IN THE SUPREME COURT OF FLORIDA

PATRICK ALAN SALGAT,

Petitioner,

v.

CASE NO. 83,216

STATE OF FLORIDA,

Respondent.

_____/

MERITS BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA CONSTITUTION

FLORIDA RULES OF CRIMINAL PROCEDURE

FLORIDA STATUTES

OTHER CITATIONS

STATEMENT OF THE CASE AND FACTS

This case is before this Court on a narrow certified question of law:

> WHETHER A JURY INSTRUCTION CONCERNING A DEFENDANT'S INCONSISTENT EXCULPATORY STATEMENTS PREVIOUSLY HELD PROPER UNDER JOHNSON V. STATE CONSTITUTES AN IMPROPER COMMENT UPON THE EVIDENCE IN LIGHT OF THE COURT'S DECISION IN FENELON V. STATE.

Although Salgat devotes thirteen pages of his brief to a summary of facts irrelevant to the certified question, he summarizes the facts on the certified question in six sentences. (I.B. 2-4, 10) The State will provide the relevant facts.

Salgat was tried by a jury on May 28, 1991. (R. 1) Seven government witnesses testified to Salgat's various exculpatory stories.

Shortly after midnight on June 18, 1990, Salgat told Daniel Scott and Ginger Billing the following story:

> [Salgat] said he had had an altercation with [a girlfriend], that he had seen somebody in the house with her involved in a sexual act or whatever, and he threw a rock through the window and slapped the girl and that he thought surely he would get in trouble for that. *** He said the man ran away indicating he was scared off. *** He made a comment that if he had had [a firearm], he would have shot them both....

(R. 662, 664) Salgat identified the man who ran as being the man who had previously arrested him. (R. 689)

At approximately 2:00 a.m. on June 19, 1990, Salgat told Ramon Issacs the following story:

> He says he was coming along 98 and he was going over the speed limit, I guess over like 90 miles an hour, and he saw a cop and they made an U turn coming after him. So he ditched his car and walked five miles to my house. *** [H]e says he was afraid of having a second DWI or something.

(R. 746) At approximately 2:30 a.m. on the same date, Salgat told Michelle Deck and Victoria Howard essentially the same story as he had told Ramon Issacs. (R. 757, 774) Later that morning, he told Michelle Deck a different story:

> He said that he went over there and the door was open and he walked in and caught them in the act and that the guy reached for his gun and they struggled with it and the gun went off and he ran.

(R. 760)

On June 19, 1990 at 8:30 a.m., Salgat told Jane Fillingim the following story:

> Monday evening [Salgat] was at the Shaker and he, uh, got a phone call there and Charlotte asked him to come over to her house. So he says he went to her house. He didn't say how he got in or who let him in or anything. I -- I guess the door -- from what he says, the door could have -- must have been open, but he says that he went into the bedroom and that Charlotte was in bed with a guy. He did not mention any names and he said that, uh, when he walked in the room and they saw who it was, the guy pulled out a gun and was going to shoot him, but they had a struggle or fight or something and Sonny said he ended up shooting the guy."

(R. 656)

The night after the incident, Salgat told Christina Billing he had been set up. (R. 711)

During the charge conference, the State requested the following jury instruction:

> Inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent.

(R. 1251, 1391-1392) The following colloquy ensued:

> THE COURT: Inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent. It comes straight out of the case of Johnson v. State at 465 So. 2d 499, a 1985 Florida Supreme Court case where that particular instruction was given to a jury and the Supreme Court held that that was a proper instruction. I would assume that Mr. Taylor [defense counsel] that you would object to the giving of that?
>
> DEFENSE COUNSEL: I in general would object to that [instruction on inconsistent exculpatory statements] but it seemed to me that the facts of the Johnson case -- I'm trying to, there was no, there's no question in this particular case as to, in our case who shot the weapon, you know, what bullet killed the defendant. There's never been a denial by Mr. Salgat or the defense in this case as to what, who shot or what caused the death and as such I think that can be distinguished from Johnson. The fact that there were inconsistent statements made at a time based on the testimony of confusion and stress, it's different then what, then that which was under the facts of Johnson and therefore, I think it can be distinguished and I object to the state's requested No. 3.
>
> THE COURT: Mr. Markey [prosecutor], anything further?
>
> PROSECUTOR: Well, other than the fact that, Your Honor, in accident and misfortune you don't have consciousness of guilt. I mean that's the whole function, he gave multiple exculpatory statements to a variety of number of people and it's, very inconsistent statements that shows the consciousness that

> it was an unlawful as opposed to a justifiable killing or excusable killing. I mean he can argue that it's not but I mean that --
>
> THE COURT: I think again based upon the facts of this particular case and we're dealing with the issue of intent, that this is a fact for the jury to make a decision on and that this is an appropriate instruction that will be given.

(R. 1252-1253)

On appeal to the First District Court of Appeal, Salgat argued that the trial court committed reversible error in giving the jury instruction based on the following ground:

> The instruction on inconsistent exculpatory statements was in error, for the same reasons the Florida Supreme Court recently banned the flight instruction. This was an improper comment on the evidence which contaminated the jury's assessment of appellant's mental state in committing the burglary that underlay his felony murder convictions.

(I.B. 26) The State argued that (1) the issue was procedurally barred because the ground raised on appeal was different from the one raised at trial; (2) the issue was without merit; and (3) any error was harmless beyond a reasonable doubt. (A.B. 16-20)

In its opinion, the First District stated:

> Salgat asserts that the trial court erred in instructing the jury that Salgat's inconsistent exculpatory statements may be used to affirmatively show consciousness of guilt and unlawful intent and cites Fenelon v. State, 594 So. 2d 292 (Fla. 1992) (Supreme Court held that the jury instruction on flight was an improper judicial comment on the evidence and should no longer be given). The Florida Supreme Court has already decided that such an instruction is not an improper judicial comment on the evidence. Johnson v.

> State, 465 So. 2d 499 (Fla. 1985), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155. Accordingly, Salgat's counsel at trial argued that the present case was distinguishable from Johnson because there was no dispute that Salgat shot Bolyard, and therefore the instruction was unnecessary. **We find that Salgat's argument on appeal was not properly preserved for appellate review.** See Graves v. State, 548 So. 2d 801 (Fla. 1st DCA 1989). Therefore, we decline to address its merits and affirm the giving of the instruction based on Johnson, supra.

(Slip Opinion, 6-7) (e.s.)

Even though the First District expressly held that the issue was procedurally barred, it, nevertheless, certified the issue to this Court as one of great public importance. It stated:

> We do find that Salgat's appellate counsel raises an important question about whether Johnson may be reconciled under the Supreme Court's recent decision of Fenelon v. State, 594 So. 2d 292 (Fla. 1992). Accordingly, we certify the following question to the Supreme Court as a question of great public importance:
>
> WHETHER A JURY INSTRUCTION CONCERNING A DEFENDANT'S INCONSISTENT EXCULPATORY STATEMENTS PREVIOUSLY HELD PROPER UNDER JOHNSON V. STATE CONSTITUTES AN IMPROPER COMMENT UPON THE EVIDENCE IN LIGHT OF THE COURT'S DECISION IN FENELON V. STATE.

(Slip Opinion, 7)

In a motion for rehearing, the State strongly urged the First District to withdraw its certified question, arguing, in pertinent part:

> There is absolutely no way the defendant in this case can obtain relief on this issue in the Florida Supreme Court. The issue before the supreme court will be whether the trial court committed fundamental error when it

> instructed the jury on the instruction at issue here. This is so because the issue was not preserved for appeal, and the only other type of error reviewable on appeal is fundamental error (unpreserved error).
>
> How could the Florida Supreme Court ever hold that fundamental error occurred under the circumstances of the instant case? To do so, it would have to hold that the trial court had an affirmative duty to refuse to give the instruction, notwithstanding supreme court precedent expressly authorizing it. (Fundamental error means that the trial court had an affirmative duty sua sponte to correct the error.)

(Rehearing motion, 2) Without comment, the First District denied the State's motion.

SUMMARY OF ARGUMENT

Since the certified question was not preserved for appeal, this Court should decline to accept jurisdiction. If jurisdiction is accepted and the question addressed, the answer to the certified question is a resounding "No." Legislative restrictions on judicial comment do not extend to presumptive instructions, which merely inform the jury of a permissible outcome. The test for determining whether such an instruction should be given is whether it is more likely than not that the presumed fact flows from the proven fact. That test was amply satisfied in the instant case. Salgat told four inconsistent exculpatory stories from which his commission of an unlawful homicide could be inferred.

The other five issues are beyond the scope of the certified question, and this Court should decline to address them.

ARGUMENT

CERTIFIED QUESTION

> WHETHER A JURY INSTRUCTION CONCERNING A DEFENDANT'S INCONSISTENT EXCULPATORY STATEMENTS PREVIOUSLY HELD PROPER UNDER JOHNSON V. STATE CONSTITUTES AN IMPROPER COMMENT UPON THE EVIDENCE IN LIGHT OF THE COURT'S DECISION IN FENELON V. STATE.

PROCEDURE. It is hornbook law that appellate courts review the case tried in the trial court; they should not try everchanging theories fashioned by the defendant as he progresses through the appellate process. Florida Rule of Criminal Procedure 3.390(d) provides:

> No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.

In City of Orlando v. Birmingham, 539 So. 2d 1133, 1134-35 (Fla. 1989), this Court explained the rationale for the contemporaneous objection rule as it relates to jury instructions:

> [I]n criminal cases where the alleged error is giving or failing to give a particular jury instruction, this Court has refused to allow parties to object to the instruction for the first time on appeal. The requirement of a timely objection is based on practical necessity and basic fairness in the operation of the judicial system. A timely objection puts the trial judge on notice that an error may have occurred and thus provides the opportunity to correct the error at an early stage of the proceedings. It is essential that objections to jury instructions be timely made so that cases can be resolved expeditiously. In the absence of

> a timely objection, the trial judge does not have the opportunity to rule upon a specific point of law. Consequently, no issue is preserved for appellate review. [citations omitted]

See, also, Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

The Birmingham explanation for the contemporaneous objection rule is echoed in State v. Applegate, 591 P.2d 371, 373 (Ore. App. 1979):

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expenses of an appeal.

For thirty years or more, this Court has consistently refused to reverse convictions based on unpreserved errors in jury instructions. See, e.g., Brown v. State, 124 So.2d 481 (Fla. 1960) (lesser degree of unlawful homicide); State v. Bryan, 287 So.2d 73 (Fla. 1973) (same); State v. Fuller, 455 So.2d 357

(Fla. 1984) (same); Murray v. State, 491 So.2d 1120 (Fla. 1986) (same); Castor v. State, 365 So.2d 701 (Fla. 1978) (lawful homicide); State v. Smith, 573 So.2d 306 (Fla. 1990) (same); Banda v. State, 536 So. 2d 221 (Fla. 1988) (same); Smith v. State, 521 So.2d 106 (Fla. 1988) (disapproved SJI on insanity); Hodges v. State, 619 So. 2d 272 (Fla. 1993) (SJI on aggravating factor in death case); Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982) (charged offense of robbery); State v. Delva, 575 So. 2d 643 (Fla. 1991) (charged offense of trafficking in cocaine).

In Hodges, this Court, once again, made it unmistakably clear that a defendant could not raise one ground in the trial court and pursue a different ground on appeal:

> The [United States Supreme] Court found the former standard instruction on the heinous, atrocious, or cruel aggravator insufficient in Espinosa. That aggravator played no part in Hodges' sentencing; the cold, calculated, and premeditated aggravator, however, did. Hodges argued to the trial court that the facts of his case did not support finding that latter aggravator [CCP] and that the aggravator itself was unconstitutionally vague. The trial court gave the standard instruction on the cold, calculated, and premeditated aggravator, but Hodges did not object to the form of that instruction, nor did he request an expanded instruction on this aggravator.
>
> The contemporaneous objection rule applies to Espinosa error, i.e., a specific objection on the **form of the instruction** must be made to the trial court to preserve the issue for appeal. Despite the failure to object at trial, Hodges challenged the constitutionality of the cold, calculated instruction on appeal. We summarily found the issue meritless, but we should have held it procedurally barred because Hodges did not

> preserve it for review by objecting at trial. Therefore, we now hold that the sufficiency of the cold, calculated instruction has not been preserved for review. [citations omitted]

Id., 619 So. 2d at 273 (e.s.).

Turning to the facts in the instant case, defense counsel objected to the instruction on inconsistent exculpatory statements because (1) commission of the act (firing fatal shot) was not in dispute, and (2) the inconsistent statements were made when the defendant was confused and under stress. These were factual distinctions, not legal grounds. Presumably defense counsel was trying to argue that the instruction was unnecessary because it related to an undisputed issue, and the presumption was irrational under the circumstances of the case. Whether the trial court fully understood the import of defense counsel's arguments is not entirely clear. What is clear though is that defense counsel was not even remotely arguing that the instruction was improper because it was a judicial comment on the evidence. It would be another eight months before Fenelon v. State, 594 So. 2d 292 (Fla. 1992) was decided. The First District expressly held that the issue was not preserved for appeal. It, nevertheless, certified to this Court the question whether the jury instruction constituted an improper judicial comment on the evidence.

In his initial brief in this Court, Salgat has attacked the jury instruction on six grounds. He contends that (1) the instruction was a judicial comment on the evidence; (2) no policy

reason exists for singling out inconsistent exculpatory stories; (3) it is difficult to determine when inconsistent exculpatory stories indicate consciousness of guilt; (4) courts are confused in determining what quantum and type of evidence supports the instruction; (5) the instruction was inaccurate under the circumstances of the instant case; and (6) the instruction was incomplete because it failed to inform the jury that there may be reasons for giving inconsistent exculpatory statements consistent with innocence. Salgat also tries to bootstrap onto this issue the flight instruction, to which no objection was made. He argues that the flight instruction should not have been given, and that this error must be considered in conjunction with the error at issue here.

Salgat asserts that these grounds were preserved in the trial court by defense counsel's statement, "I in general would object to that," and "I object to the state's requested No. 3." (I.B. 22-24) He further contends that a specific objection was unnecessary because the judge would have denied it anyway. Salgat's failure to cite authority for these novel propositions is understandable, because there is none, and, in fact, the law is expressly to the contrary. Fla.R.Crm.P. 3.390(d); Hodges.

Since the certified question, which relates to only one of the above grounds, was not preserved for appeal, and since this Court routinely refuses to review errors in jury instructions under the fundamental error doctrine, the State urges this Court to decline to accept jurisdiction in this case.

SUBSTANTIVE LAW. The challenged jury instruction given in the instant case was approved of by this Court in Johnson v. State, 465 So. 2d 499 (Fla. 1985). The defendant in Johnson was convicted of first-degree murder and sentenced to death. Pretrial, he told a friend that he had killed a man, then admitted that it was a woman. He also told the police that he was not involved in the murder, that the victim died accidentally, that a friend murdered her, and finally that he murdered her. Id., 501-503. Pertinent to the issue in the instant case, this Court stated:

> Next appellant argues that the trial court erred in giving the following instruction to the jury:
>
> > Inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent.
>
> Appellant argues that this instruction had the effect of plainly telling the jury that appellant's pretrial statements were inconsistent, exculpatory, and conclusively probative of guilt. He argues that the instruction constituted an impermissible conclusive or mandatory presumption of appellant's guilt in violation of his rights to due process of law. Appellant also contends that the instruction was an improper judicial comment on what the evidence showed.
>
> ... We find that the instruction merely made the jury aware of a legally permissible inference from certain evidence, if found, and did not have the effect of creating a mandatory or conclusive presumption. Nor did the instruction constitute a judicial comment mandating or suggesting that the jury find certain facts from the evidence. The cases cited by appellant on improper judicial comment on evidence are vastly distinguishable. It was left to the jury to

> determine whether the statements were inconsistent and exculpatory and even then the instruction plainly allowed the jury to consider whether such facts, if found, had any value in deciding whether there was intent or consciousness of guilt.
>
> The instruction was a correct statement of the legal relevance of inconsistent pretrial statements. We find the appellant's argument on this point to be without merit.

Id., at 504.

The jury instruction given in the instant case and approved of in Johnson has a long and venerable history. In 1896, the Supreme Court in Wilson v. United States, 162 U.S. 613 (1896) rejected the defendant's claim that the jury was erroneously instructed that it could infer guilt from his inconsistent exculpatory statements. The Court stated:

> Nor can there be any question that, if the jury were satisfied, from the evidence, that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right, not only to take such statements into consideration, in connection with all the other circumstances of the case, in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense, made or procured to be made, as in themselves tending to show guilt. The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt, to be dealt with by the jury.

Id., at 620-621. Recently, the United States Supreme Court reaffirmed its holding that fabrication of evidence was proof of guilt. In Wright v. West, 505 U.S. ____, 120 L.Ed.2d 225, 241 (1992), a grand theft case, the court stated, "And if the jury

did disbelieve West['s explanations], it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."

Salgat cites State v. Bonner, 406 P.2d 160, 162 (Or. 1965) for the proposition that an instruction covering false statements of the defendant amounted to a comment on the evidence. The problem with Bonner is that the court offered no analysis whatever to give its conclusion content. Obviously, a legal conclusion is only as good as its rationale.

Two lines of United States Supreme Court cases illustrate that judicial comment on the evidence is a constitutionally acceptable practice. The first line of cases expressly permits judicial comment on the evidence. See, e.g., Vicksburg & M. R. Co. v. Putnam, 118 U.S. 545, 553 (1886); Starr v. United States, 153 U.S. 614, 624-626 (1894) (judge went too far); Capitol Traction Co. v. Hof, 174 U.S. 1, 13-16 (1899); Quercia v. United States, 289 U.S. 466 (1933) (judge went too far). In Vicksburg, the Supreme Court stated:

> In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. The powers of the courts of the United States in this respect are not

> controlled by the statutes of the states forbidding judges to express any opinion upon the facts. The exceptions to so much of the judge's charge as bore upon the liability of the defendant cannot, therefore, be sustained. [citations omitted]

118 U.S. at 553-554.[1]

The second line of cases permits jury instructions on permissive presumptions (inferences). See, e.g., Barnes v. United States, 412 U.S. 837 (1973) (unexplained possession of recently stolen property); Turner v. United States, 396 U.S. 398 (1970) (unexplained possession of heroin); United States v. Gainey, 380 U.S. 63 (1965) (unexplained presence at illegally operating still); Ulster County Court v. Allen, 442 U.S. 140 (1979) (illegal possession of firearms inferred from presence in car with firearm).

The use of judicial comment as an evidentiary device has the support of law school professors, such as Professor Nesson of Harvard University. He states that the problems with permissive inferences can be "eliminated by instructing about the presumption in a manner that leaves the predicate fact in context and states the instruction in the form of judicial comment on the evidence instead of as an abstract statement that fact A may be inferred from fact B beyond reasonable doubt." Comment, "Rationality, Presumptions, and Judicial Comment: A Response to

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[1] For a discussion of legislative curtailment of the common law powers of trial judges to comment on the evidence, see Wright, "The Invasion of the Jury: Temperature of the War," 27 Temp.L.Q. 137 (1953) and "Instructions to the Jury: Summary Without Comment," 1954 Wash.U.L.Q. 177.

Professor Allen," 94 Harvard Law Review 1574, 1583, n 60 (1981) (hereinafter Comment). Professor Nesson reads Ulster County Court as supporting his position:

> The Court [in Ulster] effectively directs lower courts to do precisely what Allen (and I) advocate -- to instruct on permissive inferences in a manner that leaves them in context, converting the abstract presumption instruction to a judicial comment on the evidence itself. Allen nonetheless seems hostile to the case and suggests that the Court appears headed in a "troublesome direction." The only possibly troublesome aspect of Ulster is that the instructions given by the trial judge in the case actually stated the permissive inference in the abstract, not in context. The Supreme Court examined the facts and other portions of the instructions and concluded that the jurors must have understood that they were to evaluate the permissive inference in the context of the case. The Court, though, had to stretch to reach this conclusion. It would be troublesome if lower courts, looking for direction after Ulster, were to model their instructions after those of the Ulster trial judge, instead of tailoring new instructions that follow the thrust of the Court's opinion.

Comment, 1584.

To further illustrate his point, Professor Nesson proposed the following instruction as a substitute for the abstract instruction that was actually given in Ulster:

> It is often possible to infer from the presence of loaded firearms in an automobile that the occupants of the automobile possessed the weapons. You must decide whether, in the context of this case, such a conclusion is justified as to each defendant. You should consider all the facts. For example, consider where the guns were found, whether they were in plain sight, how easy they were to reach. Based on your

> consideration of all the evidence, you must decide whether the prosecution has proved beyond reasonable doubt that each defendant is guilty as charged.

Comment, 1589.

In Florida, the trial judge cannot comment on the evidence because the Legislature forbids it. See section 918.10(1), Florida Statutes (1993) which provides that "[t]he charge shall be only on the law of the case . . . ." (e.s.); Gibson v. State, 7 So. 376, 378 (1890) (judge's comments constituted "a violation of the statute which forbids a judge to charge on the facts"). (Title 1, Chapter 14, § 1088, Fla. Rev. Stat. 1892 provided that "the judge presiding on such trial shall charge the jury only upon the law of the case; that is upon some point or points of law arising in the trial of said cause.")[2] The legislative mandate is incorporated into Rule 3.390(a), Fla.R.Crm.P.[3]

As this Court noted in Fenelon, a permissive presumption, specifically the flight instruction, "provides an exception to the rule that the judge should not invade the province of the jury by commenting on the evidence or indicating what inferences may be drawn from it." 594 So. 2d at 294. That being said, the

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[2] The State found the Gibson case by following the trail of supreme court cases cited in supreme court opinions, commencing with Fenelon and going backwards.

[3] The Supreme Court is authorized to adopt rules of procedure, but such rules are subject to repeal by general law enacted by two-thirds vote of the Legislature. Art. V, § 2, Fla. Const.

State does not read Fenelon to mean that all judicially-created permissive presumptions are henceforth invalid.[4]

What appears to have been of most concern to the Fenelon court was the weakness of the connection between the predicate fact and the inferred fact in the flight instruction. This Court stated:

> The difficulty inherent in the flight instruction is in deciding when "leaving" or "fleeing" actually indicates consciousness of guilt. Confusion over the application of the flight instruction is reflected by the many and varied circumstances under which the instruction has been given. ***
>
> [T]here is much disagreement as to what kind and what quantum of evidence will support an instruction on flight. ***
>
> In sum, we are troubled by the inconsistencies among the cases as well as with the lack of a meaningful standard for assessing what type of evidence merits the instruction.

594 So. 2d at 295-295.

In Fenelon, the jury in effect was instructed that guilt could be inferred from flight or concealment. However, it is not necessarily the case that every person who flees is guilty of the charged offense. It, therefore, would be improper in every case where flight occurred to give a flight instruction. On the other hand, if it is more likely than not under the circumstances of

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[4] The Legislature has created several statutory presumptions, some of which are mentioned in Professor Ehrhardt's Florida Evidence, § 301.2 (West 1993). Obviously these specific statutes would take precedent over the general statute prohibiting judicial comment on the evidence.

the case that the presumed fact (consciousness of guilt) flows from the proven fact (flight), the flight instruction ought to be given.[5] Another permissive presumption that would be acceptable in context, but not in the abstract, is found in Ulster County. Comment, 1584, n 62.

Returning to the jury instruction in the instant case, several points are worth making. The instruction comported with state law. It did not contain any elaboration of the evidence. Presumptive instructions, like this one, which are stripped of a factual context, do not violate legislative restrictions on judicial comment. This instruction, as with all other permissive inferences, helped the prosecution to overcome the inherent uncertainty in circumstantial proof. See, e.g., United States v. Gainey, 380 U.S. at 67 (Congress enacted permissive presumption to assist prosecution in proving its circumstantial evidence case). It is the State's burden of proof, not the defendant's theory of defense, that determines what evidence is to be admitted in the State's case in chief and which jury instructions are to be given. The defendant's decision to defend on one element and not on another is irrelevant.

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[5] A permissive presumption does not violate the due process clause if a rational connection exists between the facts proved and the presumed elemental fact. Ulster County Court v. Allen, 442 U.S. at 157. A rational connection exists if it is more likely than not that the presumed fact flows from the proven fact. Id., at 165.

Under the circumstances of the instant case it was more likely than not that consciousness of guilt and unlawful intent flowed from Salgat's inconsistent exculpatory stories. He told four stories. In two of the stories, he implicitly denied any involvement in the murder; in one story, he indicated that the shooting was accidental without identifying himself as the triggerman; and in the fourth story, he claimed he shot the victim in self defense. Specifically, Salgat stated: (1) he threw a rock through a window and slapped a girl; (2) he was caught speeding, ditched his vehicle, and fled on foot; (3) he went inside a woman's house, a man reached for his gun, they struggled, the gun discharged, and he ran; and (4) same story except that he shot the man. Neither stress nor confusion can account for the huge inconsistencies in these stories. The inconsistencies clearly indicated that Salgat was guilty of committing an unlawful homicide.

The State declines to address Salgat's perfunctory argument relating to the flight instruction, which he has attempted to bootstrap onto this issue (I.B. 22), other than to note that the trial occurred prior to Fenelon, and there was no error in giving the flight instruction. U.S. v. Tome, 3 F.3d 342, 353 (10th Cir. 1993), cert. granted, 114 S.Ct. 1048 (U.S. 2-22-94) ("cumulative-error analysis aggregates only actual errors to determine their cumulative effect").

HARMLESS ERROR ANALYSIS. It is clear that no error occurred in instructing the jury that inconsistent exculpatory statements

can be used to affirmatively show consciousness of guilt and unlawful intent. Here, Salgat took the stand and testified contrary to his previous statements to numerous witnesses. It was the evidence of inconsistent statements, and cross examination, which was damaging, not the jury instruction itself. The jury instruction itself merely reflects common experience and knowledge: people lie in order to conceal their behavior but, because it is difficult to remember the lies, even the lies become inconsistent. In any event, the evidence of guilt was so overwhelming that the jury instruction could have had no impact on the verdict, particularly when the prosecutor could have argued the same presumption to the jury.

Moreover, the burden is on the defendant to prove the harmfulness of unpreserved error. Salgat cannot meet his burden in the instant case. He admitted killing the victim. He was indicted for first-degree murder, the culpable mental states for which were either premeditation or intent to commit an enumerated felony. The jury convicted Salgat of first-degree murder with the latter mens rea. The underlying felony, burglary, was proved through physical evidence showing that Salgat stood on the partially enclosed deck and shot through the kitchen window. (R. 976, 992) The challenged jury instruction was more pertinent to the intentional killing of the victim, which the jury rejected, than to the intentional commission of burglary.

ISSUES II, III, IV, V, AND VI

These issues were not certified as questions of great public importance, three of which were not even addressed by the First District. This Court, and the Office of the Attorney General, have legitimate cases and issues which must be addressed and should not be wasting valuable time addressing points of law which have already been addressed or resolved by the district court.

This Court has recently declined to review issues beyond the scope of the conflict or the certified questions. See, e.g., State v. Hodges, 616 So. 2d 994 (Fla. 1993); Burks v. State, 613 So. 2d 441 (Fla. 1993); State v. Gibson, 585 So. 2d 285 (Fla. 1991); Stephens v. State, 572 So. 2d 1387 (Fla. 1991). The State asks the Court to do likewise here and will not address those issues unless directed to do so.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court (1) to decline to accept jurisdiction on the unpreserved certified question; (2) alternatively, to answer the certified question in the negative; (3) to decline to address all issues beyond the scope of the certified question; and (4) to affirm Salgat's judgments and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida, 32301 this 11th day of April, 1994.

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