047

IN THE SUPREME COURT OF FLORIDA

77,213

CASE NO. 90-164

DAVID LEE GALLAGHER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JORGE ESPINOSA
Florida Bar No. 0779032
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

This is a criminal prosecution for multiple counts of second-degree murder, manslaughter, DUI-manslaughter and DUI-serious bodily injury. The defendant appeals from an opinion entered by the Third District Court of Appeals certifying the need for testimony concerning retroactive extrapolation of breath test results as a question of great public importance. The defendant's initially appealed from a conviction and sentence entered after a jury trial before the Honorable Arthur Rothenberg, Circuit Court Judge for the Eleventh Judicial Circuit.[1]

STATEMENT OF THE CASE AND FACTS

The defendant's statement of the case and facts is generally true and correct and is adopted by the State as its own.

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[1] The following abbreviations will be used throughout this brief:

(T.) - transcript of trial proceedings

(R.) - record on appeal.

SUMMARY OF THE ARGUMENT

The defendant raises five issues on appeal. First, the defendant contends that the Third District should abandon its ruling that testimony of retroactive extrapolation of blood test results is not necessary and should instead adopt the minority national opinion followed by a handful of other states. The State submits that the district court below has followed the proper standard and its decision should be affirmed.

Second, the defendant contends that the trial court should not have instructed the jury that it could convict if the defendant had a .10 or higher blood alcohol level. The State disagrees since there was ample evidence on the record which warranted the standard instruction and since the nature of the crimes, DUI related, rendered the instruction necessary.

Third, the defendant alleges that the court erred in denying defendant's motion for mistrial where a victim testified that she learned after the accident that she was struck by a drunk driver. The State submits that the defendant may not now complain of the error where he failed to request a timely curative instruction. Furthermore, any error caused by the unrepeated statement was harmless.

Fourth, the defendant alleges error in allowing the State's research psychologist to give an opinion that the defendant was

impaired by alcohol and in stating that most states have established .10 blood alcohol as the level at which one is intoxicated. The State submits that the expert could properly give his opinion as to the effect the alcohol would have on the defendant. The defendant's area of expertise also allowed for the nonlegal observation of what most states have set as the blood alcohol level of intoxication.

Lastly, the defendant alleges error in allowing several lay witnesses to testify that the defendant was drunk. Drunkenness is a matter of common knowledge and a lay witness may give such an opinion. Such testimony does not invade the providence of the jury.

POINTS ON APPEAL

I.

WHETHER THE LAW OF THIS JURISDICTION WHICH PERMITS THE ADMISSION OF BLOOD TEST RESULTS WITHOUT TESTIMONY RELATING THE BLOOD ALCOHOL LEVEL BACK TO THE TIME OF THE ACCIDENT SHOULD BE CHANGED?

II.

WHETHER THE COURT PROPERLY ADMINISTERED THE STANDARD JURY INSTRUCTION THAT THE JURY COULD CONVICT IF IT FOUND THAT THE DEFENDANT DROVE THE CAB WITH A .10 OR HIGHER ALCOHOL LEVEL IN THE ABSENCE OF TESTIMONY RELATING THE BLOOD ALCOHOL CONTENT BACK TO THE TIME OF THE ACCIDENT?

III.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING A VICTIM'S TESTIMONY THAT SHE LEARNED AFTER THE INCIDENT THAT SHE HAD BEEN STRUCK BY THE DRUNK DRIVER?

IV.

WHETHER THE TRIAL COURT PROPERLY IN ALLOWED DR. BURNS, A RESEARCH PSYCHOLOGIST SPECIALIZING ON THE EFFECTS OF ALCOHOL ON HUMANS, TO ANSWER A HYPOTHETICAL QUESTION RELATING TO A PERSON IN THE DEFENDANT'S CONDITION AND TO STATE THAT .10 BLOOD ALCOHOL IS USED BY MOST STATES AS THE POINT AT WHICH A PERSON BECOMES AN UNSAFE DRIVER?

V.

WHETHER THE TRIAL COURT PROPERLY ALLOWED LAY WITNESSES TO EXPRESS OPINIONS THAT THE DEFENDANT WAS DRUNK OR INTOXICATED?

ARGUMENT

I.

THE TRIAL COURT PROPERLY APPLIED THE RULE IN OUR JURISDICTION AND IN THE GREAT MAJORITY OF STATES, AND DID NOT REQUIRE EVIDENCE RELATING THE BLOOD ALCOHOL LEVEL BACK TO THE TIME OF THE ACCIDENT.

The Third District determined in State v. Miller, 555 So.2d 391 (Fla. 3d DCA 1989) that blood alcohol test results are admissible without any evidence relating the readings back to the time at which the defendant operated the vehicle. This ruling recognized the prevailing national rule. The defendant now contends that this Court should reject the decision of the Third District and adopt the national minority opinion set forth in Desmond v. Superior Court, 161 Ariz. 522, 779 P.2d 1261 (Az. 1989) and State v. Dumont, 499 A.2d 787 (Vt. 1985). The State disagrees.

The best rule was set forth by the New Jersey Supreme Court which determined that since the essence of the drunk driving offense is operating a vehicle after consuming too much alcohol, the blood alcohol test results are relevant regardless of whether extrapolation is possible. State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987), appeal dismissed, 484 U.S. 1038, 108 S.Ct. 768, 98 L.Ed.2d 855 (1988). Naturally, the test must be administered within a reasonable time after the defendant is stopped. If so, retroactive extrapolation testimony is not necessary since the question becomes one of weight and not admissibility.

Other courts across the country have echoed the New Jersey court's position and admit blood alcohol test results without requiring retroactive extrapolation testimony. Ohio has held that the test results reflect a legislative determination that the breath test given within two hours of the alleged offense is a sufficient and accurate indication of the blood-alcohol level at the time of driving. State v. Ulrich, 17 Ohio.App.3d 182, 478 N.E.2d 812 (Oh. 1984). In Virginia, a test result obtained within two hours of the alleged offense creates a rebuttable presumption as to the blood alcohol concentration at the time of driving. Davis v. Commonwealth, 8 Va.App. 291, 298, 381 S.E.2d 11, 15 (Va. 1989). Alaska treats the test results as presumptively equivalent to the blood alcohol content in the defendant's blood at the time of the crime. Doyle v. State, 633 P.2d 306 (Alaska.App. 1981). In Oregon, the jury may infer from the test results that the defendant was driving under the influence. State v. Conway, 75 Or.App. 430, 707 P.2d 618 (Or. 1985). In Washington state, the blood test results constitute circumstantial evidence of the blood alcohol level at the time of driving. State v. Keller, 36 Wash.App. 110, 672 P.2d 412 (Wash. 1983). In our sister state of Georgia, the blood test results establish a prima facie case of guilt. Mosley v. State, 185 Ga.App. 610, 365 S.E.2d 451 (Ga. 1988). Finally, in Hawaii, the blood test result is "competent evidence" and provides for a permissible inference as to the defendant's blood alcohol level at the time of driving. State v. Wetzel, 782 P.2d 891 (Hawaii 1989).

In Florida the legislature intended the results of a blood or breathalyzer test admitted in accordance with designated procedures to be admissible into evidence when otherwise admissible. Florida Statutes § 316.1934 (1989). The Third District in Miller followed the legislature's intent by allowing the jury to determine the evidentiary value of the blood test results without requiring retroactive extrapolation testimony. Such testimony is naturally admissible by either party to rebut the other's case or to buttress their own however it is not a prerequisite to admissibility. The defendant has presented no valid reasons why this rule should be changed and retroactive extrapolation evidence be required prior to admissibility of test results. Moreover, such a rule would directly contradict the legislatures evident intent to allow liberal admissibility of results.

Amazingly enough the defendant may be hurting his trial posture by requesting the present rule. According to the defendant the State would be allowed to state that the blood test revealed the presence of alcohol in the bloodstream but, absent retroactive extrapolation evidence, the State may not reveal the numeric results. Following such reasoning where the result reveals that the defendant is legally intoxicated the State should also be able to bring this fact to the jury without specifying the precise numeric result. This means that where the numeric result is only slightly above the legal limit the

defendant will not be able to exploit inaccuracies in the testing procedure to convince the jury that the test result is overly high. The defendant will not be able to benefit from contrasting the unreliability of the testing system with a low result such as .11. Clearly such a restriction on the admissibility of evidence benefits neither party.

The Third District has followed the better rule and its decision should be affirmed.

II.

THE TRIAL COURT PROPERLY ADMINISTERED THE STANDARD JURY INSTRUCTION FOR DUI MANSLAUGHTER WHERE THE DEFENDANT WAS CHARGED WITH THAT CRIME AND WHERE THE JURY WAS PROVIDED WITH EVIDENCE UPON WHICH THE JURY COULD FIND THAT THE DEFENDANT'S BLOOD ALCOHOL LEVEL AT THE TIME OF THE CRIME EXCEEDED .10.

In Miller the Third District held that the result of the blood alcohol test "is admissible and any time lapse in the test's administration or failure to extrapolate the result back to the time of driving goes to the weight of the evidence, not its admissibility." Miller 555 So.2d at 393. In the instant case the results of the defendant's multiple blood alcohol tests were admitted. Based on these tests and the observations of the witnesses at the scene of the crime the jury had grounds to determine, albeit circumstantially, whether the defendant's blood alcohol level exceeded .10 at the time of the offense. In view of such competent evidence the trial court correctly administered the standard jury instruction on DUI Manslaughter, including the language indicating that the jury could find the defendant guilty if he committed his actions while he had a blood alcohol level of .10 percent or higher. (R. 426-428)

The cases cited by the defendant are not applicable to the present case. In Lambrix v. State, 534 So.2d 1151, 1154 (Fla. 1988), this Court rejected administration of jury instructions on intoxication because the evidence showed use of intoxicants but not actual intoxication. The evidence in the

instant case is replete with evidence of intoxication through both the actions of the defendant and the results of administered tests. See Gardner v. State, 480 So.2d 91 (Fla. 1985) (same). The decision below should be affirmed.

III.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL WHERE THE INADVERTENT TESTIMONY WAS CUMULATIVE OF THE OBSERVATIONS OF OTHER WITNESSES AND NOT REPEATED TO THE JURY.

Before addressing the merits of the defendant's claim the State submits that the error below was not properly preserved for appellate review. Although the defendant made a timely objection to the witnesses' testimony he did not request a timely curative instruction. A curative instruction is generally sufficient to dissipate the prejudicial effect of objectionable testimony and, absent such a request, the defendant may not later complain on appeal. Marshall v. State, 439 So.2d 973 (Fla. 3d DCA 1983); Gonzalez v. State, 511 So.2d 703 (Fla. 3d DCA 1987). Where the prejudicial effect of the testimony does not vitiate the entire trial a mistrial is inappropriate; instead a curative instruction must be requested to cure the error. Duest v. State, 462 So.2d 446 (Fla. 1985).

On the merits, the State admits that the testimony in question was hearsay but submits that any error was harmless. Violations of the confrontation clause are subject to harmless error analysis. Coy v. Iowa, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); Delaware v. Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). During examination of victim, Martina Meyer, the following transpired:

Q. Ms. Meyer, as you were waiting in that area, did something happen to you?

A. Yes.

Q. Do you know what that something was?

A. In retrospect I learned what it was.

Q. What was it?

A. I was hit by a drunk taxi driver.

MS. ANOLI: Objection.

MR. SMITH: Objection, move to strike and ask for a sidebar.

(T. 1528-1529)

The prosecutor who had intended the defendant to testify that she was hit by a car was surprised by the testimony and did not refer to it again. (T. 1530-1531) Since numerous other witnesses testified that the defendant appeared drunk and impaired Meyer's testimony is at worst cumulative opinion testimony. In view of the evidence arrayed against the defendant and the brevity of the injurious testimony any error was harmless.

The defendant mistakenly relies on Postel v. State, 398 So.2d 851 (Fla. 3d DCA 1981) review denied, 411 So.2d 384 (Fla. 1981). Postel may be readily distinguish in that, in the instant case, substantial additional evidence was presented showing that the defendant appeared drunk at the time of the accident. The testimony in question was inadvertently presented. In Postel the issue was identification and all the witnesses where either tentative, dubious or vigorously

challenged. Postel at 854. Identification is a more sensitive and misleading issue than physical condition. In the instant case the testimony of the various witnesses identifying the defendant and opining that he was drunk was positive and unimpeached. (T. 978, 1071-72, 1158, 1177-78, 1390) The testimony in question, although hearsay, was merely cumulative and its effect in the context of the entire trial was harmless. The decision below should be affirmed.

IV.

THE TRIAL COURT PROPERLY PERMITTED DR. BURNS, A RESEARCH PSYCHOLOGIST, TO ANSWER A HYPOTHETICAL QUESTION WHICH POSTULATED WHETHER A PERSON IN A CONDITION SIMILAR TO THE DEFENDANT WOULD BE IMPAIRED AND TO TESTIFY THAT .10 BLOOD ALCOHOL LEVEL IS USED BY MOST STATES AS THE LEVEL AT WHICH ONE IS AN UNSAFE DRIVER.

A. Answer to hypothetical question regarding impairment.

The defendant has misread the record where he states in his appellate brief: "The trial court allowed Dr. Burns to express the opinion, after having defined impairment (T. 1658), that Gallagher was impaired by alcohol at the time of the accident. (T. 1676)" (Appellant's brief p. 24) A cursory look at the trial transcripts discloses that Dr. Burns never expressed an opinion directly addressing the defendant but instead answered a hypothetical question regarding the condition of a acting under a variety of factors individual. The transcript states:

> Q. I want to ask you a couple of hypotheticals, Doctor Burns. I will start with -- I will use State's Exhibit number One to help illustrate the sketch of the area in this case.
>
> I want you to assume a motor vehicle,...
>
> * * *
>
> Given that type of circumstances and given the presence of immediately upon the vehicle coming to a stop an odor of alcohol on the driver and blood shot glassy eyes at that time...
>
> * * *

> ...do you have an opinion as to the driver of that vehicle's impairment at the time of that crash?
>
> MR. SMITH: Objection, two grounds: Form of the question. It is an improper hypothetical. It assumes facts not in evidence; and, two, same objection made previously outside the presence of the jury regarding expert opinions in this area.
>
> THE COURT: Thank you, Mr. Smith. I will overrule your objection on both grounds. You may answer the question.
>
> THE WITNESS: Yes, I have an opinion.
>
> Q. And what is your opinion regarding the condition of that driver at that time?
>
> A. That he was impaired by alcohol.
>
> Q. And did you base that on all the factors I have described to you and all the information provided to you about this case?
>
> A. I based it on that plus my experience in administering alcohol to people and measuring their ability, and I based it on what I know about the way the body handles alcohol.

(T. 1674-1677) (portions of hypothetical excluded for sake of brevity).

A medical expert may testify to his opinion concerning the defendant's mental condition based upon such a hypothetical question. Jones v. State, 289 So.2d 725 (Fla. 1974). Such a hypothetical question is proper even where it includes facts not directly but which the facts in evidence tend to prove by inference. Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1978);

Holt v. State, 422 So.2d 1018 (Fla. 1982). Such evidence is admissible even if it amounts to an opinion on ultimate issue. Florida Statutes § 90.703 (1989); Sarno v. State, 424 So.2d 829 rev. denied, 434 So.2d 886 (Fla. 3d DCA 1982).

Although the appearance of drunkenness is a matter of common knowledge to which a lay witness may testify, an expert may also analyze a variety of medical factors and testify that based on those medical factors and the defendant's behavior an individual was medically impaired. Although no Florida cases deal specifically with drunkenness this court will find support in the decisions of the courts in our sister states. In a DUI-manslaughter case the testimony of a policeman and a fire medic that the defendant was intoxicated and incapable of driving was admissible. Commonwealth v. Reynolds, 389 A.2d 1113, 256 Pa.Super. 259 (Pa. 1977). The opinion of a doctor who examined the driver shortly after the accident was admissible. Jardine v. Upper Darby Lodge, 198 A.2d 550 (Pa. 1964). A medical expert's opinion that the defendant was intoxicated was admissible since it was based on a test administered by the expert. State v. McCarthy, 259 Minn. 24, 104 N.W.2d 673 (Minn. 1960). An expert may testify as to the effect of blood alcohol percentages in the defendant's blood. State v. Moore, 245 N.C. 158, 95 S.E.2d 548 (N.C. 1956).

Several illustrative Florida Cases on an analogous evidentiary matters help illustrate the propriety of the opinion

testimony in the instant case. In Andrews v. Tew by and Through Tew, 512 So.2d 276 (Fla. 2d DCA 1987) the court held that the opinion of an accident reconstruction expert witness, derived from skid marks, regarding speed of vehicle at the time of the automobile-pedestrian accident was admissible. In Goldstein v. State, 447 So.2d 903 (Fla. 4th DCA 1984) a state psychiatrist was allowed to testify that a witness was mentally competent at the time of trial. In Delap v. State, 440 So.2d 1242 (1983) cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984) a medical expert's opinion regarding the cause of death of a homicide victim was properly admitted. In Brown v. State, 523 So.2d 79 (Fla. 1st DCA 1988) counsel was allowed to give opinion that child victim was sexually abused.

In the instant case Dr. Burns was qualified as an expert on the effects of alcohol on human behavior and performance. (T. 1653) The doctor then testified, without objection, regarding the effects of alcohol on the human body and how these effects alter behavior in general and while driving a vehicle. (T. 1655-1664) In particular, Dr. Burns testified that his tests showed that a person is seriously impaired when his blood alcohol reaches .08 percent. (T. 1664) Based on his clear expertise the doctor was qualified to answer the properly phrased hypothetical question made by the prosecution as a way of rendering an opinion on the facts of the case. See Jones, 289 So.2d 725. The decision below should be affirmed.

B. Testimony that .10 is threshold in most states.

With regard to Dr. Burn's testimony that various states use .10 percent blood alcohol as the limit beyond which you are considered an unsafe driver there is also no error. In explaining that his test results show a person to be an unsafe driver after reaching a blood alcohol level of .08 percent the doctor testified "[c]ertainly by the time you reach .10 percent, and I crossed the legislature, the states across the United States has set that as the limit at which you are an unsafe driver." (T. 1664)

This statement is not reversible error for three separate reasons. First, Dr. Burns was qualified to testify as to the fact that .10 is the threshold blood content used by most states to designate when is presumed intoxicated. Dr. Burns' area of expertise is the effect of alcohol on human behavior and how it may impair performance. (T. 1651-1652) Her studies and practice involved knowledge of intoxication regulation in many states; particularly in the courts of Arizona, Nevada, Idaho, the State of Washington, New Hampshire, and Kentucky amongst others. (T. 1653) Moreover, the doctor's testimony was consistent with the results expressed in legally cognizable documents. "Most persons are impaired at 0.08% percent blood alcohol concentration, and it is generally agreed that almost everyone experiences reduced driving ability at and above 0.10 percent blood alcohol concentration..." MOTOR VEHICLE STUDY

COMMISSION, REPORT TO THE SENATE AND THE GENERAL ASSEMBLY OF 1975 at 141-142. Based on her professional expertise she was amply qualified to testify, not as to a legal opinion, but as to a readily verifiable fact of what numeric threshold the various state statutes set.

Even if the doctor's testimony was not properly worded the defendant failed to request a curative instruction to clarify the testimony. If the defendant's complaint rises out of the doctor's reference to the level at which drivers are considered unsafe he could certainly have cured that during trial. The defendant could have requested an immediate instruction explaining to the jury that .10 merely raises a presumption of intoxication. Since he failed to do so he may not claim error on appeal.

Lastly, even if the testimony in question is treated as error it is, at worst, harmless error. The doctor had just finished testifying that his studies showed .08 blood content constitute significant impairment. (T. 1664) At the end of the trial the jury was instructed that under Florida law they could convict the defendant if his blood alcohol level exceeded .10. (T. 1887-1890) The doctor's single, unrepeated testimony,[2] makes no judgment as to the defendant and is dwarfed by the stronger earlier observation that .08 constitutes significant

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[2] The prosecutor did not mention the testimony in closing argument.

impairment. In contrast to the substantial testimony of the defendant's condition the error, if any, is harmless. The decision below should be affirmed.

V.

THE TRIAL COURT PROPERLY ALLOWED THE LAY WITNESSES TO EXPRESS OPINIONS BASED ON THEIR OBSERVATIONS OF THE DEFENDANT THAT HE WAS DRUNK, INTOXICATED OR IMPAIRED AT THE TIME OF THE ACCIDENT WHERE INTOXICATION IS A MATTER OF COMMON KNOWLEDGE BEST EXPRESSED THROUGH OPINION SUPPORTED BY PERSONAL OBSERVATIONS.

Before addressing the merits of the defendant's argument the State submits that the defendant failed to preserve this issue for appellate review. The opinion testimony in question occurred during the testimony of Andrew Drucker (T. 977-978), Jonathan Silvas (T. 1071-1072), Frank Valiente (T. 1156-1158, 1177-1178) and officer John Crocker (T. 1390). The defendant only objected once, during the second opinion made by Frank Valiente. Even during that single objection,. the objection was made vaguely in reference to "improper opinion" and did not explain to the judge how the opinion was improper or how it could be rephrased. Nevertheless, by that point the opinion testimony was already on the record and the door was open to further testimony. The defendant failed to preserve the alleged error through a timely objection.

On the merits the defendant makes an interesting about face. After claiming, in his fourth point on appeal, that drunkenness is a matter of common knowledge open to the testimony of lay people and not experts, the defendant now reverses his position and claims that the trial court should not have admitted the opinion of lay witnesses as to whether defendant was drunk,

intoxicated or impaired. As in argument section II the State has been unable to find any Florida caselaw addressing the admissibility of lay opinion testimony concerning the drunkenness of a defendant. Again, however, there is an overwhelming body of caselaw from our sister states which this court should find very persuasive.

Basically, the opinions from other States conclude that the physical state of drunkenness is a matter of common observation and that the jury is best served by the unambiguous opinion of a witness who saw the defendant at the time of the crime. "Since drunkenness is easy of detection and difficult of explanation 'the question of intoxication is better determined from the direct answer of those who saw him than from any description of his conduct', the witness being able to reinforce his statement by the facts on which his opinion is based." Lawrence v. State, 157 Ga.App. 264, 277 S.E.2d 60 (Ga. App. 1981) citing Durkham v. State, 166 Ga. 561, 144 S.E. 109 (1928). In People v. Jacquith, the court held that a layman is competent to testify regarding intoxication from alcohol in a prosecution for **driving under the influence**, since such facts are a matter of common observation. In Commonwealth v. Neiswonger, 488 A.2d 68, 338 Pa.Super. 625 (Pa.Super. 1985) the testimony of the arresting officer in a prosecution for **driving under the influence of alcohol** was admissible notwithstanding that the officer had not seen the defendant driving. In State v. Golden, 318 S.E.2d 693, 171 Ga.App. 27 (Ga.App. 1984) the court ruled that any persons may

testify, on the basis of personal observation, as to whether another person did or did not appear to be intoxicated on a given occasion. See also Esquivel v. Nancarrow, 450 P.2d 399 (Ariz. 1969); Burke v. Tower East Restaurant, 37 A.2d 386, 326 N.Y.2d 32 (N.Y. 1971); Hansen v. Hasenkamp, 192 Neb. 530, 223 N.W.2d 44 (Neb. 1974); Doria v. Costello, 318 N.E.2d 40, 22 Ill.App.3d 505 (Ill. 1st DC 1974); Luke v. State, 340 S.E.2d 30, 177 Ga.App. 518 (Ga.App. 1986).

In Florida lay opinion testimony has traditionally been found competent on question of the defendant's mental condition. In Garron v. State, 528 So.2d 353 (Fla. 1988) the Florida Supreme Court found admissible lay opinion testimony on the defendant's sanity in a murder prosecution where the witnesses' opinion testimony was based on personal observations of the defendant. In Jones v. State, 440 So.2d 570 (Fla. 1983) a police officer with a working knowledge of firearms was allowed to offer lay opinion testimony regarding marks on stash house window. The credence and weight to be given the lay opinion testimony is a question for the jury as finder of fact. Jones at 571.

At least one civil case relied upon by the defendant approved the admission of opinion testimony concerning state of intoxication.

> Here, all three eye witnesses were allowed by the trial court to testify regarding their individual observations, including their opinions concerning intoxication of the drivers involved, the speed and distances of the vehicles,

> and the existence of a hazard. The jury should have been permitted to draw its own conclusions based upon the above testimony...

Zwinge v. Hettinger, 530 So.2d 318 (Fla. 2d DCA 1988). Although the court goes on to comment on the proper exclusion to opinion testimony regarding causation the fact remains that opinion testimony regarding causation was properly presented to the jury.

The defendant's claim that the opinion testimony on drunkenness should be excluded because it comments on a ultimate issue is also without merit. Testimony is not necessarily excludable because it comments on an ultimate issue. Fla. Stat. § 90.703 (1990). In the present case, as repeatedly stated in the out of state cases, an opinion is the **best** way of presenting testimony on drunkenness or intoxication.[3] See Lawrence, 157 Ga.App. 264, 277 S.E.2d 60. The fact that the witnesses could and did describe the symptoms they observed does not remove the propriety of their opinion testimony. In fact, their ability to describe these symptoms is a predicate to their opinion and complements its probative value to the jury. Based on these grounds the opinion testimony was properly admitted and the decision below should be affirmed.

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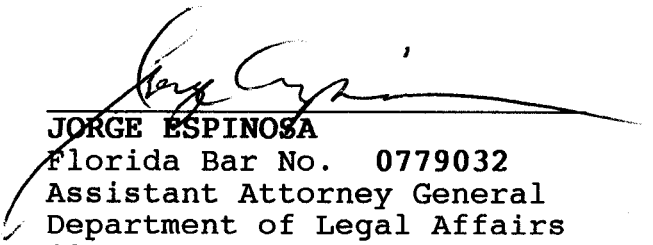
[3] The defendant's concession that he committed the accident should not serve him to manipulate the trial in order to exclude relevant admissible evidence by making the state of intoxication the ultimate issue of the case.

CONCLUSION

Based on the foregoing arguments and citations of authority the decision below should be affirmed.

Respectfully submitted,

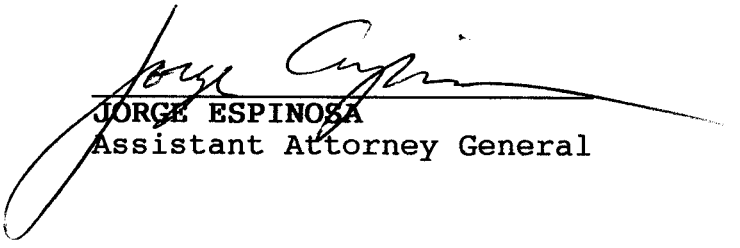
ROBERT A. BUTTERWORTH
Attorney General



JORGE ESPINOSA
Florida Bar No. **0779032**
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **ROBERT BURKE**, Assistant Public Defender, **OFFICE OF THE PUBLIC DEFENDER**, 1351 N. W. 12th Street, Miami, Florida 33125 on this 30 day of April, 1991.



JORGE ESPINOSA
Assistant Attorney General

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