IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,572

STATE OF FLORIDA

Petitioner.

vs.

DENNIS MANCUSO,

Respondent.

****

ON APPEAL FROM THE CIRCUIT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGES**

FLORIDA STATUTES:

PRELIMINARY STATEMENT

Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal; Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except that Petitioner may also be referred to as "the State."

The following symbols will be used:

"R" Record on Appeal

"RB" Respondent's Brief

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts set out in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

POINT I

The trial court properly instructed the jury on leaving the scene of an accident involving death or personal injury. The State maintains that a driver's duty to investigate the scene of an accident occurs upon having knowledge of the accident.

POINT II

The trial court properly denied Respondent's challenge for cause. Prospective Juror Jones indicated that she could be fair, and stated that she would follow the trial court's instructions.

POINT III

The trial court properly excluded evidence of the victims' blood alcohol levels and blood contents. The evidence was not relevant to any material fact in dispute.

ARGUMENT

POINT I

IN A PROSECUTION FOR VIOLATION OF SECTION 316.027, FLORIDA STATUTES (1991), THE STATE NEED NOT SHOW THAT THE DEFENDANT KNEW OF THE INJURY OR DEATH.

Respondent refers to the recent decision of the United States Supreme Court in Staples v. United States, 8 Fed. L. Weekly S115 (U.S. May 23, 1994) (RB 30-33). Petitioner submits that Staples supports its position in this case, for the court reiterated its earlier holding in United States v. Freed, 401 U.S. 601, 607, 609, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), that for a conviction under the National Firearms Act, the Government is not required to prove knowledge that a firearm is unregistered. Rather, it need only prove knowledge that a firearm is within the statutory definition of "firearm."

The State analogizes knowledge of a qualifying firearm to knowledge of an accident in the instant case. A person who is aware that he has a firearm within the terms of the statute "would hardly be surprised to learn that possession...is not an innocent act." Staples, 8 Fed. L. Weekly at S115; Freed 401 U.S. at 609. Similarly, a person who is aware that he has been in an accident would hardly be surprised to learn that leaving the scene of an accident is not an innocent act. At the very least, other persons involved in the accident might be left without adequate coverage for physical damage and possible long term, but not life-threatening, physical injury. Even more frightening, these other persons might be left without immediate medical intervention necessary to prevent an injury from turning into a fatality.

Hence, just as the government under the Firearms Act does not need to show that an owner of a firearm knew that it was unregistered, the State should not be required to show that a driver involved in an accident knew that it resulted in injury or death. The fact of an accident should alert a driver that he is dealing with a situation that places him "in responsible relation to public danger," Staples, 8 Fed. L. Weekly at S116; United States v. Dotterweich, 320 U.S. 277, 281, 88 L.Ed.48 (1943), so to make him "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Staples, 8 Fed. L. Weekly at S116; United States v. Balint, 258 U.S. 250, 253, 66 L.Ed. 604 (1922). If anything, the facts of the instant case present a stronger argument for requiring only minimal knowledge, because not only are accidents potentially dangerous, but unlike nonautomatic guns that are commonplace and widely accepted as lawful, leaving the scene of an accident is not. See Staples, 8 Fed. L. Weekly at S117.

The State disputes Respondent's contention that constructive knowledge of injury, i.e. a driver reasonably should know injury has occurred, sufficiently achieves the legislature's purpose of getting assistance to those who need it (RB. 24-25). "Should know" is grounded on circumstantial evidence, primarily on the severity of an accident. However, the possibility of injury is not always dependant on the degree of impact. For instance, a simple bump can cause a person's muscle or cartilage to be pulled or dislocated, or can aggravate a preexisting condition. Additionally, even the slightest impact could cause a

person with a heart problem, or other such disability, to become excited and have an attack. And, of course, there are times when injury might be delayed, like when a radiator damaged in a collision explodes a few minutes later. Therefore, the better policy is to require a driver who has been involved in **any** accident to stop and investigate.

The State maintains that the legislature included "willfully" in Section 316.027(2), Florida Statutes, because of its felony status, which is due to the increased risk associated with leaving the scene of an accident that involves injury, as opposed to one that does not. In Staples, the court suggested that some mens rea is required when a violation is punished as a felony. 8 Fed. L. Weekly at S118. Here, that mens rea, "willfully," refers to the intentional act of leaving the scene of an accident **regardless** of its nature. Thus, in this case, the State's discussion of "regulatory" and "public welfare offense" is not synonymous with strict liability, but means only that the evil prohibited by the act, failing to stop and remain at the scene of an accident, presents a public danger that must be prevented.

Respondent states that the court in State v. Johnson, 630 A.2d 1059 (Conn. 1993), on which Petitioner relies, construed a statute that is worded differently than section 316.027 (RB. 22). Indeed, the Connecticut statute reads, "Each person operating a motor vehicle who is knowingly involved in an accident which causes physical injury.... See Johnson, 630 A.2d at 1060 n.2. Despite the inclusion of the term "knowingly" in the Connecticut

statute, the court in Johnson rejected the defendant's argument that the State needed to show knowledge of injury. The thrust of the Connecticut and Florida statutes is the same, that some injury occured for the statute to be applicable; only one says "which causes injury," while the other says "resulting in injury."

Respondent claims that the Johnson decision was based on a statutory amendment unique to Connecticut (R.B. 22). The amendment, however, only changed the category of persons affected by the statute. Prior to the amendment, the statute applied to a person who "causes" injury, whereas after the amendment, it applied to a person "involved" in accidents which cause injury. The State submits that the amended version interpreted by the court in Johnson is similar to section 316.027.

Finally, while Respondent notes that no states in which the courts have interpreted hit-and-run statutes to require knowledge of injury have since adopted legislation to the contrary (R.B. 26), he does not claim that any state that has held that the state need not show such knowledge has done the same. Perhaps legislatures adopted the Model Code knowing its terms had not been judicially interpreted, thereby deferring to the courts for future clarification. What is important in the State of Florida is that this court consider the legislature's purpose in enacting section 316.027, to encourage driver responsibility and provide immediate assistance to those in need.

POINT II

THE TRIAL COURT PROPERLY DENIED RESPONDENT'S CHALLENGE FOR CAUSE.

This court does not have jurisdiction to consider this point. In Savoie v. State, 422 So.2d 308, 310 (Fla. 1982), this court stated that it may, in its discretion, consider other issues "properly raised and argued before this court." Respondents additional points were not properly raised, for he did not file a cross-notice to invoke this court's discretionary jurisdiction. Hence, he is only a respondent, not a petitioner, and therefore, is only entitled to respond to the argument raised by Petitioner, not make new argument. See generally Lopez v. State, 19 Fla. L. Weekly S304 (Fla. June 9, 1994).

The test for determining juror competency is whether a juror can lay aside any bias or prejudice, and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So.2d 1034, 1041 (Fla. 1984). Deciding whether a juror meets this test is within a trial court's discretion based upon what the court hears and observes. Hitchcock v. State, 578 So.2d 685, 688 (Fla. 1990). Manifest error must be shown before a trial court's ruling will be disturbed on appeal, Davis v. State, 461 So.2d 67, 70 (Fla. 1984), so an appellant has a heavy burden of showing an abuse of judicial discretion, Williams v. State, 386 So.2d 538, 540 (Fla. 1980).

Respondent has failed to meet that burden. Prospective Juror Jones never stated that she would not be able to render a verdict in this case, or that she was certain that she could not

be fair and impartial due to her experience. To the contrary, she said that she could be a fair juror (R 26, 53). She also stated that she would have to find Respondent not guilty if there was no evidence presented (R 82-83). Finally, she said that she could follow the trial court's instruction and put aside her sympathy for the victim (R 101). See Murphy v. State, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (it is sufficient to lay aside an opinion and base a verdict on the evidence); State v. Williams, 465 So.2d 1229, 1230 (Fla. 1985) (jurors stated they could be impartial and base their verdict solely on the evidence); Davis v. State, 461 So.2d 67, 70 (Fla. 1984) (juror said that she would listen to all of the evidence and base her decision on it); Parker v. State, 456 So.2d. 436, 442 (Fla. 1984) (juror said that she would follow the directions of the court and render a verdict based on the evidence); Hunt v. State, 330 So.2d 502, 503 (Fla. 3d DCA 1976) (juror said that her ability to be fair would not be affected).

Not only were the family deaths that Prospective Juror Jones recently endured not auto related (R 99), but Jones' job for the Department of Motor Vehicles giving road tests to drivers had nothing to do with automobile accidents (R 55). Although her husband worked for the Department of Transportation for twelve years, he did not deal with anything like the instant case (R 55). Prospective Juror Jones was involved in an automobile accident at one time, from which she settled a lawsuit, but she stated that she had no hard feelings about it (R 70-71). She said that she does not drink because of her church, but

acknowledged that she had gone to bars and taverns in the past, and said that she does not mind if others go to such places or drink (R 109-111). Jones left the voir dire proceedings not inexplicably, but to use the bathroom (R 76-77).

The cases cited by Respondent are distinguishable from the instant case. In Hamilton v. State, 547 So.2d 630, 632-633 (Fla. 1989), the juror stated that she had a preconceived notion of the defendant's guilt, and that the defendant would have to put forth evidence to convince her that he was not guilty. So, even if the juror had stated that she could render a decision based on the facts, she would have still impermissibly presumed the defendant was guilty.

And in Singer v. State, 109 So.2d 7 (Fla. 1959), one juror who had read an article about the case said that he had a fixed opinion about the case, while the other juror said that he knew the family of the victim, and that might cause him to be prejudiced or biased. The other juror also said that he had read an article about the case, had an opinion as to guilt, and that he would require evidence to remove the opinion.

In Denson v. State, 609 So.2d 627, 628 (Fla. 4th DCA 1992), the challenged juror was an assistant state attorney in the county where the defendant was being tried, while in Street v. State, 592 So.2d 369, 371 (Fla. 4th DCA 1992), the challenged juror suggested that if he knew the defendant had committed previous crimes, he might think that he was more capable of committing other crime.

In Robinson v. State, 506 So.2d 1070-1071 (Fla. 5th DCA 1987), and White v. State, 579 So.2d 784, 785 (Fla. 3d DCA 1991), the jurors in question said that because of their concern for children, they were not sure whether they could be impartial in cases where the victims were children. And, in Kemp v. State, 611 So.2d 13, 14 (Fla. 3d DCA 1992), the challenged juror said that she thought she would think of her husband, a firefighter, running through a burning building, where the case was for arson.

Unlike the above referenced cases, Prospective Juror Jones did not have a specific bias for the state (Denson) or against the defendant (Singer, Hamilton, Street). Nor was this case one where Appellant was on trial for causing the accident which resulted in the death of one victim, but was only being tried for leaving the scene of the accident. In Robinson and White, the defendants were being tried for offenses which caused, or could have caused, harm to children. And, in Kemp, the defendant was accused of causing a fire, which presumably required firefighters to place their lives in jeopardy.

Regardless, any error in refusing to excuse Jones for cause was harmless. A trial court has the discretion to grant additional peremptory challenges, in the interest of justice where there is a possibility that a defendant would be prejudiced. Johnson v. State, 222 So.2d 191, 192 (Fla. 1969). Sub judice, the trial court did not abuse its discretion because appellant did not suggest any prejudice. See Parker v. State, 456 So.2d 436, 442 (Fla. 1984); Knight v. State, 338 So.2d 201, 203 (Fla. 1976).

Looking directly at the issue of whether an appellant has shown reversible error by pointing to a prospective juror whom he wishes to excuse with an additional peremptory challenge, this court has indicated that the juror should be objectionable. See, e.g., Hall v. State, 614 So.2d 473, 476 (Fla. 1993) (for reversible error, an "objectionable" juror must have been accepted); Hitchcock v. State, 578 So.2d 685, 689 (Fla. 1990) (petitioner did not show "prejudice" due to his being denied a second additional peremptory challenge); Trotter v. State, 576 So.2d 691, 693 (Fla. 1990) (to show reversible error, a defendant must show that an "objectionable" juror had to be accepted); Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990) (petitioner failed to show juror who served on jury was "unacceptable" to him). Pentecost v. State, 545 So.2d 861, 863 n.1 (Fla. 1989) (to show reversible error, defendant must show that an "objectionable" juror sat on the jury). That makes sense because, as stated above, unlike with peremptory challenges, additional peremptory challenges are discretionary. Therefore, if he really wants one, a defendant needs to do something more than merely ask for an additional peremptory challenge in order to show that it would facilitate justice.

In this case, the State fears that Respondent's request for a second additional peremptory challenge might have been made only for the purpose of establishing harmless error on appeal. Defense counsel did not indicate why he wished to strike Juror Lambke (R 120). A review of the record indicates that she would have probably been a good juror for the defense, rather than

being "objectionable," since she admitted to driving at night while fatigued (R 104-105), and stated that she hit another car in a collision in the past (R 74).

POINT III

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE VICTIMS' BLOOD ALCOHOL LEVELS AND BLOOD CONTENTS.

This court does not have jurisdiction to consider this issue for the same reason given under Point II.

Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401, Florida Statutes. Why the victims in this case were crossing the interstate on foot between four and six in the morning was not a material fact in this case. Thus, the blood alcohol levels, and blood contents, of the victims was irrelevant. Without that evidence, the jury could conclude that the victims' behavior was "irrational," which is what defense counsel wanted to establish by way of the blood test results (R 133). In any event, Respondent's knowledge, and not the victims, was what was in dispute.

Respondent suggests that the jury might have thought that the girls were engaging in behavior that might have increased their visibility. Respondent, however, ignores that the blood alcohol test results would only go to show why the girls acted as they did, and not what the girls were doing at the time they were struck. Regardless, in Respondent's statement, the police officer told him that the girls were walking in the emergency lane and decided to cross the street.

Warren v. State, 577 So.2d 682 (Fla. 1st DCA 1991), cited by Respondent, is distinguishable from the instant case. In Warren, the proposed evidence went to a material fact in dispute because it tended to show the thrust of the defendant's defense, that the

victim was suffering from cocaine withdrawal which caused him to be violent towards the defendant.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this court REVERSE the decision of the Fourth District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by courier to: PAUL PETILLO, ESQUIRE, Assistant Public Defender, 421 3rd Street, West Palm Beach, Florida 33401 this 27th day of June, 1994.

Of Counsel

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