IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

HAROLD COOPER,

Respondent,

_____/

CASE NO. 82,024 (42,034)

5TH DCA NO. 92-1175

ON THE APPEAL FROM THE DISCTIRCT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS AND THE CASE

The Respondent accepts the Statement of the Case and Facts as presented in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The most fatal and egregious error committed by the Trial Judge in Responent's trial was to permit Officer Marsala, a qualified accident reconstructionist, to give his opinion on the ultimate fact in issue in this case when the facts leading to this issue were within the ordinary experience of the jurors who could draw their own conclusion from them. Over strenuous objection when asked by the prosecutor what his opinion was that caused the accident, Officer Marsala testified:

> "Without a doubt, the fact that Mr. Cooper was intoxicated to the extent that his normal."
>
> * * *
>
> "That his normal faculties were impaired in such a way that he ran off the road and struck the rear of the motorcycle, clearly."

The Appellant's attorney moved for a mistrial. The Trial Judge denied the mistrial reasoning:

> "The proof of impairment was offered by other witnesses. It's already been established in evidence without that, this officer couldn't have testified to it."

But had Respondent's intoxication already been established in evidence? Let's review the evidence.

Cynthia Melancon, the bartender at Memory Lane, testified she refused to serve the Respondent because his speech was slurred and he rested his head on the bar on three (3) occasion.

Officer Terkowski testified he smelled an alcoholic beverage coming form Respondent's mouth area while Respondent was lying unconscious at the hospital. (T151-166) Barry Funck, the

State's toxicology/Chemistry expert reported he was unable to determine the Respondent's condition at the time of the accident. (T183-191)

Then there was James A. King, a victim himself, who spoke with the Respondent at Memory Lane, observed him for approximately twenty (20) minutes and later assisted him in starting his motorcycle because Respondent had a lame leg and the motorcycle had to much compression for him to kick start it. (T52,70) Mr. King had told the police after the accident and testified at trial that the Respondent did not appear intoxicated to him. (T71) That the Respondent did not stumble around, speech was normal, did not slur his words and was coherent. (T71) He also testified that he could tell from past experience when a person was intoxicated. (T75)

Now let us review the basis for Officer Marsala's opinion as pointed out by Respondent's attorney to the Trial Judge: 1. Mr. Marsala was not present at the scene of the accident to observe the Respondent; 2. He did not perform the blood test on Respondent's blood; 3. He did not perform any field sobriety test on Respondent; 4. He did not perform a breathalyzer test on him; 5. In fact, he never once saw the Respondent until weeks after the accident; and, 6. At the time he conducted his accident reconstruction he was not even aware that Respondent had been drinking or the final test results of his blood alcohol level.

Yes, there was evidence before the Jury that the Respondent may have been impaired by alcohol at the time of the accident. But, there was evidence of equal value presented to the

Jury that just minutes before the accident he was closely observed by one of the victims, in whose opinion Respondent not to be impaired or intoxicated.

Wasn't this ultimate issue for the Jury to decide drawing upon their own experiences and upon the testimony provided to them at trial? Did they really require the opinion and conclusion of Officer Marsala on this ordinary issue of fact? The answer to these rhetorical questions is an empathic yes and no respectively,, and it was prejudicial error for the Trial Judge to allow the opinion and conclusion of Officer Marsala into evidence.

This error was not harmless, because the ultimate issue of the Respondent's intoxication and cause of the fatal accident had been cast in doubt due to the conflicting evidence presented to the Jury on his physical sobriety before the accident; together with a plausable explanation for the cause of the accident being attributible to the bad transmission and faulty brakes of the motorcycle the Respondent was driving.

In addition, two (2) other evidentiary matters were uncontradictably presented to the Jury, which are arguably very persuasive in presenting Respondent's contention that it was an unavoidable accident. First, James King agreed that it is normally true that when one Harley Davidson rider sees another Harley Davidson rider on the side of the road they'll try to stop and help them out. (T70) Secondly, Louise Barnes testified:

> "The reason the bike (Harley Davidson Appellant was operating) was being stored in Melbourne was because it was going to go to a motorcycle shop to have the transmission

rebuilt. Also there were faulty rear brakes on the bike." (T210)

These two (2) statements taken together reasonably explain why the Respondent steered the bike to the area where James King and Faith Armstrong had stopped, i.e. to help them out if they were having a problem; and, the reason he could not safely stop the bike from colliding with their motorcycle was due to break failure and transmission problems.

The Trial Judge permitting Officer Marsala to give his hearsay embraced opinion that the accident was solely caused by Respondent's intoxication, left the Respondent defenseless. Here was an opinion of an acknowledged official expert on the ultimate issue to be decided by the Jury which was sanctioned by the Court in the presence of the Jury. This Judicial exercise was tantamount to the Trial Judge telling the Jury that Officer Marsala's opinion is the opinion shared by the Court.

The timely objection by the Respondent's attorney followed by his request for a mistrial was mandated in this instance in order to grant the Respondent a fair trial.

SENTENCING

The Trial Judge sentenced the Respondent to term of thirty (30) years for DUI manslaughter, and a consecutive sentence of ten (10) years for DWLS manslaughter of the same victim Faith Armstrong. It is respectfully urged that the Respondent could not be convicted and sentenced to both DUI manslaughter and DWLS manslaughter for a single death of Ms. Armstrong. Double Jeopardy considerations pevent multiple sentences for a single death.

ISSUES PRESENTED

POINT I.

WHETHER THE TRIAL JUDGE ERRED IN PERMITTING OFFICER MARSALA WHO TESTIFIED AT TRIAL, AS AN ACCIDENT RECONSTRUCTION EXPERT, TO TESTIFY OVER THE OBJECTION OF THE RESPONDENT, THAT THE CAUSE OF THE ACCIDENT WAS CLEARLY RESPONDENT'S INTOXICATION TO THE EXTENT HIS NORMAL FACULTIES WERE IMPAIRED IN SUCH A WAY THAT HE RAN OFF THE ROAD AND STRUCK THE REAR OF MR. KING'S MOTORCYCLE CAUSING THE DEATH OF MS. ARMSTRONG.

ARGUMENT

THE STATEMENT

Q. Okay. My final question for you, sir, is do you have an opinion to a reasonable scientific certainty of what caused the accident in this case?
A. Without a doubt, the fact that Mr. Cooper was intoxicated to the extent that is normal.
MR. KOSAN: Objection, Your Honor. He's an accident reconstructionist. He's not here as a DUI investigator.
THE COURT: It's a question of opinion by the officer. I'll allow it.
THE WITNESS: That his normal facilities were impaired in such a way that he ran off the road and struck the rear of the motorcycle, clearly.

That opinion of Office Marsala was unequivocally directed to the guilt or innocence of the Respondent to the charge of DUI manslaughter. There are a litany of Florida Appellate decisions which steadfastly hold: "The opinion of a witness as to the guilt or innocence of an accused person is not admissible in evidence." **Gibbs v. State**, 193 So.2d 460, 463 (Fla 2nd DCA 1967); 6 F.L.P. Criminal Law Section 458; **Myers v. State**, 43 Fla. 500, 31 So. 275; **Urga v. State**, 104 So.2d 43 (Fla. 2nd DCA 1958); **Farley v. State**, (Fla 4th DCA 1976); **Spradley v. State**, 442 So.2d 1039 (Fla 2nd DCA

1983); **Glendening v. State**, 536 So.2d 212, (Fla. 1988).

A Trial Judge must protect against the danger that a Jury will accept the Judgment of an expert in place of its own. **U.S. v. Sorondo**, 45 F.2d 945, (11th Cir. 1988).

The accident occurred at approximately 2:00 P.M. (T-48) Officer Marsala arrived at the scene of the accident at approximately 3:15 P.M. (T-223) The victims and their two (2) motorcycles had already been removed from the accident site at the time of Officer Marsala's arrival. (T229-234) Officer Terkowski advised Officer Marsala of the location where the bodies were found and where the motorcycles finally came to rest. (T-229) He personally viewed the motorcycles while they were in storage and viewed photographs taken of them at the scene of the accident. (T-238) He personally reviewed the accident scene, took measurements and photographs. (T223-246)

He gave his opinion to the Jury that Respondent's motorcycle struck the rearend of Mr. King's motorcycle, (T232-233) a fact which was not in dispute, because five (5) eyewitnesses to the accident had all testified to that fact prior to Officer Marsala taking the witness stand. He "theorized" on how fast Respondent's motorcycle was traveling, but the record is not clear exactly what point Respondent's motorcycle had reached when Officer Marsala approximated the speed it was traveling, i.e. was that the speed of Respondent's motorcycle when it left the roadway, or was that the speed he was traveling at the point of impact? (T-232)

Officer Marsala did not testify he interviewed any of the

numerous witnesses to the accident, and all the information he acquired was: "derived from Officer Terkowski, who was (had arrived) earlier." He never spoke to Mr. King, the other living accident victim. He spoke to Officer Terkowski only at the accident scene, not later after Officer Terkowski had gone to the hospital and requested a sample of Respondent's blood.

Upon the above observation of Officer Marsala, the Court permitted him, over the strong objection of Respondent's attorney and request for mistrial, to give his opinion as to the guilt of Respondent for DUI manslaughter. (T-240)

It is the Respondent's contention that the Trial Judge erred in permitting Officer Marsala to testify to the guilt of the Respondent and/or to an "ultimate issue", which was manifestly within the ordinary experience for the Jurors themselves to decide. This argument is made more patently valid when we recognize that the evidence produced at trial is found to be in conflict over the issue whether the Respondent was impaired or intoxicated at the time of the fatal accident.

Permitting Officer Marsala, who had been qualified as an expert accident reconstructionist, to give his opinion and conclusion to the Jury as to the cause of the accident, was tantamount to the Court directing the Jury to return a verdict finding the Respondent guilty of DUI/manslaughter.

Terminally, even experts are precluded from giving conclusions, when the facts leading up to the conclusion are within the ordinary experience of the Jury.

It is well established that the opinion of a witness on a fact in issue is not admissible where the Jury is as well qualified as the witness to form an opinion on the subject, and even expert witnesses are precluded from presenting their opinions and conclusions when the facts are within the ordinary experience of the Jurors.

In **Johnson v. State**, 393 So.2d 1069 (Fla. 1980), this Court cited with approval the Appellate decision in **Nelson v. State**, 362 So.2d 1017 (Fla. 3d DCA 1978) as follows:

> In **Nelson v. State**, the appellate court affirmed the trial court's exclusion of expert testimony of a psychologist on matters of eyewitness identification or from a criminal trial and correctly stated:
>
> "When facts are within the ordinary experience of jurors, conclusions to be drawn therefrom are left to the jury. **McGough v. State**, 302 So.2d 751 (Fla. 1974); **Tongay v. State**, 79 So.2d 673 (Fla. 1955); **Thomas v. State**, 317 So.2d 450 (Fla. 3d DCA 1975). We believe it is within the common knowledge of the jury that a person being attacked and beaten undergoes stress that might cloud a subsequent identification of the assailant by the victim. As such, the subject matter was not properly within the realm of expert testimony...
> 362 So.2d at 1021.

This Court in **Town of Palm Bay v. Palm Beach County**, 460 So.2d 879, 882 (Fla. 1985), when deciding the propriety of admitting into evidence expert opinion testimony on an "ultimate issue" stated:

> Petitioners argue that section 90.703, Florida Statutes (1981) permits opinion testimony from ultimate issue to be decided by the trier of fact. . . . We agree. However, section 90.703 does not imply the admissibility, of all opinions. If the witness conclusion tells the

> trier of fact how to decide the case, and does not assist it in determining what has occurred, then it is inadmissible. See, e.g., **United States v. Milne**, 487 F.2d 1232, 1235 (5th Cir. 1973).

It is respectfully presented, that Officer Marsala's testimony on this "ultimate issue" did not assist the Jury in its determination on what had occurred, but told the Jury how to decide the issue of Respondent's guilt.

The Respondent would refer to this Court's decision in **Glendening v. State**, 536 So.2d 212 (Fla. 1989), in his initial brief for the legal proposition that an expert opinion as to the guilt of an accused is not admissible evidence. The **Glendening**, supra, Court concluded that a professional, recognized as an expert in interviewing suspected young victims of sexual abuse, would be permitted to testify that it was her opinion that the child had been sexually abused. This opinion testimony could be applied by the Jury to connect the medical evidence to the cause. However, the Court found it was improper for the expert to testify that it was her opinion "that the child's father was the person who committed the sexual offense." In that respect this Court stated:

> We agree with Glendening that it was improper for the expert witness to testify that it was her opinion that the child's father was the person who committed the sexual offense. An opinion as to the guilt or innocence of an accused is not admissible. See **Lambrix v. State**, 494 So.2d 1143 (Fla. 1986); **Spradley v. State**, 442 So.2d 1039, (Fla. 2d DCA 1983). Although section 90.703 would appear to permit such an opinion, such testimony is precluded on the basis of section 90.403. Any probative value such an opinion may posses is clearly outweighed by the danger of unfair prejudice. This error does not, however, require

reversal. Except in cases of fundamental error, an issue will not be considered for the first time on appeal. **Steinhorst v. State,** 412 So.2d 332 (Fla. 1982). Defense counsel neither objected to the answer nor moved to strike it and the error is not of a fundamental nature. Accordingly, the issue is not properly preserved for appeal because the question was proper and the improper reply was not contemplated by the question and was not the subject of a motion to strike.

Let us turn to the colloquy which raised the objection before the Trial Court, as follows:

> Q. Okay. My final question for you, sir, is do you have an opinion to a reasonable scientific certainty of what caused the accident in this case?
> A. Without a doubt, the fact that Mr. Cooper was intoxicated to the extent that is normal.
> MR. KOSAN: Objection, Your Honor. He's an accident reconstructionist. He's not here as a DUI investigator.
> THE COURT: It's a question of opinion by the Officer. I'll allow it.
> THE WITNESS: That his normal facilities were impaired in such a way that he ran off the road and struck the rear of the motorcycle, clearly.
> MR. RAPPEL: Thank you. I have no further questions, and I'll tender the witness for cross-examination.
> MR. KOSAN: Your Honor, may we approach?
> THE COURT: Yes, you may approach.
> Be seated, please, Corporal.
> (Whereupon the following proceedings were had at the bench out of he hearing of the jury).
> MR. KOSAN: Your Honor, he was qualified as an accident reconstructionist of where the point of impact was, where this vehicle came from, where these vehicles came to, where this vehicle hit this vehicle, not as to why the accident happened. That's what somebody's state of intoxication was. <u>I think that was highly prejudicial</u>. He's not qualified as an expert. I'd move for a mistrial at this point.
> THE COURT: Okay. He testified as an accident reconstruction officer expert as to what his opinion of the cause of the accident was, and

he attributed a portion of that cause to the intoxication or the impairment.
MR. RAPPEL: I think he's entitled to do that, Judge.
THE COURT: He didn't make that determination. He learned that from somebody else, and we've already heard from somebody else proof of impairment. Based on that, I believe it's admissible.
MR. KOSAN: But, Your Honor, the question was what caused the -- what was --
THE COURT: Right.
MR. KOSAN: I don't think that it's appropriate for him to make an opinion of what Mr. Cooper's intoxication was. He was not there to witness what his intoxication was.
THE COURT: Okay.
MR. KOSAN: He did not perform the blood alcohol test.
THE COURT: Right.
MR. KOSAN: He did not see Mr. Cooper do any field sobriety tests. He did not conduct a breathalyzer test on him.
THE COURT: Right
MR. KOSAN: He's got no indications.
THE COURT: I agree with you as far as you've gone, but you haven't gone far enough. The proof of impairment was offered by other witnesses. It's already been established in evidence. Without that, this Officer couldn't have testified to it. I'm going to overrule the objection and deny the motion.
MR. KOSAN: Your Honor, that's an opinion of an ultimate fact in this case.
THE COURT: Based on what he learned in the course of his investigation, I think he can do that.
MR. KOSAN: Well, Your Honor, I object and I move for mistrial.
THE COURT: Okay. Overruled and denied.

Candidly, in the State's presentation of its case-in-chief the testimony of Officer Marsala as an accident reconstructionist was superfluous. Prior to his testimony the Petitioner had presented five (5) eyewitnesses to the accident, all of whom distinctly testified as to how the motorcycle accident had occurred. Their testimony is consistent with saying Respondent's

motorcycle turned west off of Highway U.S. 1, left the raodway and plowed into the rearend of Mr. King's motorcycle and all three (3) people flew off the bikes. (T124)

The only conflict in the testimony of the witnesses was on the very issue Officer Marsala was permitted to give his unqualified opinion and conclusion, i.e. was the Appellant intoxicated at the time of the accident. Victim James King, who had come to loathe the Respondent for taking the life of his fiancee and for causing him serious bodily injury, (T628-629), testified that he had spoken to and observed the Respondent for twenty (20) minutes prior to the accident. He testified that the Respondent "did not appear to be intoxicated" that he was not "stumbling around", his "speech appeared normal" and he was not "slurring his words". (T71) He went on to testify that "most of the time he could tell when someone was drunk or not". (T75) He had also communicated the fact that he did not believe Mr. Cooper was intoxicated at the time of the motorcycle accident to the police. (T71)

Had it not been for the highly prejudicial statement of Officer Marsala that it was the Respondent's intoxication that caused him to run off the road and crash into Mr. Kings' motorcycle, the Jury could have reasonably concluded otherwise. The evidence did suggest that it was usual for a Harley Davidson driver, who sees another Harley Davidson rider on the side of the road, that they will "try to stop and help them out". (T70) Additionally, Ms. Barnes testified that the Harley Davidson that

Respondent was operating had been previously in storage because it's transmission needed to be "rebuilt" and "there were faulty rear brakes on the bike". (T210)

These facts taken together weave another reasonable explanation as to the cause of the this accident. Respondent left Memory Lane on his Harley Davidson shortly after Mr. King and Ms. Armstrong left. It may be noted that none of the eyewitnesses to the accident testified that Respondent's operation of his motorcycle on U.S. 1 prior to his running off the road was either negligent or dangerous. It may be reasonably assumed that Respondent, upon seeing Mr. King and Ms. Armstrong on the side of the road, that they were having a problem with their bike and he intended to stop and help them. It is also a reasonable assumption that in the act of pulling off the road the faulty brakes failed him and gearing down, the bad transmission failed to properly engage and to slow down the engine as it is intended too. (In other words, these two (2) major mechanical problems with the motorcycle were the cause for Appellant being unable to stop the bike in time to avoid its collision with Mr. King's motorcycle.) Thus, the fatal accident was caused by mechanical failure of Respondent's motorcycle, and not due to the impairment of the Respondent.

The above factual scenario is a reasonable hypothetical basis for Respondent's innocence to the charge of DUI manslaughter. Had it not been for the damaging and prejudicial opinion of Officer Marsala as to his own conclusion as to what caused this accident,

Respondent may have been acquitted of DUI manslaughter by the Jury.

The Respondent contends that this highly prejudicial error should entitle him to a new trial. A Respondent should be granted a new trial where it appears that the error of the trial judge seriously affected the fairness of the trial. **State v. Lewis**, 543 So.2d 760, 764 (Fla. 2d DCA 1989). Under Fla.R.Crim.P. 3.600(b)(8) whenever a Defendant did not receive a fair and impartial trial which was not due to any fault of the Defendant, and where substantial rights of the Defendant have been prejudiced, he should be entitled to a new trial.

Respondent is immanently aware that errors are subject to harmless error analysis, as set forth in **Chapman v. California**, 386 U.S. 18, 22 87 S.Ct 824, 827, 17 L.Ed.2d 705 (1967); **State v. DiGuilio**, 491 So.2d 1129 (Fla 1986). The harmless error test, as explained in **DiGuilio, supra**, places the burden on the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Id. at 1138. It can be alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. The state has this burden because it is the beneficiary of the error. Id. at 1138. the question is then postured whether there is a reasonable possibility that the error affected the verdict. Id.at 1139. Application of the test requires a close examination of the impermissible evidence which might have possibly influenced the jury in reaching its verdict. Id. at 1138.

The error is not harmless and a new trial is warranted

when it is reasonably evident that a prosecutor has presented inadmissable evidence that may have influenced the jury to arrive at a verdict it otherwise might not have reached. **State v. Helton**, 551 So.2d 1267 (Fla. 1st DCA 1989). In the case sub judice, it is reasonably evident that Officer Marsala's inadmissable opinion and conclusion on the cause of the accident had great impact upon the Jury and they could have reasonably reached a contrary verdict had it not been for these impermissible remarks.

The factual scenario presents a reasonable factual basis upon which the Jury could have found Appellant not guilty to the charge of DUI/Manslaughter. Had it not been for the highly prejudicial opinion of Officer Marsala as to his expressed opinion Respondent, was guilty of the charge, the Jury may have acquitted Respondent of this crime.

POINT II.

WHETHER THE TRIAL JUDGE ERRED IN SENTENCING THE RESPONDENT TO CONSECUTIVE SENTENCES FOR A CONVICTION OF DUI MANSLAUGHTER AND DWLS MANSLAUGHTER FOR THE SAME DEATH OF MS. ARMSTRONG.

ARGUMENT

This Honorable Court has recently put this issue to rest in its unanimous decision of **State v. Chapman**, 18 Fla. L. Weekly Section 499, Case No. 80,691, September 23, 1993, in which this Court affirmed its holding in **Houser v. State**, 474 So.2d 1193 (Fla. 1985), "that a single death cannot support convictions of both DUI Manslaughter and Vehicular Homicide".

CONCLUSION

Predicated upon the authorities and argument presented under Point I of this Appeal, Respondent respectively requests the Court to reverse his conviction for DUI/manslaughter and remand this case to the trial Court for a new trial.

In the alternative, under Point II of this Appeal, Respondent would request this Court to vacate Respondent's conviction and sentence for DWLS/manslaughter remanding this case to the trial Court for resentencing.

Respectively presented:

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