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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,580

MICHAEL EARL DOBBINS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, **Michael Earl Dobbins**, was the Appellant below and the defendant in the trial court. The Respondent, **the State of Florida**, was the Appellee below and the prosecution in the trial court. The parties will be referred to as they stood before the trial court. The symbol "R" will designate the record on appeal and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The State rejects the Defendant's Statement of the Case and Facts on the ground that it is based on the Defendant's testimony which was rejected by the trier of fact. It is further rejected because it contains argument and conclusions of law, both of which are totally inappropriate in this section of the brief.

The Defendant was charged by information with simple battery.[1] The crime was enhanced from a first degree misdemeanor to a third degree felony, pursuant to Section 775.085.(1) Fla. Stat. (1989). (R. 524-525). This Statute has been commonly referred to as a Hate Crimes Statute, but the word "Hate" is not used in it, and the statute facially is an enhancement statute. It will be referred to in this brief as "the Statute."

The Defendant pled not guilty and requested trial by jury. Prior to trial, the Defendant filed a Motion to Dismiss the Information on the ground that Section 775.085(1) was unconstitutional. The Defendant alleged that Section 775.085(1) was unconstitutional under the First Amendment to the United States Constitution since the Statute abridged the rights of free

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[1] The Defendant was also charged with being an accessory after the facts. (R. 524). However since he was acquitted of the charge, (R. 407) it is irrelevant to the issue at hand and therefore no further mention of the charge will be made.

speech. This challenge was made facially and as applied. (R. 527). A hearing thereon was had on June 18, 1991. (R. 5). At the hearing the Defendant contended that the Statute sought to enhance punishments for crimes based on the actor's beliefs and therefore abridged free speech. He also contended that the Statute was vague since it terms were not understandable by persons of ordinary intelligence. Specifically he complained that the terms "evidencing prejudice" was vague. (R. 5-13). The State responded and argued that the Statute only sought to regulate speech as a buy-product of regulating conduct, and that the Statute is not overbroad or vague since it regulates specific conduct not speech. (R. 13-23). The trial court then took the motion under advisement until the conclusion of the trial. (R. 28).

The trial of this cause then commenced. The victim, John Daly converted to Judaism in 1986 when he was thirteen years old. A conversion was necessary since Daly's father was Jewish and his mother was not. (R. 71-73).

Sometime in 1986, Daly through Tom Arnold and his sister-in-law Heather Arnold, first became acquainted with the Ocala skinheads. (R. 76). In October 1989 he joined the skinheads. At that time no one knew that he was Jewish. (R. 77-78). The skinheads he associated with were Chris Doyle, John Kahlkopf, Terry Lewis, Heather Arnold. (R. 80-81). While he was a

skinhead, Daly always deflected questions concerning his Jewishness. (R. 90).

On the night of October 6, 1990, Daly worked from 3:30 p.m. until 9 p.m. During work Heather Arnold telephone him three times. Initially Heather informed him of a party on Daytona Beach that night and, after Daly's reluctance to join the festivities, he was ordered to go to the party. The order came from Heather Arnold, who was his superior in a group called the American Front. The American Front originated out of West Palm Beach and was led by David Lynch, Heather's boyfriend. The American Front is a skinhead group, that advocates white supremacy. (R. 82-85).

The party was being given at Fran Mercuri's house. Mercuri was the Florida leader of the White Arion Resistance, a national white supremacist group. Others expected at the party were the Defendant, Richard Meyer, and some new recruits. (R. 85-86). After work, Daly picked up Heather Arnold, Chris Doyle and John Kahlkopf and drove to Daytona Beach. (R. 91). Once there, they met up with Meyer and Mercuri and they all proceeded to the party at Mercuri's house. The Defendant was already at the party and when Daly arrived he introduced himself to the Defendant. (R. 91-94).

During the party, Daly was made to feel as an outsider. (R.95-98). After a while, Daly was convinced to go down to the beach with the rest of the group. Daly drove and he took Doyle, Kahlkopf and Lewis with him. His passengers, who knew that Daly was going to be beaten up at the beach, did not tell Daly this. Meyer drove the Defendant, Mercuri, Meyer, Rob Huttner and Heather Arnold to the beach. (R. 99-101).

Shortly after they all arrived at the beach, Lewis hit Daly on the head. (R. 101). Thereafter, all the others, including the Defendant, began kicking Daly about the head and chest. (R. 102). Daly heard the Defendant call him a "Jew Boy" while he was kicking Daly. (R. 105). Thereafter, Meyer dragged Daly to the water and attempted to drown him. (R. 106). Meyer was unsuccessful and the group left. Eventually, Daly recovered and drove home. (R. 107-117).

John Kahlkopf testified that on October 6, 1990, John Daly picked him up and drove to Daytona Beach to attend a party. Chris Doyle and Heather Arnold were also in Daly's car. At the party were Meyer, Defendant, Lewis and Mercuri. (R. 197-200). During the party, he heard that Daly was going to be beaten up because he was Jewish. (R. 251-252). Once they got to the beach, someone yelled now and the Defendant, Meyer, Lewis, and Mercuri started hitting and kicking Daly. (R. 253-254). After Meyer tried to drown Daly, Kahlkopf pulled him out of the water and left him lying on the beach. (R. 256-257).

Chris Doyle testified that on October 6, 1990, Daly drove him, Kahlkopf and Heather Arnold to Daytona Beach for a party. (R. 217). During the party he heard Terry Lewis say he was going to fight Daly. (R. 200). At the beach, he saw Lewis start the fight and then everyone else joined in, including the Defendant. (R. 221). During the beating he heard someone yell "Jew Boy" and Daly's response that he was a white power skinhead. (R. 225). After the incident, Defendant threatened him with physical harm if he talked. (R. 230-231).

Robert Huttner, a skinhead, was associated with Meyer and the Defendant. He also roomed with Terry Lewis. (R. 305-306). On October 6, 1990, Huttner, along with the Defendant, Meyer and Lewis went to the Daytona Beach party at Mercuri's house. (R. 308). During the party, he overheard conversations about beating up Daly because he was Jewish. (R. 313). Huttner went with the group to the beach, the purpose of which was to assault Daly. The reason for the assault was because Daly was Jewish. (R. 314-315). After the assault, the Defendant was telling everyone not to tell anyone that he hit Daly. (R. 322).

Terry Lewis went to the Daytona Beach party. (R. 340). At Mercuri's house, he overheard a conversation concerning a eventual assault on Daly. (R. 348). During this conversation the fact that Daly was Jewish was brought up. The Defendant was

privy to this conversation. They said that since he was Jewish, Daly needed to be killed. (R. 348-351). During the assault on Daly, Lewis saw the Defendant kick Daly twice. (R. 356).

The State rested. (R. 381). The Defendant moved for a judgment of acquittal on the grounds that although the battery may have been proved, the State failed to prove that the Defendant evidenced prejudice while committing the battery. (R. 385-386). The motion was denied. (R. 401).

The Defendant testified in his own behalf. (R. 412-478). He denied knowing that Daly was Jewish. (R. 426). He admitted punching Daly at the beach, but denied taking any other actions against Daly. (R. 430). He also denied having knowledge of a preplanned assault. (R. 432). He also denied calling Daly a "Jew Boy" and kicking him. (R. 434). He denied knowing that Daly was Jewish or that the assault was going to occur because he was Jewish. (R. 474).

At the close of the evidence, the Defendant renewed his motion for judgment of acquittal. It was denied. (R. 479-480).

At the charge conference, the following occurred concerning the charge of battery.

> THE COURT: The battery, I had made the determination that the aggravated nature

will be read, if you find the defendant guilty of battery you must determine beyond a reasonable doubt by your verdict whether the commission of a battery evidenced prejudice based upon the ancestry, ethnicity, religion of John Daly.

Do you want to place any objection on the record?

MR. DEES: The defendant objects to the instruction because it nowhere limits the jury to have to find that it was the defendant, Michael Dobbins, who in the commission of the battery, evidenced prejudice based upon the victim's ancestry, ethnicity, or religion.

THE COURT: Mr. Purdy, any response?

MR. PURDY: Yes, Your Honor. I believe that is an appropriate instruction by the way the statute is written, that is exactly how it's written. And I believe that that is correct.

MR. DEES: Defendant also believes that the entire instruction should not be given on the grounds Florida Statute 775.085, the basis for that instruction is unconstitutional, as I have already argued in my Motion to Dismiss.

THE COURT: That has been preserved.

Gentlemen, having considered counsel's arguments, I'll give 3.01 principal, and I'll take out the attempt.

Mr. Dees, any objections?

MR. DEES: Yes, Your Honor. We object that the evidence does not support the giving of the charge. The charged [sic] against Mr. Dobbins is directed against him individually. He's not shown in that charge to be aiding and abetting any other person. He is not charged as an aider and abettor in any way.

> The evidence fails to show that he either knew what was going to happen or intended to participate actively or sharing in expected benefit, or that what he did was intended to help anyone else commit a crime.

(R. 482-483). Thereafter closing arguments were had, the jury was instructed, and eventually returned a guilty verdict. (R. 498). The trial court then held the Statute was constitutional:

> THE COURT: Counsel, I have heard arguments as to the constitutionality of 775.085. I will at this time pronounce my ruling. Every effort should be made to uphold a statute, and every presumption indulged in favor of its validity.
>
> 775.085 places the burden of proving beyond a reasonable doubt the defendant's reason for committing the underlying crime on the State.
>
> The Legislature legitimately determined that the danger to society from criminal conduct directed toward an individual because of his or her race, color, ancestry, ethnicity, religion, or national origin of a victim is greater than the danger of such conduct under other circumstances.
>
> The law doesn't control speech, but endeavors but -- the law doesn't control speech but enhances the penalty for criminal conduct committed for an improper motive or purpose because of prejudice due to race, color, ancestry, ethnicity, religion or nation origin of the victim existing at the time of the commission of the charged offense.
>
> This Court declares the statute to be constitutional.
>
> (R. 499-500).

The Defendant then appealed to the Fifth District Court of Appeal. The District Court upheld the trial court's ruling of constitutionality. The District Court found that the Statute was neither vague nor overbroad since the Statute requires that the commission of the underlying crime must evidence the prejudice. The fact that prejudice may be exhibited during the commission of the crime is insufficient to activate the Statute. The District Court also found that Statute punishes conduct and not opinion and therefore does not run afoul of the First Amendment to the United States Constituition. Specifically, the District Court found opinions are not punished, but only when one acts on such opinion is the Statute violated.

The Defendant then sought review by this Court.

POINTS ON APPEAL

I.

WHETHER SECTION 775.085, FLA. STAT. (1989) IS UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

II.

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY FROM THE STATUTE WHERE THE ONLY OBJECTION MADE WAS THAT THE PRINCIPAL THEORY DID NOT APPLY TO THE STATUTE.

III.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION UNDER THE STATUTE.

SUMMARY OF THE ARGUMENT

The trial court held the Statute to be facially constitutional. This was correct since this Statute is neither overbroad or vague.

The Statue does not attempt to regulate First Amendment conduct and therefore is not overbroad. In fact the First Amendment is not implicated, since the Statute created new substantive crimes. The substance of these new crimes is the legislative conclusion that but for an identified immutable characteristic of the victim, the entire criminal episode would not occurred. As such the Statute punishes criminal action and does not run afoul of the First Amendment.

The Statute is also not vague since it affords a person of ordinary intelligence a reasonable opportunity to know what is prohibited and has sufficient standards for its enforcement. What is prohibited is any felony or misdemeanor that is committed because the victim has one of several identified immutable characteristics, i.e. race, color, national origin, etc. This requires scienter on the Defendant's part. Since scienter is inferred as part of the Statute, any First Amendment vagueness problems which might otherwise exist are eliminated.

As to the other possible vagueness claims, the Statute survives the challenge. Although the underlying crimes are not listed in the Statute itself, effective notice is provided by the fact that the crimes are published in Florida Statutes. A review of the terms used in this Statute establishes that they are easily definable and have been so defined, albeit in other circumstances, and therefore are fully capable of being understood by ordinary persons of common intelligence. As such the statute is not constitutionally vague due to a lack of intent, insufficient guidance for law enforcement, or undefined terms.

The evidence also established that the Statute was constitutional as applied. It showed that but for the fact that the victim was Jewish, the Defendant would not have committed the battery at all.

The trial court correctly instructed the jury that a conviction could be obtained under the Statute where the Defendant was an aider and abettor. Furthermore, the issue was waived below, when the Defendant failed to provide the trial court with the instruction now requested.

The evidence adduced at trial well supports the jury verdict. The victim testified to racist statements made by Defendant during the battery, and other witnesses, including

Defendant, testified to the racial slurs yelled at the victim during the attack. Further, several witness/participants testified that the victim's "Jewishness" was "the" or "a" reason for the attack. Viewed in the light most favorable to upholding the verdict, there is substantial, competent evidence of Defendant's guilt.

ARGUMENT

I.

SECTION 775.085, FLA. STAT. (1989) IS NOT UNCONSTITUTIONALLY OVERBROAD AND/OR VAGUE.

INTRODUCTION

This case involves a facial challenge[2] to Section 775.085(1), Fla. Stat. (1989), which provides:

(1) Evidencing prejudice while committing offenses; enhanced penalties. -

> (1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on race, color, ancestry, ethnicity, religion, or national origin of the victim:
>
> (a) A misdemeanor of the second degree shall be punishable as if it were a felony of the third degree.
>
> (b) A misdemeanor of the first degree shall be punishable as if it were felony of the third degree.
>
> (c) A felony of the third degree shall be punishable as if it were a felony of the second degree.

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[2] A "facial" challenge, in this context, means a claim that the law is "invalid in toto and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

> (d) A felony of the second degree shall be punishable as if it were a felony of the first degree.[3]

The trial court and the District Court correctly found the Statute to be constitutional. The grounds for this determination was that the Statute places the burden of proving beyond a reasonable doubt on the State that the reason for committing the crime was the fact that the victim was a member of a protected class. (R. 499-500).

The Statute regulates only nonprotected conduct. It does not criminalize the use of words, whether alone or in conjunction with conduct, unless words evidenced the prejudicial intent to commit the crime. If the State did attempt to punish pure expression, it would be unconstitutional, as the United States Supreme Court held in R.A.V. v. City of St. Paul, 120 L.Ed.2d 305 (1992).

The trial court having made a facial determination of constitutionality, the facts of this case are initially

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[3] The statute was amended in 1991 to include sexual orientation as a victim classification and to add an additional subsection (3):

> (3) It shall be an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated herein.

irrelevant. The facial constitutionality of the Statute is presently before this Court in the consolidated cases of State v. Stalder, Case No. 79,924 and State v. Leatherman, Case No. 80,128, and in the case of State v. Richards, Case No. 80,863.

Several court have passed on the constitutionality of enhancement statutes, but the differences in the language of these statutes make conclusions therefrom difficult to draw. The Oregon statute has been upheld against free speech and vagueness attacks. State v. Plowman, 314 Or. 157, __ P.2d __ (1992), and State v. Beebe, 67 Or. App. 738, 680 P.2d 11, appeal denied, 297 Or. 459, 683 P.2d 1372 (1984); State v. Hendrix, 107 Or. App. 734, 813 P.2d 1115 (1991). So has the New York statute. People v. Grupe, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988). The Ohio statute, which is very similar to the ADL model,[4] has

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[4] Many of the enhancement statutes in effect in various states are modelled on a form of statute created by the Anti-Defamation League of B'Nai B'rith ("ADL"). The ADL model statute reads:

Intimidation

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ___ of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutory proscribed criminal conduct].
>
> B. Intimidation is a ___ misdemenor/felony [the degree of criminal

been held unconstitutional in State v. Van Gundy, No. 90 AP-473, 1991 Ohio App. LEXIS 2066 (1991) and State v. May, No. 12239, 1991 Ohio App. LEXIS 2066 (1991) principally on grounds of vagueness of the terms "by reason of" and "race of another" (that is whether the term applies to the victim or another), neither of which terms occurs in Florida's Statute; however, the Ohio statute was held to be facially constitutional by another Ohio appellate court in State v. Wyant, No. 90-CA-2, 1990 Ohio App. LEXIS 5589 (1990). It is the State's understanding the issue is presently before the Ohio Supreme Court. The Michigan statute, which is substantially different than both the ADL model statute and Florida's Statute, has been held unconstitutional on both vagueness and free speech grounds in People v. Justice, No. 1-90-1793 (Mich. Dist. Ct. 1990). Again, the State understands that an appeal from the trial court's dismissal is pending. Finally, the day after the decision by the United States Supreme Court in R.A.V., the Wisconsin Supreme Court in a 5-2 decision, held that Wisconsin statute unconstitutional.[5] State v. Mitchell, 169

> liability should be made continent upon the severity of the injury incurred or the property lost or damaged].

One commentator recently stated that "twenty two states have adopted laws resembling the ADL model intimidation statutue." Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. 333, 340 (1991). Florida's Statute is quite different in form from the ADL model statute.

[5] This statute is similar to that of Florida.

At the time of Mitchell's crimes, sec. 9393.645, Stats. (1989-

Wisc. 2d 153, 485 N.W. 2d 807 (1992). Since the Wisconsin statute is similar to Florida's and the ruling on its

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90), provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court

constitutionality is that presently before the United States Supreme Court, the State suggests that a ruling herein should await the outcome of Wisconsin v. Mitchell.

STANDARD OF REVIEW

State statutes are presumed to be constitutional, and every reasonable presumption must be drawn in favor of the validity of the statute. Tal Mason v. State, 515 So. 2d 738 (Fla. 1987); State v. Board of Education of Florida, 467 So. 2d 294 (Fla. 1985); Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Vanbibber v. Hartford Acc. & Indem. Ins. Co., 439 So. 2d 880 (Fla. 1983). Indeed, any reasonable doubt is deemed to support the constitutionality of the statute. Bunnell v. State, 453 So. 2d 808 (Fla. 1984). It is with these well established standards in mind that this Court must asses whether the trial judge and the District Court in the instant case correctly concluded that the Statue is constitutional.

> shall direct that the trier of fact find a special verdict as to all of the issues specificied in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Appellate courts must give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). The statute's opponent must establish that it is invalid beyond, and to the exclusion of, every reasonable doubt. See State v. Kinner, 398 So. 2d 1360 (Fla. 1981). See also New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). (Burden of showing statute to be unconstitutional is on the one challenging it, not the one defending it).

Ordinarily criminal statutes are to be strictly construed in favor of the accused. Section 775.021(1), Florida Statutes (1991). However, they are not to be construed so strictly as to emasculate the statute and defeat the obvious intention of the Legislature. The rule of strict construction is subordinate to the rule that the intention of the Legislature must be given effect. This is so regardless of whether such construction varies from the statute's literal language. Griffis v. State, 356 So. 2d 297 (Fla. 1978); Valdes v. State, 443 So. 2d 221 (Fla. 1st DCA 1983); State v. Nunez, 368 So. 2d 422 (Fla. 3d DCA 1979); George v. State, 203 So. 2d 173 (Fla. 2d DCA 1967).

To determine legislative intent this Court must consider the circumstances and documentation accompanying a law's

enactment, its evident purpose, the particular evil it seeks to remedy, and the fact that it seeks to protect a particular class or remedy a special problem. Carawan v. State, 515 So. 2d 161 (Fla. 1967); State v. Webb, 398 So. 2d 820 (Fla. 1981). When reasonably possible and consistent with legislative intent, this Court must give preference to a construction of a statute which will give effect to the statute over another construction which would defeat it. Schultz v. State, 361 So. 2d 416 (Fla. 1978).

An application of the foregoing principles of statutory construction should establish that the State's interpretation of the Statute must prevail. The Statute was enacted to remedy the acknowledged evil of bias motivated crimes. The remedy perceived by the Legislature was to more severely punish those individuals who commit crimes against a particular class of people only because those people belong to that particular class. Since the Legislature's intent was to protect individuals from bias motivated crimes, the State's construction of the Statute is eminently reasonable. This is so even though the construction varies from the Statute's literal language. The State's reasonable interpretation would save the Statute from constitutional infirmities and as such should prevail over Defendant's interpretation, regardless of its reasonableness.

OVERBREADTH

Overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not present before the Court. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). In a facial challenge to the overbreathness of a law, the Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Statute, as hereinafter analyzed, does not apply to a substantial amount of protected conduct, and therefore the overbreadth challenge fails.

The Statute does not implicate the First Amendment[6] because it does not seek to regulate words, expressions or thought. The Statute seeks to punish indisputable illegal activity that would not have been perpetrated but for the

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[6] The Defendant has also challenged the Statute under the State's Constitution freedom of speech clause, see Art. 1, Sec. 4 Florida Constitution. However, it will not be addressed separately herein since the scope of the State and Federal Constitutions' guarantees of freedom of speech are the same. Florida Canners Ass'n v. State, Dept. of Citrus, 371 So. 2d 503 (Fla. 2d DCA 1979), affirmed, 406 So. 2d 1079 (Fla. 1981).

defendant's reasonable belief that the victim belonged to a class encompassed by the Statute. As such, the Statute creates a new substantive crime, which carries a more severe penalty than crimes which occur for reasons other than the defendant's state of mind towards a perceived immutable characteristic of his victim.[7] The legislature appropriately determined that once it is shown beyond a reasonable doubt that the Defendant committed a particular act because the victim was a member of an enumerated class, the length of punishment should be more substantial than in other cases. This interpretation was applied by the trial court herein. (R. 499-500).

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[7] Once a conviction has been obtained evidence that the defendant committed the crime because it was racially motivated is a proper factor for increasing the type or length of punishment. In capital sentencing proceedings, evidence of racial intolerance is admissible where such is relevant to an aggravating circumstance. In Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Court held that a sentencing judge in a capital case might properly take into consideration Barclay's racial hatred and his desire to start a race war to support an aggravating factor. In Dawson v. Deleware, ___ U.S. ___, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) this principle was reconfirmed. In Dawson the Court found the evidence that defendant belonged to a hate group was irrelevant to the reason for the murder. However, it did hold that had some evidentiary connection been made between his membership in the hate group and the killing, then it would have been admissible to support an aggravating factor and reaffirmed the rule of Barclay. id. at 117 L.Ed.2d at 317-318. Likewise, in noncapital cases, evidence that the defendant's crime was racially motivated is a sufficient reason for an upward departure in the sentencing guidelines for a conviction of shooting into an occupied dwelling. Grant v. State, 586 So. 2d 438 (Fla. 1st DCA 1991).

This interpretation is consistent with how the State treats other specialized victims; to wit: the elderly and juveniles. An aggravated assault or aggravated battery upon a person 65 years of age or older is not only reclassified to a higher degree, but also requires the imposition of a three year minimum mandatory term. See Section 784.08 Florida Statutes (1991). Juveniles are also afforded favorite treatment and extra protection against crime. See Section 794.011 Florida Statutes (1991) regarding increased penalties for sexual batteries on minors based on the age of the minor-victim.

This interpretation is similar to how the burden of proof is allocated in discrimination cases under Title VII of the Civil Rights Act of 1964 (42 USC §2000 e et. seq.). In the civil anti-discrimination context, discriminatory intent must be at least a substantial factor in causing the complained of result. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The Court rejected a but for analysis, in favor of the substantial factor test. However, this makes sense since Title VII litigation is civil and, as such, the standard of proof is the preponderance of the evidence. In criminal cases, where the reasonable doubt standard exists, it is consistent therewith to utilize a but for standard to determine discriminatory intent.

The foregoing interpretation of the Statute would also be faithful to the Legislature's reason for its enactment. The

Statute serves the State's compelling interest in protecting its citizens from prejudice based on race, color, ancestry, enthnicity, religion, or national origin. Regardless of the right to hold a personal opinion, actions based upon such prejudice are an evil which the State has a right, and a duty, to prohibit.[8] "[C]rimes of interracial violence generate widespread

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[8] The Statute is one of many enacted in this country to deal with a pressing problem, the massive increase of "hate crimes" in this country. See, Hernandez, Note: Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence", 99 Yale L.J. 845 (1990) (hereinafter "Hernandez"); Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. L. Rev. 333 (1991) (hereinafter "Gellman"). As summarized by Hernandez:

> Although there are no accurate data on the number of bias crimes committed each year, every national indicator shows that violence against individuals based on their race, ethnicity, and sexual orientation is increasing. Three thousand acts of bias-related violence were documented nationwide between 1980 and 1986. For example, the Puerto Rican Legal Defendant & Education Fund has seen a marked increase in racial violence (hate crimes or bias crimes) against Latinos, to a point where it now receives an average of two calls per weeks about such incidents. More than one in five gay men and nearly one in ten lesbians have been physically assaulted because of their sexual orientation. As such statistics indicate, the term commonly knows as "racially motivated violence" is not quite accurate in as much as such bias-related violence extends to discrete groups other than racial minorities. (at 845-6, footnotes omitted).

Furthermore, the impact of such crimes is diverse and severe. As summarized by Gellman:

> Without question, bigotry-motivated crime, like all bigoted action and expression, causes

fear and intimidation within and between communities, affecting many more individuals than the victim and his immediate

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> real and serious harm to its direct victims, to other members of the victims' groups, to members of other minority groups, and to society as a whole. Whatever police and constitutional problems ethnic intimidation statutes may have, these statutes are the reflection of legislatures' recognition that these harms are real and significant.
>
> ...
>
> The psychological harm of race-based stigma is often much more severe than that of other sterotypes, because race is an immutable characteristic (unlike poverty or alcoholism, for example). To a great extent, this is also true of the other characteristics included in various ethnic intimidation statutes: religion, national origin, gender, sexual orientation and handicap. Victims of stigmatization begin to doubt their own worth and sometimes even begin to believe the stereotypes. When this happens, they either despise themselves or lose their sense of self altogether. These victims may ultimately reject their own identify as members of the group.
>
> The effects of stigmatization occur on several levels. Psychological responses include humiliation, isolation, and self-hatred. These responses may affect intergroup relations and even relationships within the group. Racial stigmatization can also contribute to mental illness and psychosomatic disease. It can lead to substance abuse as victims seek escape. Stress-based hypertension may also be related to racial labeling. These psychological injuries may affect victim's careers as well, creating defeatism and expectation of failure. Minority group children are particularly vulnerable, exhibiting self-hatred early and coming to question their own intelligence, competence, and worth.

acquaintances." Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv. L. Rev. 1270, 1280 (1988). Such crimes "have the potential to incite further violence." Id. "[I]nterracial violence possesses a capacity to destroy racial harmony, pluralism, and equality." Id. at 1281. See Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431 (emphasizing the immediacy of the injurious impact of racial insults, and the psychological injuries sustained by those victimized).

The decision on R.A.V. v. St. Paul, 120 L.Ed.2d 305 (1992) does not dictate a different result since the statute in question therein was interpreted by the Minnesota Supreme Court as one dealing with fighting words. As such, the United States Supreme Court was required to review it in accordance with First Amendment principles. The Court held that although "fighting words" may be regulated, such regulation must include all offensive instances. To pick and choose which fighting words are to be regulated and which are not makes the statute under inclusive and therefore unconstitutional. The Court found that this was content-based discrimination aimed at a particular

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> The continued existence of bigotry is evidence that our society has failed to live up to its professed ideal of egalitarianism. Failure of our legal system to provide at least a civil form of redress to victims of bigotry-related harm sends the message that our commitment to that ideal is not so strong as we might like to believe. (at 340-341).

message and it was not aimed only at the "secondary effects" of speech.

Florida's statute, on the other hand, is not meant to criminalized the speakers opinions or ideas. He can hate anyone he wishes and he can espouse said hatred in a public forum without any fear of arrest from the State. Rather it is only when he acts on his discriminatory concepts, i.e., selects a victim because of an immutable characteristic, does he violate the Statute. Since the statute deals with conduct, the First Amendment is not implicated and the case is not controlled by R.A.V.

As the foregoing establishes, the Statute does not regulate protected conduct and therefore the First Amendment overbreadth is not applicable. In order for the Defendant to maintain his challenge to the Statute on the ground of non-First Amendment overbreadth, he is required to establish that his own admitted conduct is wholly innocent and its proscription is not supported by any rational relationship to a proper governmental objective. State v. Ashcraft, 378 So. 2d 284 (Fla. 1979). The Defendant herein cannot meet this requirement. First, there was an admitted unlawful touching (R. 430) and this is not wholly innocent conduct and further that making an unlawful touching a crime bears a rational relationship to public safety.

VAGUENESS

A law does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. The Defendant, in order to succeed must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, supra. The standards for evaluation vagueness were delineated in Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

The foregoing standards are not to be mechanically applied. The degree of vagueness depends in part on the nature of the enactment. Criminal enactments are viewed more stringently. However, a scienter requirement may mitigate a

criminal laws vagueness, especially with respect to the adequacy of notice as to what conduct is proscribed. Likewise a more stringent vagueness test applies if the enactment threatens to inhibit First Amendment rights. Village of Hoffman Estates v. Flipside, Hoffman Estates, supra.

A criminal statute which as a strict liability statute might infringe on First Amendment freedoms, can be rescued from First Amendment pitfalls by reading scienter into the statute. In Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) the Court found a statute, which made it illegal to possess any obscene or indecent writing, vague because it did not require scienter or mens rea. As such, the statute tended to inhibit people from validly exercising their First Amendment freedoms. In Cohen v. State, 125 So. 2d 560 (Fla. 1960), a statute similar to the one struck down in Smith v. California was upheld. The Court found it was constitutional and did not infringe on the First Amendment, because scienter was read into the statute and therefore the State had to charge and prove this element.

The instant Statute does not specifically require scienter, however, based on the foregoing, it is to be read into the Statute,[9] thus saving the Statute from Defendant's First

[9] That scienter is impliedly included in the Statute is a reasonable interpretation, inasmuch as the 1991 amendment, see

Amendment vagueness attack. With the addition of the scienter element, an individual's First Amendment right to speak and spew hatred is not regulated. Further, the addition of scienter mitigates against vagueness, since this is adequate notice of what conduct is proscribed, to wit: any felony or misdemeanor that is committed only because of the victims' protected status.

Since scienter is impliedly included in the Statute, it does not have First Amendment implications and therefore is subject to a less stringent vagueness test. However, since the Statute is a criminal enactment, it is necessary to determine the level of knowledge necessary to defeat a non-First Amendment vagueness challenge. The State submits that if the scienter requirement is read as specific intent, then the Statute is sufficiently clear to defeat the vagueness challenge.

At common law, crimes generally were classified as requiring either "general intent" or "specific intent". The main distinction between specific intent and general intent is the element of bad or evil purpose which is only required for specific intent. A person who knowingly commits an act which the law makes a crime has "general intent," while the person who commits the same act with bad purpose has "specific intent." In a general sense "purpose" corresponds loosely with general

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footnote 1, explicity adds knowledge as an element of the offense and thus makes explicit what previously was implicit.

intent. See United States v. Bailey, 444 U.S. 394, 402-405, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). United States v. Haldeman, 559 F.2d 31, 114, (DC Cir. 1976).

As stated hereinbefore, the Statute creates a but for crime. As such, the defendant's purpose is at issue, thereby making a violation of the Statute a specific intent crime. A defendant's purpose in committing the underlying offense is to harm his victims based on their immutable characteristics, which are protected by the Statute. The purpose to commit the crime and harm the victim, must, of course, be proven beyond a reasonable doubt. Therefore, the Defendant was clearly on notice as to what conduct is proscribed and the Statute does not suffer from vagueness.

The Statute is also not vague for failing to list all the felonies and misdemeanors to which it applies. The fact that the crimes are published in Florida Statutes defeats such a claim.

The Statute also withstands the Defendant's vagueness challenge because the terms "evidencing prejudice" is capable of being understood by persons of ordinary intelligence. The failure to define the term "evidencing" within the Statute is of no moment. The Statute's use of the verb "evidences" makes it clear that one is not held accountable for merely holding an opinion. "Evidences" means: "[T]o offer of constitute evidence

of PROVE, DISPLAY, EVINCE . . .." Webster's Third New International Dictionary 789 (1986 Ed.). "Evidences" is used in Florida's rules and statutes in its verb form. See § 90.953, Fla. Stat. (1989); §384.281(1)(c), Fla. Stat. (1989); §392.57(1)(c), Fla. Stat. (1989); Rules Regulating the Florida Bar 8-2.2(f). This term has consistently been used by the United States Supreme Court, without additional definition, to mean to offer or constitute evidence of. Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 502, 89 S.Ct. 684, 93 L.Ed. 834 (1949). (Freedom of speech and press is not unconstitutionally abridged by legislation making a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed). Walton v. Arizona, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 511, 529 (1990). (A crime is committed in an especially depraved manner when the perpetrator relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in the killing).

The failure to define the term "prejudice" within the Statute is also not fatal. The State contends that its ordinary meaning is a matter of common understanding. In the context of the Statute, "prejudice" is: "2c: [A]n irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristic - compare discrimination." Webster's Third New International Dictionary, 1788 (1986 Ed.).

Examples of the use of "prejudice" in Florida's rules and statutes include:

(1) Florida Statute §38.10 which gives a party to a legal proceeding the right to have the judge disqualified "for prejudice" upon submission of an affidavit giving "the reasons for the belief that any such bias or prejudice exists . . .." § 38.10, Fla. Stat. (1989).

(2) Florida Statute §120.71(1) which provides for disqualification "from serving in an agency proceeding for bias, prejudice, or interest . . .." § 120.71(1), Fla. Stat. (1989).

(3) Florida Statute § 364.10 which prohibits a telephone company from subjecting "any particular person or locality to any undue or unreasonable prejudice or disadvantage . . .." § 364.10, Fla. Stat. (1989).

(4) Florida Statute §905.04(1)(b) which provides that prospective member of the grand jury can be challenged "on the ground that the juror . . .[h]as a state of mind that will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging." § 905.04(1)(b), Fla. Stat. (1989).

(5) Rules of Juvenile Procedure 8.320(d) and 8.850(a) set out of the procedure to disqualify judges "for prejudice" and "on account of prejudice." Fla.R.Juv.P. 8.320(d), 8.850(a).

However, perhaps the best example of the use of the word "prejudice" to connote bias is found in Florida's evidentiary statutes. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair **prejudice** . . .." (emphasis added) § 90.403, Fla. Stat. (1989). The courts of this State deal with this provision on a daily basis. The courts have also recognized and considered racial prejudice in connection with prosecutorial misconduct issues. See Robinson v. State, 520 So. 2d 1, 6-7 (Fla. 1988); Battle v. United States, 209 U.S. 36, 28 S.Ct. 422, 52 L.Ed. 670 (1908).

Since the Statute is facially constitutional, the Defendant's only alternative left to challenge the Statute is that it was unconstitutional is applied. This he cannot accomplish because his conduct falls within the Statute and therefore he may not complain of its application. To allow the Defendant to do so would allow him to raise the rights of unidentifiable third parties in this case. State v. Hamilton, 388 So. 2d 561 (Fla. 1980).

At trial, the victim, John Daly, testified that while he was being battered by the Defendant, who was, a member of the

racist skinhead organization, shouted, "Jew Boy" at him. Further, other witnesses testified that during the attack, the skinheads were "yelling racial slurs" at their victim, including, "die, Jew Boy, die" and "die, Jew, die." (R. 316, 358, 433). Several of the skinheads testified that "the" or "a" reason for the attack was that Mr. Daly was Jewish. (R. 251-252, 313, 314, 315, 351). The Defendant's conduct is clearly proscribed by the Statute, and therefore, the Statute was constitutionally applied to the Defendant.

II.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY FROM THE STATUTE, WHERE THE ONLY OBJECTION MADE WAS THAT THE PRINCIPAL THEORY DID NOT APPLY TO THE STATUTE.

At the charge conference, the Defendant only objected to the instruction which would permit the jury to find the Defendant guilty as an aider and abettor. Specifically, he contends that a conviction under the State can be obtained only when the Defendant himself actually commits the act in question. As such he wants to make the Statute the only criminal offense not subject to the principal statute. See § 777.011 Florida Statutes.

Clearly this is not the law since simple battery has always been subject to the principal statute. See Owens v. State, 289 So. 2d 472 (Fla. 2d DCA 1974). Since the battery statute is subject to the principal theory of culpability, then the Statute is also subject thereto. A defendant who knows that the reason the victim was selected was because of his status in a protected class and aids or abets another in committing a crime against the victim, is certainly culpable for a crime under the Statute since his actions would have helped the principal commit the crime. Under such circumstances a defendant could be an aider or abetter under the Statute.

The Defendant next complains that the trial court's failure to give clarified instruction on the standard of proof under the Statute was error. However this was not preserved for review since he failed to provide the trial court with the instruction he now claims would have satisfied him at trial. This failure precludes him from complaining herein. State v. Smith, 573 So. 2d 306, 310 (Fla. 1990).

III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION UNDER THE STATUTE.

The Defendant complains that the evidence did not establish that he was prejudiced against his victim, John Daly, nor did it show that he aided and abetted the commission of a crime which evidenced prejudice against Mr. Daly. The State disagrees.

If, after resolving all conflicts in the evidence in favor of upholding the verdict, it must be upheld. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The evidence presented to the jury must be viewed in the light most favorable to upholding the verdict. Herman v. State, 472 So. 2d 770 (Fla. 5th DCA 1985), rev. denied, 482 So. 2d 348 (Fla. 1986). All reasonable inferences which may be derived from the evidence, favorable to the verdict, must be considered in support of the verdict. Tibbs v. State, 397 So. 2d at 1123.

The State contends that the evidence adduced at trial, when viewed in the light most favorable to the verdict, exceeds the requisite standard. On the issue of the evidence of prejudice, the substantial evidence supporting the verdict includes:

(1) Both the Defendant and his victim were members in the American Front. (R. 84, 307, 338). That organization is "[a] white supremacy [sic] organization," and it's members are called "skinheads." (R. 85). Its goal was "to create a pure Arion society, where [sic] all the members being of a white race." (R. 340). The Defendant testified that it is "part of the creed of the skinheads to be prejudiced against Jewish people." (R. 468). The organization distributed anti-Jewish literature, which encouraged persons "to go out and do things against minorities." (R. 129, 130).

(2) Victim Daly was Jewish. (R. 73, 529-530). Mr. Daly did not tell the other skinheads that he was Jewish, although he was asked by various members if he was Jewish. (R. 89, 90). Fellow skinhead members knew that he had spent time in Israel, and when they asked him if he was Jewish, "I'd say, well, I have been to Mexico and I'm not Mexican. That usually ended the conversation."[10]

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[10] Mr. Daly said that he was teased about his time in Israel, including jokes that he was "tight with money." (R. 140, 141) on one prior instance, Fran Mercuri had called him Jewish. (R. 141-142)

(3) Several fellow skinheads testified that Mr. Daly's Jewishness was "the" or "a" reason for the attack.[11]

(A) John Kahlkopf testified that one reason for the attack was that one of the skinheads, Heather Arnold, told the others that Mr. Daly's parents had "Jewish articles in their house that they brought back from Israel." (R. 251-252). The following occurred: Prosecutor - "So while you were at the house, did you hear discussions about the fact that he was Jewish or that they had Jewish artifacts in his home?" Kahlkopf - "Yeah."[12] (R. 253).

(B) Robert Huttner testified that he remembered "someone saying to the effect that [Daly] was Jewish." (R. 313). He added that the "purpose of going to the beach" was "[t]o assault John Daly." (R. 314). He testified that he first learned that John Daly was going to be assaulted during a discussion that "he was Jewish." (R. 314). Mr. Huttner testified that "everybody" became "pretty well riled up because he was Jewish." (R. 315).

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[11] Mr. Daly testified that it was "a very strong possibility" that the reason for the attack on him was that he is Jewish. (R. 154).

[12] Further Kahlkopf was asked, "This thing about the tattoo on Heather's neck . . . wasn't even brought up as a reason at the party; is that correct?" (R. 272) He replied, "Yes." (R. 272).

(C) Terrence Lewis testified that at the house, in the room where Mr. Mercuri kept his guns, "it was mentioned that [Daly] was Jewish."[13] (R. 348, 351). He also testified that they started talking "he was Jewish . . . he needs to be killed." (R. 351).

Further, Mr. Lewis had heard one of the Orlando skinheads, Rich Meyer, "talking about [Daly] before . . . he had been the butt of a lot of jokes." (T. 347). Mr. Lewis added, "[W]hen I met him, you know, it sort of sunk in the way his appearance and the way he carried himself." (R. 347). A reasonable inference from this evidence is that those present, including the Defendant, recognized that Mr. Daly was Jewish because he looked Jewish. See generally State's Exhibit 2, at R 531 [photos of victim],

(4) Regarding the actual battery on Mr. Daly, the witnesses testified as follows:

(A) While he was on the ground, Mr. Daly saw the Defendant "[s]tanding I believe to my right, kicking me." (R.

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13 Mr. Meyer told Mr. Lewis that Mr. Daly's "parents had visited the Holy Land and then come back, meaning Israel. . . . And then he [Meyer] was talking about how he [Daly] was Jewish." (R. 348)

102). During the beating, Mr. Daly heard the Defendant shout "'Jew Boy.'"[14] (R. 105, 151, 152).

(B) Robert Huttner testified that while Mr. Daly was being beaten, those participating in the attack were "yelling racial slurs." (R. 316). Christopher Doyle heard Mr. Daly "yelling, I'm a white power skinhead, I'm a white power skinhead" while he was being battered.[15] (R. 225). The State asserts that a reasonable inference from this evidence is that Mr. Daly was responding to racial slurs directed at him. A further reasonable inference is that when Mr. Daly made these statements, he believed that racism was the reason or motive for the attack.

(C) Terrence Lewis testified that while "punching him in the face," someone was "yelling, 'die, Jew, die.'"[16] (R. 358).

(5) After the attack and on the way back to the house, the Defendant stated, "'We're in the web now," which means "you

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[14] Christopher Doyle testified that while Mr. Daly was being beaten, Doyle heard "[s]omething like" "Jew Boy." (R. 225) John Kahlkopf testified that he "might have heard" someone say "Jew Boy." (R. 268)

[15] Similarly, Terrence Lewis testitied that Mr. Daly was "yelling 'stop it, I want to be a white supremist [sic], why are you doing this, I'm a white supremist [sic], I'm a legal white supremist [sic].' (R. 357)

[16] At first Mr. Lewis attributed this statement to Mr. Huttner, but later he said that it was possible that someone else had made it. (R. 358).

killed someone." (R. 257). When they left the beach, some of the witnesses thought Mr. Daly was dead. (R. 255, 361). The Defendant threatened the others saying, "If anybody says something, I'm going to come down there and kill you myself."[17] (R. 258-259).

(6) The Defendant admitted his guilt of the battery, and said he was the second one to strike Mr. Daly. (R. 431, 445). He admitted that the words, "'die, Jew Boy, die'" were spoken during the attack. (R. 433, 466-467). He also admitted that Mr. Daly repeatedly yelled, "'why are you doing this, I'm a white power skinhead.'" (R. 433). Further, the Defendant testified that on the way to the beach, he rode "in the back of the truck" with Heather Arnold. (R. 471, 472).

On cross examination of Mr. Huttner, defense counsel established that Heather Arnold told the skinheads that John Daly was Jewish on the way to the beach. (R. 326-327). The Defendant, himself, testified that he rode in the back of the truck with Ms. Arnold on the way to the beach. (R. 471, 472). The State contends that a compelling inference from this evidence is that the Defendant knew that Mr. Daly was Jewish before attacking him on the beach.

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17 Mr. Kahlkopf testified that he was "absolutely positive" that the Defendant made that threat. (R. 259) Mr. Lewis testified similarly. (R. 363)

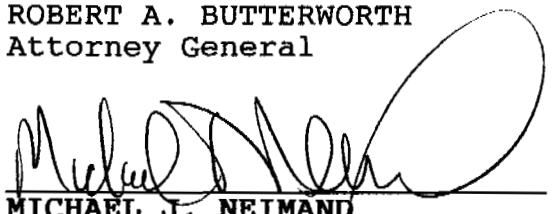
Under the facts of the instant case, a great deal more than "name-calling" was established. The State proved that the Defendant evidenced prejudice against Mr. Daly during the battery. It also established that the Defendant aided and abetted fellow skinheads in committing a battery during which they evidenced prejudice against Mr. Daly, making him guilty as a principal. See State v. Roby, 246 So. 2d 566 (Fla. 1971). The jury's verdict is well supported by substantial, competent evidence, and this Honorable Court should uphold it. Tibbs, Herman.

CONCLUSION

Based on the foregoing points and authorities the State respectfully urges that the decision of the Fifth District Court of Appeal upholding the constitutionality of Section 775.085, Florida Statutes should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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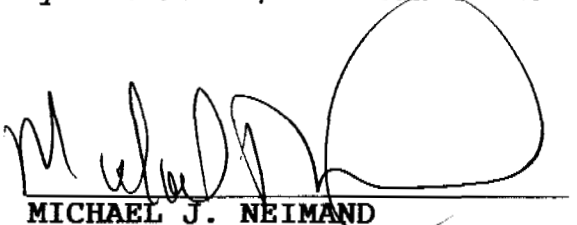
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERIT** was furnished by mail to **JEFFREY L. DEES**, Attorney for Appellant, 347 South Ridgewood Avenue, P. O. Drawer 2600, Daytona Beach, Florida 32115 on this 12 day of March, 1993.



MICHAEL J. NEIMAND
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,580

MICHAEL EARL DOBBINS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

APPENDIX TO

BRIEF OF RESPONDENT ON THE MERITS

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without merit where the evidence is known to the attorney. *See also Jones, supra; Smith, supra;* and *Busch v. State,* 466 So.2d 1075, 1078 (Fla. 3d DCA1984).

In the instant case, Vann admits that his attorney knew, at the time of trial, the evidence claimed to be newly discovered. Therefore, the evidence does not qualify as newly discovered, and the exception to Rule 3.850 is not applicable. I must dissent from the majority's decision to reverse.

Michael Earl DOBBINS, Appellant,

v.

STATE of Florida, Appellee.

No. 91–1953.

District Court of Appeal of Florida, Fifth District.

Sept. 24, 1992.

A defendant appealed his jury conviction for battery entered by the Circuit Court for Volusia County, Shawn L. Briese, J., and sentence imposed under enhancement provisions of hate crime statute. The District Court of Appeal, Harris, J., held that: (1) the hate crime statute did not violate the First Amendment, and (2) even if the statute was considered to regulate the content of speech, it was justified because it was narrowly tailored to serve compelling state interest.

Affirmed.

1. Criminal Law ⇐1206.1(1)

Hate crime statute, which provides for reclassification of penalties for crimes evidencing certain prejudices, is not vague and overbroad; statute requires that it is commission of crime that must evidence prejudice, and fact that racial prejudice may be exhibited during commission of crime is itself insufficient. West's F.S.A. § 775.085; U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇐90.1(1)

The First Amendment prohibits intrusion into rights of one to freely hold and express unpopular, even intolerant, opinions. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.1(1)
Criminal Law ⇐1206.1(1)

Hate crime statute, which provides for reclassification of penalties for crimes evidencing certain prejudices, does not violate First Amendment as improperly punishing opinion; statute only applies when one acts on an intolerant opinion to injury of another. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; West's F.S.A. § 775.085; U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐90.1(1)
Criminal Law ⇐1206.1(1)

Even if the hate crime statute, which provides for reclassification of penalties for crimes evidencing certain prejudices, regulates the content of speech, the statute was not unconstitutional under the First Amendment in that it was justified because it was narrowly tailored to serve compelling state interest of insuring basic human rights of members of groups that historically had been subjected to discrimination because of membership in those groups. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; West's F.S.A. § 775.085; U.S.C.A. Const.Amend. 1.

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Robert A. Butterworth, Atty. Gen., Tallahassee, and Judy Taylor Rush, Asst. Atty. Gen., Daytona Beach, Michael Neimand, Miami, and Richard Doran, Tallahassee, for appellee.

Kenneth W. Shapiro of Berger & Shapiro, P.A., Ft. Lauderdale, for Amicus Curiae, Anti–Defamation League of B'Nai B'rith.

HARRIS, Judge.

John Daly, a Jewish youth, in protest to his parents and denial of his religion, joined the "Skinheads", an association openly and vociferously anti-Semitic. Ultimately, when his fellow members learned of his Jewish background, some of them decided to take action.

He was beaten by several members of the association, including Michael Earl Dobbins, appellant herein. During the beating, Dobbins and others made such statements as "Jew boy," and "Die Jew boy."

Dobbins was tried and convicted under the battery statute (Fla.Stat. 784.03(1)(a)) and sentenced under the enhancement provisions of the hate crime statute (Fla.Stat. 775.085).

We find the evidence sufficient to uphold the jury's verdict that Dobbins committed the proscribed act and that the commission of the act evidenced prejudice based on Daly's "ancestry, ethnicity, religion or national origin".

The sole issue that we find merits discussion is the constitutionality of section 775.085, Florida Statutes (1989). We find it to be constitutional.

VAGUE AND OVERBROAD

[1] Appellant first contends that the statute is vague and overbroad. He contends the statute is susceptible of applying to protected speech because it does not require that the prejudice alleged have any specific relationship to the commission of the crime.

This argument seems to concede that if the statute permits enhancement only upon proof, beyond a reasonable doubt, that appellant committed the battery motivated, in whole or in part, because Daly was Jewish, the enhanced penalty would be appropriate.

That is precisely the way we read the statute. Section 775.085 provides:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if *the commission of such felony* or misdemeanor *evidences prejudice based on the* race, color, *ancestry, ethnicity, religion* or national origin *of the victim.*

Appellant urges that the language can be read to apply to a situation in which the defendant commits a race, color or religious neutral crime (for example, resisting arrest because he thinks he's innocent), but during the commission of the offense makes a racial slur. We do not agree. The statute requires that it is the *commission of the crime* that must evidence the prejudice; the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient.

In the present case the jury was required to find that the *beating*, based on the background and relationship between the participants *and* the statements made during the beating, *evidenced that Daly was the chosen victim because he was Jewish.* Had the fight occurred for some other reason (over a woman, because of an unpaid debt, etc.), the mere fact that Daly might have been called a "Jew boy" could not enhance the offense.

PUNISHMENT OF OPINION

The more troubling argument made by Dobbins is that the enhancement provision punishes opinion. We find the statute involved in this case sufficiently different from the St. Paul ordinance so that *R.A.V. v. City of St. Paul*, — U.S. —, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), is not dispositive.[1]

[2] First, *R.A.V.* dealt with an ordinance that expressly made criminal the placing "on public or private property a symbol ... which one knows ... arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender ..." This clearly makes criminal the public expression of an intolerant opinion. We agree that the First Amendment prohibits intrusion into the rights of one to

1. We notice also that in R.A.V. the defendant did not appeal, and the Supreme Court did not consider, his conviction of a racially motivated assault. It is this issue, in essence, that is before us.

freely hold and express unpopular, even intolerant, opinions.

[3] But section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement.

John Stuart Mill in his *On Liberty*[2] points out this distinction:

> Such being the reasons which make it imperative that human beings should be free to form opinions, and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded, or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hinderance, either physical or moral, from their fellow men, so long as it is at their own risk and peril.
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> This last provision is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor ... ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corndealer ... Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.

We believe that the act of choosing a victim for a crime because of his race or religion is a type of speech that is subject to regulation.

We recognize that other courts have reached a different result under similar facts and similar law.

The Court in *State v. Mitchell*, 169 Wis.2d 153, 485 N.W.2d 807, 812 (1992) stated:[3]

> Without doubt the hate crime statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.

We concede, as we must, that the defendant's motive is implicated in this issue. But that does not mean that the prohibited conduct is not subject to regulation.[4] As the Supreme Court stated in *R.A.V.*:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
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> We have long held, for example, that nonverbal expressive activity can be

2. John Stuart Mill, On Liberty 119 (Penguin Books Ltd., 1974) (1st ed. 1859)

3. *See also State v. Wyant*, 64 Ohio St.3d 566, 597 N.E.2d 450 (1992).

4. For example, the Supreme Court in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), held that a sentencing judge in a capital case might properly take into consideration "the elements of racial hatred" in Barclay's crime as well as "Barclay's desire to start a race war." If a court may properly consider such racial hatred in determining whether to impose a harsher sentence, may not the legislature mandate that the judge do so? Is it proper for the court but not the legislature?

banned because of the action it entails, but not because of the ideas it expresses.

R.A.V., 112 S.Ct. at 2542–4.

The purpose of section 775.085 is to discourage through greater penalties the discrimination against someone (by making such person the victim of a crime) because of race, color, or religion. How does this differ from any discrimination prohibition? The refusal to hire a woman cannot be justified under 42 U.S.C. section 2000e–2, 29 C.F.R. section 1604.11 (1991) because it is the expression of the employer's opinion that women should not be in the work place. The rejection of Blacks from a jury is not exempted from the consequences of *Powers v. Ohio*[5] and *State v. Neil*[6] because it is an expression of the attorney's or client's opinion that Blacks are incompetent.

In such cases it is not the *content* of the speech that is prohibited, but such *act* of discrimination. It does not matter why a woman is treated differently than a man, a black differently than a white, a Catholic differently than a Jew; it matters only that they are.

So also with section 775.085. It doesn't matter that Dobbins hated Jewish people or why he hated them; it only mattered that he discriminated against Daly by beating him because he was Jewish. This, we think, meets the Supreme Court test in *R.A.V.*:

> Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices [citation omitted]. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., — U.S. at —, 112 S.Ct. at 2546–7.

The Supreme Court in *R.A.V.* made it clear that they were not addressing victim specific discrimination when it said:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause) ...

Id., — U.S. at —, 112 S.Ct. at 2548.

In our case there is no equal protection challenge to section 775.085 which does prohibit "fighting words" directed at certain groups.

[4] There is yet another reason we find the statute constitutional. Even if the statute is considered to regulate the content of speech, it is nonetheless justified because it is narrowly tailored to serve the compelling state interest of ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically been subjected to discrimination because of membership in those groups.

The Supreme Court in *R.A.V.* recognized this as a proper reason for regulating content and stated:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interest.

Id., — U.S. at —, 112 S.Ct. at 2550.

In *R.A.V.*, the Supreme Court held that it was not. But again in *R.A.V.* the Court was dealing with an ordinance that regulated specific speech content that St. Paul considered to violate the rights "of such group members to live in peace where they wish." The Court held that the same beneficial effect sought by St. Paul could have been obtained with a less intrusive ordinance that did not target the specific content prohibited by the ordinance. For example, the ordinance could provide that it was a violation to molest Jewish people because of their religion. This would not regulate the content of speech but rather the act of religious molestation. In our case, it is the act of discrimination against

5. — U.S. —, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

6. 457 So.2d 481 (Fla.1984).

people because of their race, color or religion by making them victims of crime that is prohibited and punished, not the specific opinion that leads to that discrimination. We think that appropriate.

AFFIRMED.

GOSHORN, C.J., and DAUKSCH, J., concur.

Robert Garner JETT, Appellant,

v.

STATE of Florida, Appellee.

No. 90–257.

District Court of Appeal of Florida, Fifth District.

Sept. 25, 1992.

Defendant was convicted on charges of sexual battery and lewd and lascivious assault on a child, following trial in the Circuit Court, Brevard County, John Antoon, II, J., and he appealed. The District Court of Appeal, Harris, J., on rehearing en banc, held that psychotherapist privilege was waived by statute concerning child abuse communications, and thus defendant was entitled to question psychotherapist and psychologist concerning communications with alleged child victims.

Reversed and remanded.

Cowart, J., concurred specially with opinion in which Dauksch, J., concurred.

W. Sharp, J., concurred in part and dissented in part, with opinion.

Griffin, J., dissented with opinion in which Goshorn, C.J., and Diamantis, J., concurred.

Diamantis, J., dissented with opinion in which Goshorn, C.J., concurred.

1. Infants ⇐13

Statute requiring recording of child abuse is not limited to the first person reporting it and does not exempt treating professionals who are brought in to counsel perpetrator or victim after the child abuse has been reported, and person given obligation to report may not assume that someone else has or will report and cannot rely on statement by perpetrator, victim or parent that matter has been reported. West's F.S.A. § 415.504(1).

2. Witnesses ⇐219(1)

Waiver of privilege with respect to situation involving child abuse or neglect makes the information communicated to health provider available to alleged perpetrator as well as to the victim or the state, and it is not essential that defendant be charged with child abuse in order for waiver of the privilege to arise; it is sufficient that the actual charges constitute child abuse.

3. Witnesses ⇐219(1)

Psychotherapist privilege was waived by statute relating to communications concerning child abuse, and defendant was entitled to question psychotherapist and psychologist concerning communications with alleged child victims, though defendant was charged with sexual battery and lewd and lascivious assault on child, not with child abuse or neglect, in that defendant's actual relationship with the children, who were daughters of his half-sister, met the definitional requirements for "child abuse or neglect." West's F.S.A. §§ 415.503(3), 415.504(4)(a), 415.512.

See publication Words and Phrases for other judicial constructions and definitions.

James B. Gibson, Public Defender, and Larry B. Henderson, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

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HARRIS, Judge.

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