the day of this incident and Fonseca, who Garcia described as hyper, nervous, and sweating, was placed in Garcia's police unit. (T. 437-40). Garcia, on direct examination, testified that Fonseca told him, in Spanish, that, "My wife is okay. She doesn't have anything wrong with her." (T. 440). Garcia testified on cross and redirect examinations that the literal translation of what Fonseca said was, "My wife doesn't have anything". (T. 445, 452-53).

Garcia advised Fonseca of his Miranda rights in Spanish. (T. 440-41). Fonseca then made further statements, indicating that he and his wife were having an argument in the bedroom, that he heard a loud noise, and that he saw his wife lean over and collapse on the floor. (T. 441-42). Fonseca also told Garcia that he called the police and hung up, got Alicia a drink of water, and then called the police again and hung up. (T. 442). Fonseca told Garcia that he then went to his neighbor's house. (T. 442).

Officer Garcia then added, without being asked, that Fonseca told him that he had been arrested previously for battery on his wife and "this was an ongoing thing". (T. 443). Defense counsel's objection was overruled, and a sidebar was refused. (T. 443). The trial judge said to the jury, "Do you understand, ladies and gentlemen, this is the arrest that we talked about once before. It is an arrest and no more than that." (T. 444).

On cross-examination, Garcia testified that he did not recall if he asked, or if Fonseca told him, what the couple had been arguing about. (T. 448-50). Garcia then volunteered, "but if I can add to it, he did tell me about him and his wife having previous arguments and being arrested previously for that". (T. 450). Defense counsel later unsuccessfully moved for mistrial, noting that Garcia's unsolicited responses had given the testimony regarding prior bad acts a "snowballing effect". (T. 460). The prosecutor indicated that he had intended to elicit that testimony from the officer because it was relevant as Williams rule evidence. (T. 460). The trial judge denied the motion for mistrial indicating that, "I think it has become less and less

prejudicial, if it was ever prejudicial. I don't think the jury understands that in the context. I don't think it has any prejudicial effect on the defendant whatsoever." (T. 460).

Detective McCully was the lead investigator on the case. (T. 342-43). After responding to the scene, McCully went to ward D of Jackson Memorial Hospital to speak with Fonseca. (T. 331-32). Detective Borega accompanied McCully to act as an interpreter. (T. 214, 332). Fonseca was advised of his Miranda rights, voluntarily executed a waiver of rights form, and gave an oral statement. (T. 215, 332-33; R. 34-35). Borega did not remember any of the details of the statement, but McCully did. (T. 220-21, 332).

McCully testified that Fonseca told him that he was asleep, his wife tapped him, and then he heard a poof sound. (T. 333). His wife then said, "Papito, you hit me." (T. 333). Fonseca then went back to sleep for a moment, got up, turned on the lights, and saw that she was bleeding. (T. 333). Fonseca then checked the wound and saw she had been shot, got blood on his hand, and then checked the residence for intruders with a Samurai sword. (T. 333). A serologist testified to a finding that there was blood on the sword, but there was too little to determine the blood grouping. (T. 263-64, 265).

Fonseca told McCully that after looking for intruders he tried the numbers his wife had given him to deactivate the alarm, but none of them worked. (T. 333). Fonseca then called 911, but became confused and hung up. (T. 333-34). Fonseca told McCully that he then went to his neighbor's house. (T. 334).

During this first encounter with Fonseca, McCully had him photographed and had a hand swab for gunshot residue done. (T. 305-51). No gunshot residue was found on Fonseca's hand. (T. 351, 482). The technician who testified for the State indicated that 80% of the particles are lost after one (1) hour and that most or all of the gunshot particles can be lost by placement of the hand in a pocket, running of the hand through the hair, or washing of the hand. (T. 482-83).

A gunshot residue swab was not taken from the victim, Alicia Vallea. (T. 342-43, 371). On direct examination, McCully indicated that it was an oversight to fail to direct that a gunshot residue test be done on Alicia's hands. (T. 342-43). Also during his direct testimony, he implied that once the medical examiner performed the autopsy, any residue on her hands would have been removed by removal of her ring or the washing of her hands. (T. 342-44). When questioned about the oversight on cross-examination, McCully testified that a gunshot residue test could have been done on Ms. Vallea before the medical examiner conducted the autopsy, but said that it is normal procedure not to process the body for evidence before the coroner examines it. (T. 371-72).

After speaking to Fonseca, McCully went to his office and, thinking he would need an interpreter for future conversations in the investigation and knowing Detective Borega would not be available, he enlisted Detective Alvarez' aid. (T. 337-38).

McCully and Alvarez went to the residence and observed the scene. (T. 335). Because Fonseca had told some witnesses that

Alicia had been shot through a window, the detectives checked the windows. (T. 335). There was one open window, but it had a screen which was intact and had no bullet holes. (T. 335-36).

They also found two (2) weapons under the bed, including a Cobra 9 millimeter semi-automatic machine pistol. (T. 336-37). By stipulation, a document was admitted into evidence showing that Fonseca had purchased a 9 millimeter weapon from Tamiami Gun Shop on November 13, 1985. (T. 257). That weapon was admitted into evidence and a firearms technician testified that the bullet recovered from Alicia's body was fired from that gun. (T. 266-271). A fingerprint technician testified that no latent prints of comparison value could be lifted from the weapon. (T. 434-37). The State's serologist testified that the weapon had blood on it consistent with type O, the same as Alicia Vallea's blood type. (T. 262-63, 265).

The detectives also discovered blood in the bedroom, and the bathroom, and a white powder which they suspected was cocaine in the bathroom. (T. 336). The blood found in the bathroom was consistent with type B, the same as Fonseca's blood type.[2] (T. 263).

At 2:00 p.m. on June 30, 1988, Alvarez and McCully returned to the the hospital to speak to Fonseca again. (T. 300-01). Fonseca again voluntarily agreed to speak to the officers, signing a Miranda rights waiver form. (T. 301-02, 320-21, 355). Fonseca originally told the officers that he and his wife had

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[2] The police had obtained, with Fonseca's consent, a sample of his blood. (T 299-300, 337, 352-53).

rented some videos, watched them, and that he had fallen asleep. (T. 302). At some point, Fonseca heard a poof sound and was awakened by his wife saying she had been hit or he had hit her. (T. 302).

Fonseca examined his wife, noticed a wound in the abdomen area, and checked the house for intruders, taking the weapon he had found lying in the bedroom. (T. 302). After checking the entire house and finding no one, Fonseca tried to call 911. (T. 302). He was connected, however, to an English speaking operator, could not communicate with her, and hung up. (T. 302). Fonseca then called some friends and relatives to try to get help. (T. 302). One friend's car was broken down, and another was not home, but Fonseca left a message on his answering machine. (T. 303). Fonseca's uncle was sick or asleep and his aunt would not let Fonseca speak to him. (T. 303). Fonseca then ran outside to a neighbors house, setting off the alarm. (T. 303). Fonseca said that when he returned to the house with the neighbors, Ms. Vallea pleaded for him to call 911 for help. (T. 304).

Detective Alvarez told Fonseca that there was no evidence of any intruders and attempted to place in Fonseca's mind the possibility that his wife committed suicide. (T. 305). Alvarez testified that it was an interviewing technique he used whereby he changed the scenario of the incident to see how the suspect responded. (T. 305). Alvarez indicated that when the suspect responded to the change by sticking with his story, it was an indication that he was telling the truth. (T. 305). However, if

the suspect changed the story every time Alvarez changed the scenario, then it was an indication that the suspect was hiding something or lying. (T. 305). A defense objection to Alvarez' testimony was overruled, the judge saying "That was the officer's opinion only". (T. 305-06).

Alvarez then testified that after he suggested suicide, Fonseca told the detectives that his wife was a cocaine user who was in a financial bind, and had threatened to commit suicide. (T. 306-07). Fonseca said that his wife kept nagging him to go out and get her Corvette which had broken down, and to purchase some cocaine for her. (T. 307). Fonseca kept trying to sleep and his wife kept tapping him and telling him to get the Corvette and the cocaine. (T. 307). Fonseca remembered that at one point Alicia said that she had $100,000. 00 in life insurance so her daughter would be well cared for. (T. 307). Fonseca then repeated that he heard a poof sound, his wife woke him and said, "you hit me", and he turned on the lights and saw that she was wounded. (T. 307-08). Alvarez testified that at one point Fonseca said, "This is the worst thing I've ever done". (T. 308-09). When Alvarez asked him to explain that, Fonseca said that he meant that it was the worst thing that ever happened to him. (T. 309-10).

Alvarez then changed the scenario again, telling Fonseca that he believed Fonseca was holding the gun during the incident. (T. 309). Fonseca then said that his wife had been threatening to commit suicide during the evening. (T. 309-10). Fonseca did not believe that she would do so, but she kept tapping him and

telling him that she was going to do it. (T. 309-10). He reached toward her and slapped at her and told her to stop and that's when he heard the poof sound. (T. 309-10). He then briefly went back to sleep, but awoke when she said "I think you hit me". (T. 309-10).

Alvarez next told Fonseca that he did not believe him because the gunshot residue test showed that there was gunpowder on his hand. (T. 310, 356). Alvarez and McCully both admitted that they did not have the gunshot residue test results at that time and that the statement to Fonseca was a lie. (T. 310, 327, 356-57). Both saw nothing wrong with the lying, characterizing it as an interviewing technique designed to get at the truth, which they are allowed to use. (T. 327-29, 357).

Alvarez then told Fonseca to get at the truth and testified that every time he changed the scenario, Fonseca changed his story. (T. 310-11). Fonseca repeated that his wife kept tapping him and saying she was going to commit suicide. (T. 311). Fonseca saw that she was holding some object in front of her but he could not tell in the darkness what it was. (T. 311). Fonseca said the object was pointed toward her stomach area and demonstrated that she was holding it straight out in front of her with her arm perpendicular to her torso. (T. 311-12). Fonseca reached over, grabbed the object, and made a pulling or jerking motion. (T. 312). When he did so, he heard the poof sound and the object fell. (T. 312). He then went back to sleep momentarily. (T. 312). When Alvarez confronted Fonseca by suggesting that the gun would have made a loud noise in the closed room, Fonseca did not

respond. (T. 312-13).

Alvarez told Fonseca that he did not believe him, but Fonseca stuck to the story about jerking the gun away. (T. 313). Alvarez asked why he did not tell the police that it was a suicide right from the start and Fonseca told him that every time the police had gone to the house about a domestic dispute he had gotten the short end of the stick. (T. 314).

At 9:15 p.m. on June 30, 1988, Alvarez and McCully took a formal statement from Fonseca which was admitted into evidence as State's exhibit 11. (T. 316-17; R. 53-98). The statement was basically consistent with the final version of events Fonseca had related to the detectives. (R. 53-98). Fonseca noted that Alicia had threatened to commit suicide before and indicated that five (5) to eight (8) minutes elapsed between the time that Alicia was shot and the time that he ran out of the house. (R. 61, 66, 76, 90-91). He explained that he initially said that someone shot through the window because he was confused and thought at that time that she must have been shot that way. (R. 84-86). On July 1, 1988, McCully and Alvarez returned to the hospital, Fonseca read his statement, made some minor changes, and swore that it was true and accurate. (T. 358-60, R. 96). On cross-examination, Detectives Alvarez and McCully admitted that Fonseca never said, in any statement, that he shot Alicia Vallea. (T. 329, 365-68).

On September 13, 1988, Detective McCully spoke to Fonseca again, with Detective Torres interpreting. (T. 282-83, 362-63). Fonseca's statement was consistent with the one given on June 30, 1988. (T. 282-295). In fact, Detective McCully told Detective

Torres that the statement was consistent, with the exception of two discrepancies, with the earlier statement. (T. 363-64). Detective Torres acknowledged that Fonseca never said that he shot Alicia Vallea. (T. 295-97). Torres also recalled Fonseca saying that when he first discovered Alicia had been shot, he did not know what had happened. (T. 293-94).

Detective McCully verified that Fonseca called 911 in the early morning hours of June 29, 1988. In fact, transcripts of the 911 calls were admitted into evidence. (R. 99-103). The second call demonstrates some confusion regarding what police agency is speaking or responding and Fonseca never specifically asks for assistance. (R. 100). McCully also verified that Fonseca called two of his friends and his aunt. (T. 368-69). One of the friends testified to receiving the call, noting that Fonseca told him that Alicia was shot, but did not mention anything about suicide or an accident. (T. 182-84). McCully also confirmed that the light in the bedroom was on, as Fonseca had said, that Alicia had life insurance, that she owned a Corvette and was behind in her payments, that Alicia was deeply in debt and the house was in foreclosure, and that Alicia had a high concentration of cocaine in her system when she died. (T. 368-70, 372-73). The defense admitted into evidence documents showing foreclosure on the house and a default on the car. (R. 120-34).

Crime scene technician Michael Byrd testified that he measured the length of Alicia Vallea's arm and found it to be twenty-seven (27) inches from the fingernail of her index finger to her shoulder and twenty-three (23) inches from the inside of

her armpit to her index finger. (T. 387-89). It was seven (7) inches from her wrist to her index finger. (T. 388-89). Byrd also measured the distance from the trigger of the gun to the end of the barrel as five and one-quarter ($5\frac{1}{4}$) inches. (T. 789-90). The parties stipulated that the shot which killed Alicia was fired from between nineteen (19) inches and five (5) feet. (T. 272-73).

Forensic pathologist J.S. Barnhart performed an autopsy on Alicia Vallea and determined that she died from a gunshot wound to the left side of the abdomen. (T. 486-87). The wound was three (3) inches to the left of, and slightly below, the navel, passing at an angle of 45° front to back and slightly downward. (T. 488-89).

Dr. Barnhart was asked whether, if an officer arrived on the scene and found the body to be cold and stiff, it was likely that the victim had been killed immediately prior to the officer's arrival. (T. 489-90). Barnhart responded that he did not "think it is reasonable that she was killed very shortly before these notations were made on her body". (T. 490-91).

Dr. Barnhart testified that he had examined suicide victims before, but had never examined one with an entry wound in that location. (T. 491, 493-94). Dr. Barnhart was then asked to assume that the victim's arms measured twenty-seven (27) inches from shoulder to index finger and twenty-three (23) inches from armpit to index finger, that there were seven (7) inches from her wrist to her index finger, that the gun was five and one-quarter ($5\frac{1}{4}$) inches from trigger to barrel, and that the shot was fired

from nineteen (19) inches to five (5) feet away from the body. (T. 494-95). He was then asked whether, based upon his examination and experience, it was likely or reasonable that the victim could have shot herself. (T. 495). A defense objection that Barnhart was not qualified to offer an opinion and that the question was speculative was overruled. (T. 495). Dr. Barnhart responded, "Well, the answer is that I can't speak to the reasonableness of the likelihood. I can only say that it is possible." (T. 496).

On cross-examination, Dr. Barnhart noted that Alicia had no defensive wounds, and acknowledged that she had .21 milligrams of cocaine per liter of blood in her system when she died. (T. 499-503). There was also an indication that sometime shortly before her death the victim had used a combination of cocaine and alcohol. (T. 502-03). Dr. Barnhart testified that the amount of cocaine found was fairly significant and was consistent with an amount which could be found in someone who had used cocaine every day for a year. (T. 503). Dr. Barnhart also testified that side effects of cocaine use include physical and mental sluggishness and depression. (T. 503). Barnhart reiterated that it was possible that a person could have committed suicide in the manner outlined by the prosecutor. (T. 503-04).

After the State and defense had rested, and after a luncheon recess, the State informed the court that it wished to reopen its case because Barnhart had contacted the prosecutor and told him that he believed he had answered the question about the likelihood of suicide incorrectly and feared he had misled the jury.

(T. 530). Dr. Barnhart informed the judge that he believed it was possible to commit suicide by holding the gun nineteen (19) inches away from the body, but because he had never seen a self-inflicted wound which was not a contact wound or a close contact wound he believed it was unlikely. (T. 532-33). The trial judge overruled a defense objection and allowed the State to reopen its case. (T. 533-37).

Upon reopening its case the State asked Dr. Barnhart what had happened over the lunch break and Barnhart responded:

> I was very personally concerned about the answer that I had given to one of the questions. The question, as I recall it, was, is it likely--
>
> * * *
>
> Is it likely or reasonable for a person to commit suicide holding the gun as has been mentioned with the muzzle nineteen inches from the body and propelling the bullet in a downward direction at a 45 degree angle.
>
> My answer, which I don't think I thought out very well, it wasn't exactly prepared, was, I don't know the likelihood, when in reality, I do know the likelihood.
>
> It bothered me so much I couldn't eat lunch. I felt a need to come back and explain the answer that I gave, and to explain what I feel is the real answer to that question. T. 542-43).

Barnhart was then asked the earlier hypothetical regarding his opinion on the likelihood or reasonableness of committing suicide in the manner described and, while demonstrating with a nineteen (19) inch dowel in the barrel of the gun, responded,

> That it is unlikely that a person commit suicide by placing a gun at this distance and shooting it into their abdomen from this angle.

* * *

> The reason for that is I purchased this dowel rod for the purpose of answering the question, is it possible for a person to hold a gun like this from this distance.
>
> And my arms are fairly long, and the answer to that question is yes, it is possible.
>
> But the other question as to the likelihood, given all the other possibilities for a self-inflicted injury, to hold a gun out here at this distance, at this angle, I just feel it is very impossible, unlikely, based on my experience of having seen many, many self-inflicted gunshot wounds. I have just never seen anything like that. (T. 545).

On cross-examination, Barnhart reiterated that the reason he believed it was unlikely was because he had never seen anything like it before. (T. 547). He admitted that it would be possible, but that it is very unlikely, based upon his experience. (T. 547-48).

(E) The Closing Arguments

During the prosecutor's closing argument he twice contended that Fonseca's prior acts of violence against Alicia Vallea proved that he had killed her. (T. 560-61, 632-33).

The trial judge instructed the jury on excusable homicide using the introduction to homicide instruction. (Tr. 649). The jury was later reinstructed with the same instruction. (Tr. 678-90, 683).

The jury returned verdicts of guilty on both counts and Fonseca was adjudicated guilty. (T. 690-92; R. 153-54). The State moved to have Fonseca declared an habitual offender. (T.

699; R. 157). The prosecutor told the judge that upon finding Fonseca an habitual offender the court had to sentence him to life in prison. (T. 702-03). The court found Fonseca to be an habitual offender and sentenced him to life in prison on the second-degree murder count, with a three (3) year mandatory minimum, and fifteen (15) years in prison, consecutive, on the possession of a firearm conviction. (T. 702-03, 714-15). The only scoresheet in the record reflected a guidelines range of seventeen (17) to twenty-two (22) years. (SR. 1-2).[3] No written reasons for departure were given.

The Third District Court of Appeal found the issues going to the conviction without merit, but reversed and remanded for resentencing within the guidelines.

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[3] The Third District Court of Appeal vacated a conviction for unlawful possession of a firearm. The deletion of that conviction from the scoresheet will reduce the guidelines range to twelve (12) to seventeen (17) years.

POINTS ON APPEAL

(I)

WHETHER THE THIRD DISTRICT WAS CORRECT IN REVERSING AND REMANDING FOR RESENTENCING WITHIN THE GUIDELINES WHERE THE TRIAL COURT DEPARTED FROM THE GUIDELINES WITHOUT PROVIDING WRITTEN REASONS?

(II)

WHETHER THE TRIAL COURT ERRED IN ALLOWING A POLICE OFFICER TO EXPRESS HIS OPINION ON THE TRUTHFULNESS OR CREDIBILITY OF FONSECA'S STATEMENTS, THEREBY INVADING THE JURY'S PROVINCE AND DENYING FONSECA A FAIR TRIAL?

(III)

WHETHER THE TRIAL COURT ERRED IN DENYING FONSECA'S MOTION FOR MISTRIAL WHERE CUMULATIVE EVIDENCE OF, AND ARGUMENT ON COLLATERAL CRIMES BECAME THE PRIMARY FEATURE OF THE TRIAL SO THAT THE PREJUDICIAL IMPACT OF THE EVIDENCE OUTWEIGHED ITS PROBATIVE VALUE, DENYING FONSECA HIS RIGHT TO A FAIR TRIAL?

SUMMARY OF ARGUMENT

The Third District Court of Appeal was correct in reversing and remanding for resentencing within the guidelines because its application of Pope v. State, 561 So.2d 554 (Fla.. 1990), was either (a) not retroactive, or (b) a retroactive application required by principles of fairness and the constitutional guarantee of equal protection, and (c) the sentence was a knowing departure from the guidelines without written reasons.

The trial court erred in allowing a police officer to express his opinion on the credibility of the defendant's statements because the opinion invaded the jury's province to judge the credibility of the statements and denied Fonseca a fair trial.

The trial court erred in denying Fonseca's motion for mistrial where cumulative evidence of, and arguments on, collateral crimes became the primary feature of the trial so that the prejudicial impact of the evidence outweighed its probative value, denying Fonseca a fair trial.

ARGUMENT

I

THE THIRD DISTRICT WAS CORRECT IN REVERSING AND REMANDING FOR RESENTENCING WITHIN THE GUIDELINES WHERE THE TRIAL COURT DEPARTED FROM THE GUIDELINES WITHOUT PROVIDING WRITTEN REASONS.

The State concedes that the sentence is a departure sentence without written reasons, but contends that the trial judge should be allowed a second chance to impose a departure sentence. The State is wrong.

(A)

This case is a "pipeline" case; that is, one which was not final by trial or appeal when a controlling decision, Pope v. State, 561 So.2d 554 (Fla. 1990) (Pope II) was issued. Reed v. State, 565 So.2d 708 (Fla. 5th DCA 1990); Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986). See also, State v. Safford, 484 So.2d 1244 (Fla. 1986). Because pipeline cases are not final, the question of retroactivity is not implicated in application of a newly announced controlling decision. Reed. See also, State v. Castillo, 486 So.2d 565 (Fla. 1986) (application of State v. Neil, 457 So.2d 481 (Fla. 1984) to pipeline cases not a retroactive application as reference to retroactivity in Neil meant to apply to completed cases).[4]

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[4] That is the reason that Ree v. State, 565 So.2d 1329 (Fla. 1990), does not authorize a departure sentence upon remand. Application of Pope to a "pipeline" case is "not retroactive" or, in the words of the decision in Ree, is a prospective application.

Generally, the "[d]ecisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since the time of trial." Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983); Accord, Castillo; Morgan v. State, 392 So.2d 1315, 1316 (Fla. 1981). That general rule has been applied to "pipeline" cases. See, Castillo; Safford; Reed. In fact, the decision in Reed involves a situation almost identical to the one in this case. There, the Fifth District Court of Appeal affirmed a guidelines departure sentence based upon its earlier decision in Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). After this court issued its decision in Pope II, reversing the Fifth District, Reed timely moved for rehearing. The Fifth District granted rehearing on the authority of this court's decision in Pope II, citing the general rule that Reed was entitled to the benefit of the law at the time of appellate disposition and rejecting the State's argument that such a ruling was an impermissible retroactive application of Pope II.

The same reasoning applies here. The application of Pope II to this case is simply a prospective application of the general and controlling law that cases are to be decided according to the law at the time of appeal. Lowe. Indeed, this court has applied Pope II in exactly that manner. Robinson v. State, 15 F.L.W. 612 (Fla. November 29, 1990); Ferguson v. State, 566 So.2d 255 (Fla. 1990).[5] Accordingly, Fonseca requests that the cause be reversed

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The state's contention that this court's pre-Pope decisions on the resentencing issue were confusing is incorrect; indeed, it is impossible to call them confusing because this court did not address the issue until Pope II was decided and has consistently (Cont'd)

and remanded with directions that he be resentenced within the guidelines.

(B)

There is authority which recognizes application of a new decision to a "pipeline" case as a retroactive application. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, __ L.Ed.2d __ (1987). Such retroactive application is required, however, based upon principles of fairness and the constitutional guarantees of equal protection. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, __ L.Ed.2d __ (1987).

In Griffith, the United States Supreme Court characterized the application of a new constitutional rule of criminal procedure to a "pipeline" case as a retroactive application. The court, however, held that retroactive application was required by "basic norms of constitutional adjudication". Id., 107 S.Ct. at 713. The court first noted that its duty to adjudicate cases and controversies required that it apply its best understanding of the law to any case pending before it; otherwise, it would be acting not like a court but like a legislature.

Secondly, the court reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same." Id., 107 S.Ct. at 713. The court pointed out that

> [i]t "hardly comports with the ideal of 'administration of justice with an even hand,'" when "one chance beneficiary -- the lucky individual whose case was chosen as the occasion for announcing the new principle --

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applied the rule since then.

> enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine."

Id. at 716 (citations omitted).

Mr. Pope benefited from the announcement of the rule that upon remand from a departure sentence with no written reasons, he must be resentenced within the guidelines. Moreover, appellate courts in this state, including this court, have applied Pope II to cases where sentence was imposed before the Pope II decision, but appeals were pending after the Pope II decision. Robinson; Ferguson; Smith v. State, 15 F.L.W. 1916 (Fla. 2d DCA August 8, 1990). To deny Mr. Fonseca the same benefit under identical circumstances is manifestly unfair and a denial of his state and federal constitutional rights to equal protection of the laws. U.S. Const. Art. IV, §1; Art I, §§ 2, 9, Fla. Const.; See, Myers v. Ylst, 897 F.2d 417, 421 (9th Cir 1990) ("[t]he equal protection clause prohibits a state from affording one person (other than the litigant whose case is the vehicle for the promulgation of a new rule) the retroactive benefit of a [court's] ruling on a state constitution's right to an impartial jury while denying it to another"). Cf. Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946) (prosecution by method which denies defendant benefit of the statute of limitations while others guilty of same offense receive benefit of limitations period denies equal protection); South Florida Blood Service v. Rasmussen, 467 So.2d 798, 803 (Fla. 3d DCA 1987) (court orders may constitute state action subject to constitutional limitations), approved 500 So.2d 533 (Fla. 1987). Accordingly, principles of equity and fairness, as

well as the constitutional guarantees of equal protection of the laws, require that this court reverse and remand with directions that Mr. Brown be resentenced within the guidelines.

(C)

Finally, the State contends that under this court's decisions in State v. Vanhorn, 561 So.2d 584 (Fla. 1990) and Roberts v. State, 547 So.2d 129, 131 (Fla. 1989), the trial court is entitled to a second opportunity to provide written departure reasons. Respondent disagrees.

The prosecutor moved to have Fonseca declared an habitual offender. (T. 699). The trial court found Fonseca to be a habitual offender (T. 702-03) and the prosecutor mistakenly informed the trial judge that, upon such a finding, the maximum habitual offender sentence (here life) must be imposed. (T. 702-03). State v. Brown, 530 So.2d 51 (Fla. 1988). The trial court then, after being made aware the guidelines range (R. 707-08), and after a long recitation about the defendant's prior convictions and bad acts, and reference to the facts of this case, imposed a life sentence. (T. 708-714). Only after the sentence had been imposed did the prosecutor, as an apparent afterthought, mistakenly say:

> So it's clear, 775.084, the habitual offender statute takes the sentence out of the guidelines.
>
> This is not considered a deviation or departure, simply a life sentence which is not controlled by the guidelines. (T. 715).

The sentencing hearing then immediately concluded. (T. 715). The trial judge never adopted or in any way approved the State's

incorrect position.

In Shull v. Dugger, 515 So.2d 748 (Fla. 1987), this court held that when departure sentences are declared invalid on appeal, resentencing must be within the guidelines range. This court did so in order to avoid (a) needlessly subjecting "the defendant to unwarranted efforts to justify the original sentence"; and (b) absured results. Id. at 750. Vanhorn and Roberts created a limited exception to that rule. As this court noted in Vanhorn, "a departure sentence is permissible on remand if the trial court erroneously believed it was imposing a sentence falling within the guidelines range while giving no reasons for what amounted to a de facto upward departure." Vanhorn, at 585. Here, the trial judge did not "erroneously believe it was imposing a sentence falling within the guidelines." The trial court knew the guidelines range, imposed a sentence outside the guidelines, and failed to give written reasons, as required, for that departure. In Roberts, this court distinguished Shull v. Dugger, and Smith v. State, 536 So.2d 1021 (Fla. 1988), on exactly the same factual basis as exists here, that the trial judge knowingly departed from the guidelines range without proper justification. Roberts, at 130-31.

This case is simply no different from those in which trial judge's utilized a defendant's habitual offender status as a reason for departure, except that here no written order was entered. Those defendants won reversals for resentencing within the guidelines. Knowles v. State, 550 So.2d 1133 (Fla. 3d DCA 1989); McIntyre v. State, 539 So.2d 603 (Fla. 3d DCA 1989).

Roundtree v. State, 536 So.2d 1141 (Fla. 2d DCA 1988). Mr. Fonseca is entitled to the same relief.

Even if Roberts and Vanhorn were deemed to apply here, they should apply as an exception to Shull v. Dugger only where the record clearly demonstrates that the trial judge mistakenly believed departure reasons were unnecessary. Here, the prosecutor's after the fact statement, neither approved nor in any way adopted by the judge, who had already imposed sentence, cannot be deemed to clearly demonstrate that fact. Accordingly, the Third District correctly remanded for resentencing within the guidelines.

II

THE TRIAL COURT ERRED IN ALLOWING A POLICE OFFICER TO EXPRESS HIS OPINION ON THE TRUTHFULNESS OR CREDIBILITY OF FONSECA'S STATEMENTS, THEREBY INVADING THE JURY'S PROVINCE AND DENYING FONSECA A FAIR TRIAL.[6]

The Third District Court of Appeal, without expressly addressing this issue, found it to be without merit. That ruling was incorrect because, though no Florida case has ever expressly addressed this issue, related precedent logically supports the argument.

It is improper, because it is an invasion of the jury's duty to judge the credibility of witnesses, for one witness to express an opinion on the truthfulness of another witness. Alvarado v. State, 521 So.2d 180 (Fla. 3d DCA 1988); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984). That rule applies equally to the defendant when he testifies as a witness at trial. Maloy v. State, 41 So. 791, 792, 52 Fla. 101 (Fla. 1906) ("the credibility of the defendant as a witness in this case was a question for the jury to determine without the aid of the opinion of another witness"); Bowles v. State, 381 So.2d 326, 327 (Fla. 5th DCA 1980) (invasion of jury's province to judge credibility of witnesses to allow four (4) police officers to testify that they would not believe the defendant under oath). The error in allowing such

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Once this court acquires jurisdiction of a cause, it has jurisdiction over the entire cause and may, in its discretion, rule upon issues which do not specifically provide a basis for jurisdiction. Savoie v. State, 422 So.2d 308, 310 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). Respondent requests that this court exercise its discretion and review issues II, and III.

testimony is magnified when the witness offering the opinion is a police officer because they are "generally regarded by the jury as disinterested and objective and therefore highly credible". Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979). See also, Bowles; Lamb v. State, 357 So.2d 437 (Fla. 2d DCA 1978); Brown v. State, 344 So.2d 641 (Fla. 2d DCA 1977).

Here, Detective Alvarez testified to the content of Fonseca's first statement. (T. 302-05). Alvarez then testified that he suggested to Fonseca that his ex-wife may have committed suicide. (T. 305). When asked why he made that suggestion he said:

> It is an investigative technique that we used to change the scenario, to see if this individual is being truthful. If I change the scenario, and he continues with the same story, it is indicative that the person is telling the truth.
>
> But, if I change the scenario, and he changes his story, he changes it again, again and again, and every time I do that he keeps changing the story, it is indicative that he is hiding something and lying. (T. 305).

Defense counsel's objection to the testimony was overruled, the trial judge stating, "That was the officer's opinion, only". (T. 305).

Detective Alvarez then testified to the specifics of Fonseca's responses to Alvarez' changing of the scenario. (T. 306-16). Then, on cross-examination, when Alvarez was confronted with his lie about the gunshot residue test, he testified:

> Well, when you pose it like that, no, I like to tell the truth to people. Every time I told him a different scenario, he changed and changed and changed, which was indicative of him hiding, having some sort of deception.

> So, I created a scenario. For that I had to lie. Again, when I changed the scenario to contradict his previous statement, he would change his story. (T. 328).

In closing argument, the prosecutor capitalized on Detective Alvarez' testimony when, in discussing the credibility of Fonseca's statements, he told the jury:

> It wasn't only, of course, that the defense kept repeating the statement or false account of what happened. Detective Alvarez told you that in his conversation with the defendant alone, there were four separate accounts of what happened. And the detective's experience that when a fact is changed and presented to a person who is being interviewed, oftentimes when the person is being deceitful, he will change the story to meet that set of facts.
>
> That is exactly what the defendant did when Detective Alvarez, even to the point where the detective made up a fact that a gunshot residue had been found on his hand. The defendant changed his story to meet that fact. (T. 553).

Just as it is the jury's responsibility to judge the credibility of witnesses at trial, it is also the jury's duty to judge the credibility of, and decide what weight should be given to, a defendant's statement. Palmes v. State, 397 So.2d 648, 653 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Therefore, it is also an improper invasion of the jury's province to allow a witness to express an opinion on the truthfulness or credibility of a defendant's statement. Cf., Maloy; Bowles. While Detective Alvarez could have testified to the fact that Fonseca changed his story, it was improper for him to offer the opinion that the changed story meant Fonseca was lying; it was the jury's province to draw whatever conclusions it might

from the fact that Fonseca changed his story. See, Hodge v. State, 26 Fla. 11, 7 So. 593, 595 (Fla. 1890) (testimony expressing conclusions regarding accused's intentions properly excluded; witness may testify to acts of accused, but it is for jury to draw conclusions from those acts). The error of allowing such an opinion is aggravated when the witness offering the opinion is, as here, a police officer, because jurors tend to view officers as neutral and objective, and, therefore, more credible. Bowles; Perez; Lamb; Brown.

Here, Detective Alvarez told the jury that when suspects respond to a change in scenario with a change in their story the suspect is lying and being deceitful. He then said that Fonseca responded to each change in scenario with a change in his story, clearing indicating his opinion that Fonseca was lying.[7] The prosecutor used that opinion testimony in closing to convince the jury that Fonseca's statements, and therefore his defense, were not credible. That testimony impermissibly invaded the province of the jury to determine the credibility of Fonseca's statements and was prejudicial error in this case, a circumstantial evidence case in which the jury's judgment of the credibility of the defendant's statements was critical to their decision. Accordingly, the cause must be reversed for a new trial.

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7 Indeed, the trial judge, in overruling the objection, noted: "That was the officer's opinion." (T. 305-06).

III

THE TRIAL COURT ERRED IN DENYING FONSECA'S MOTION FOR MISTRIAL WHERE CUMULATIVE EVIDENCE OF COLLATERAL CRIMES BECAME THE PRIMARY FEATURE OF THE TRIAL SO THAT THE PREJUDICIAL IMPACT OF THE EVIDENCE OUTWEIGHED ITS PROBATIVE VALUE, DENYING FONSECA HIS RIGHT TO A FAIR TRIAL.

Evidence of other crimes or bad acts is admissible if relevant to a fact in issue. Bryan v. State, 533 So.2d 744, 745-47 (Fla. 1988), cert. denied, ____ U.S. ____, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). That rule is limited, however, by the rules that (a) the State should not be permitted to make the evidence of other crimes the feature of the trial; (b) the evidence is inadmissible if its sole purpose is to demonstrate bad character or the propensity to commit crime; and (c) even if relevant, the evidence is inadmissible if its prejudicial impact outweighs its probative value. Bryan, 533 So.2d at 746. Here, the evidence of other crimes became the primary feature of the State's case and, consequently, the probative value of the repeated and cumulative evidence of other crimes was outweighed by its prejudicial impact.

The first six (6) paragraphs of the prosecutor's opening statement established the State's theory of the case and made Fonseca's prior crimes and bad acts the feature of the trial:

> Ladies and gentlemen of the jury, Alicia's death certificate may read that she died on June 29th, 1988, but the evidence in this case will show that, in fact, she began to die when she met this man, because almost from that day that she met Rafael Fonseca, the

> pattern of beatings and threats that he made to her preordained her death on June 29th, 1988.
>
> You will hear about the times that yelling was heard behind a closed bedroom door; and when the door opened, the defendant was found on top of Alicia Vallea, choking her with one hand and holding a pistol to her head with the other hand.
>
> You will hear about the time that arguing was heard between the two of them, Alicia being beaten by the defendant. The defendant was walking around the house with a machine gun strapped over his shoulder military-style, parading up and down, threatening to kill her.
>
> You will hear that even some of the violence occurring in the presence of the police officers. That, even the presence of law enforcement officers didn't deter the defendant.
>
> On August 17th, 1985, the police officers were called to Alicia's home in reference to a domestic dispute. When they got there, the defendant answered the door. He got into an argument with a police officers (sic); the police officers said that they weren't leaving until they could see Alicia.
>
> Alicia came from behind a door from another room, battered and bruised and bleeding. When she tried to tell the officer what happened, right in front of the police officer, Rafael Fonseca, laughing now, punched the victim, Alicia, in the head three times right in the presence of the police officer. (T. 144-45).

Then, during trial, the State presented three (3) witnesses, Emiliana Vallea, Nilda Reyes, and Officer Marrero, whose sole purpose was to testify to prior crimes or bad acts of the defendant. Additionally, Emiliana Vallea's testimony went beyond those specific instances which the trial court had ruled, prior to trial, that she would be permitted to testify about. Specifically, she did not testify only to the prior instances of vio-

lence toward the victim which she had witnessed. She also, at the very beginning of her testimony, stated that, "When she met him, and when he began to live with her, he started to threaten her". (T. 393-94). Later, she testified that Fonseca went to jail for the attacks on Alicia.[8] (T. 396).

Additionally, another State witness, Officer Garcia, made a particular point to testify, without being asked, that Fonseca "stated he had been arrested for battery on his wife, and this was an ongoing thing". (T. 443). Later, again without being asked, Officer Garcia noted that Fonseca "did tell me about him and his wife having previous arguments and being arrested previously for that". (T. 450). Defense counsel's motion for mistrial, based upon the snowballing effect of the evidence of prior bad acts, was denied, the trial judge finding that he evidence "has become less and less prejudicial, if it was ever prejudicial". (T. 460).

Finally, in closing argument the prosecutor continued to highlight the prior bad acts by telling the jury:

> . . . He picked up his machine gun, and as he had done before, he threatened Alicia with this machine gun. This time he carried

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The trial court's "curative" instruction was not helpful. It indicated that the witness' answer "in the opinion of the defense attorney was an improper statement", implying that the judge thought otherwise. (T. 404). That implication was buttressed by the judge's failure to tell the jury to disregard the statement. See, Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983) (judge's "cautionary" instruction did not cure error where he did not tell jurors that evidence was inadmissible and that they should disregard it). (T. 404-07). Additionally, the instruction repeatedly emphasized the fact that Fonseca had been arrested, one time indicating that the police "simply had to do what the law requires to be done under the circumstances". (T. 405).

through on that threat.

Now, how do we know that?

Well, you heard the testimony from Emiliana Vallea and Nilda Reyes, the mother and sister of the deceased.

They testified to the prior acts of violence that were directed by the defendant towards Alicia, including the one where he carried a machine gun.

(Tr. 560-61).

* * *

The defense attorney mentioned the testimony of Emiliana Vallea and Nilda Reyes.

There is an old saying that the oftener a thing is done, the less likely that it is done by accident.

Now here, we have a situation where the defendant is claiming that either Alicia has shot herself, or she shot herself deliberately.

When we have, as we do here -- and it's not only from family members, but from a police officer -- evidence of prior violence, and prior beatings, and the prior use of a murder weapon, that evidence is admissible not to paint the defendant as a bad guy.

You can think of him whatever you want, bad or good, but to show that his explanation is unreasonable, it is not true, because the sole source of violence directed to Alicia Vallea throughout the last five years was by this person. That is why that evidence came in.

And yes, it is not contested by Ms. Johnston and I that almost every time Alicia would drop the charge. Emiliana testified to you about that.

Everybody has definitely stated that the history of this relationship is a punch in the face. The police are called. A charge is filed and then he comes begging, "Oh, we can't

do this," and they get back together again.

(T. 623-33).

Even if the trial court's pretrial ruling regarding the other crimes and prior bad acts was correct, it was error to allow Emiliana Vallea to broadly state that Fonseca began threatening the victim from the moment they met. Additionally, her testimony that Fonseca went to jail for attacking the victim was highly prejudicial and not cured by the ineffective curative instruction. It was also error to allow Officer Garcia to twice testify, in broad, non-specific language, to prior "ongoing" difficulties with the victim. Moreover, the trial court should not have allowed the State to make the prior bad acts the feature of the trial, as is evidenced by the prosecutor's opening statement and closing argument where he tells the jury that Alicia Vallea's death was not accidental or suicide, but was intended and "preordained" by Fonseca's prior acts.

The cumulative effect of all of the evidence and argument regarding prior crimes and bad acts made that evidence the feature of the trial, caused its prejudicial impact to outweigh its probative value, and denied Fonseca a fair trial. See, Lee v. State, 531 So.2d 133 (Fla. 1988) (undue emphasis placed on improper evidence of collateral crimes constituted reversible error); Walker v. State, 403 So.2d 1109 (Fla. 2d DCA 1981) (cumulative effect of repetitious evidence of collateral crimes and defendant's flight resulted in fundamental prejudice to defendant's right to a fair trial). Accordingly, the cause should be reversed for a new trial with directions to carefully limit the

evidence and argument on prior bad acts and carefully instruct the jury on its use.

CONCLUSION

Based on the cases and authorities cited herein, the petitioner requests this court to reverse tha remand for a new trial or, in the event the conviction is affirmed, affirm the Third District's remand for resentencing within the guidelines.

Respectfully submitted,

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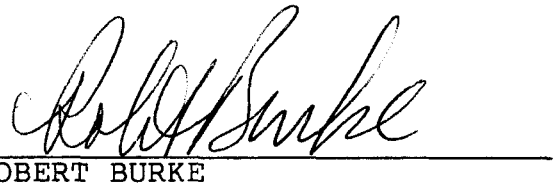
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 28 day of January, 1991.



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