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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,862

STATE OF FLORIDA,

Petitioner,

v.

KENNETH M. PIERCE,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Kenneth Pierce was the defendant below and will be referred to as "Respondent." The State will be referred to as "Petitioner." References to the record will be preceded by "R." References to any supplemental record will be preceded by "SR."

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with vehicular homicide in the death of Nicole Walker (Count I), failing to stop and give his name after an accident with injury to Michelle Vitallo and/or Brooke Mansey (Count II), operating a motor vehicle with a suspended driver's license and causing the death of Nicole Rae Walker (Count III), and tampering with evidence by removing a camper top from (Count IV) and by altering front end damage to a pickup truck (Count V) (R 2199-2201).

During voir dire, the trial judge told prospective jurors that first cardinal rule was that they must presume Appellant innocent (R 52). The second cardinal rule is that the State has the burden to prove the Defendant guilty (R 52). The Defendant does not have to prove anything (R 52, 195). The Defendant is presumed innocent (R 53). The State must prove the Defendant guilty (R 53).

The trial judge then told the prospective jurors (R 53-55):

> Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, you must be satisfied the State must demonstrate to you beyond and to the exclusion of every reasonable doubt that the Defendant is, in fact, guilty. That's what's known as the standard of proof and that's a landmark concept, that's a bedrock foundation of our American criminal

jurisprudence system. And that is whenever a jury anywhere, whether San Diego, California to Bangor Maine, from Seattle, Washington to Key West, whenever any jury ever finds any Defendant guilty of any crime, whether it be stealing a six pack of beer, first degree murder, robbery, rape, drug trafficking, arson burglary, no matter what the charge is, if that jury finds the Defendant guilty that means they have been satisfied and has been demonstrated to them by the State that the Defendant is guilty beyond and to the exclusion of every reasonable doubt.

Now, I'll give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of trial. But suffice it to say, it's a very heavy burden about the State shoulders whenever it charges somebody with committing a crime in order to secure a conviction. And even though it's a heavy burden however, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt.

You do not have to be one hundred percent satisfied the Defendant's guilty in order to find him guilty. The only thing that's absolutely certain in life is death and taxes. So the State does not have to convince you to 100 percent certainty of the Defendant's guilt but merely beyond and to the exclusion of reasonable doubt.

And as I told you, I will give you a more elaborate definition of what that phrase means later during the instructional phrase of the trial. But suffice it to say it's a very heavy burden that the State has.

> Now, the point I'm trying to make is that at the conclusion of this trial if you have a doubt as to the Defendant's guilt, you must find him guilty, unless it's a reasonable doubt. If you have a doubt you must find him guilty unless it's a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason to, that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt , an imaginary doubt, or a forced doubt, that's not a reasonable doubt. And if the State otherwise convinces you that the elements of these crimes are present, you must find the Defendant guilty.

The trial judge told prospective jurors that the burden of proof was on the State (R 55). Appellant had no burden (R 56). His failure to present evidence could not be held against him (R 56). He cannot be presumed guilty because he does not put on evidence (R 56, 57). The defense has no burden (R 58).

The trial judge then said (R 61):

> Now, the fifth phase of the trial consists of the instructions. That's where I give you the law you apply to the evidence in this case. Any pre-conceived ideas you have as to what the law is or what the law should be must be disregarded by you. The only law you apply to the evidence in this case is the law that I give you (emphasis supplied).

The trial judge also told the jury that every element of every charge must be proved beyond and to the exclusion of every

reasonable doubt (R 62, 160). The prosecutor indicated that Appellant must be presumed innocent until the State proves all elements of each crime beyond a reasonable doubt (R 194). Defense counsel extensively discussed the reasonable doubt and burden of proof standards (R 215-25, 386-87).

At the close of evidence, the trial judge instructed the jury that the burden of proof was on the State and that the Defendant was presumed innocent until every material allegation of the offenses are proved beyond a reasonable doubt (R 2077-78).

The trial judge then stated (R 2078):

> Whenever you hear the words 'reasonable doubt,' you must consider the following:
>
> A reasonable doubt is not a possible doubt, a speculative doubt, and imaginary doubt or forced doubt. Such a doubt must not influence your to return a verdict of not guilty if, in fact, you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.
>
> A reasonable doubt may arise from the evidence, conflict in the evidence or lack of evidence.
>
> The bottom line is, if you have a reasonable doubt,

you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty (emphasis supplied).

The trial judge later told the jurors that they must follow the law as given in these instructions (R 2081). The case must be decided only upon the evidence (R 2081). The trial judge again reminded the jury that they must follow the law as explained in these instructions just given (R 2081).

Appellant specifically agreed to the final jury instructions as given by the trial judge (R 1981-82, 2088)

The jury found Petitioner guilty as charged (R 2324-28)

The Fourth District reversed, finding the trial judge's unobjected to preliminary statements on reasonable doubt made to prospective jurors to be fundamental error under Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. Nov. 7, 1995). See Pierce v. State, 671 So. 2d 186 (Fla 4th DCA 1996). Jurisdictional briefs were filed. This Court then granted Petitioner's motion to stay and ordered briefing on the merits.

JURISDICTIONAL STATEMENT

The issue in this case is whether a trial judge's unobjected to preliminary comments on reasonable doubt constitute fundamental error. This claim has been raised in at least nineteen cases, including:

Brown v. State, Case no. 95-3997 (pending)

David Jones v. State,
656 So. 2d 489 (Fla. 4th DCA),
rev. denied, 663 So. 2d 632 (Fla. Nov. 7, 1995)(reversed).

Cifuentes v. State, 21 Fla. L. Weekly D77 (Fla. 4th DCA Jan. 3, 1996)(reversed based on Jones)(notice to invoke filed).

Frazier v. State, 664 So. 2d 985 (Fla. 4th DCA), rev. denied, 666 So. 2d 145 (Fla. 1995)(reversed based on Jones).

Jones v. State, 662 So. 2d 365 (Fla. 4th DCA), rev. denied, 664 So. 2d 249 (Fla. 1995)(reversed based on Jones).

Lusskin v. State, Case No. 95-0721 (pending)

McInnis v. State, 671 So. 2d 803 (Fla. 4th DCA 1996) (reversed based on Jones, pending in this Court, case no. 87,915).

Pierce v. State, 671 So. 2d 186 (Fla 4th DCA 1996) (reversed based on Jones, jurisdiction pending in this Court, Case no. 87,862).

Poole v. State, 21 Fla. L. Weekly D245 (Fla. 4th DCA Jan. 24, 1996) (reversed based on Jones), notice to invoke filed).

Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA), rev. denied,

664 So. 2d 249 (Fla. 1995)(reversed based on Jones).

Reyes v. State, Case No. 88,242 (jurisdiction pending).

Variance v. State, 21 Fla. L. Weekly D79 (Fla. 4th DCA Jan. 31, 1996) (reversed based on Jones)(jurisdiction accepted by this Court, Case no. 87,916).

Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995) (reversed based on Jones, pending in this Court, case no. 87,575).

Bove v. State, 670 So. 2d 1066 (Fla. 4th DCA 1996) (reversed based on Jones, question certified).

Rodriguez v. State, Case no. 95-0749 (pending).

Smith v. State, Case no. 95-1636 (pending).

Jackson v. State, Case no. 95-3738 (pending).

The trial judge in Jones had been making these preliminary comments for many years. Not surprisingly, this issue is also being raised in post-conviction motions. See e.g., Tricarico v. State, 629 So. 2d 142 (Fla. 4th DCA 1993)(trial court case no. 91-8232 CF10).

Obviously, some of theses cases may be difficult to retry. A great number of victims are affected by these cases. Smith involves convictions for kidnaping, extortion, impersonating a police officer and burglary. This case involves the killing of a young child. Lusskin involves a conviction for solicitation to commit first degree murder. Bove is a first degree murder case.

Rodriguez is an attempted first degree murder case. Tricarico is a first degree murder case.

In McInnis, the Fourth District found the comments of a ***second*** trial judge to be fundamental error under Jones. In Smith, a ***third*** judge's comments are being challenged as impermissible under Jones. In Brown, and Jackson, the comments of two more trial judge's are being challenged as fundamental under Jones. This issue is unquestionably one of great public importance. This Court should accept jurisdiction as it did in Wilson and correct the Fourth District's far-reaching misapplication of the law as soon as possible.

SUMMARY OF THE ARGUMENT

I & II

Taken alone, or properly considered with the complete, approved, standard instructions given at the end of trial, the unobjected to preliminary comments on reasonable doubt were an accurate statement of the law. The reasonable doubt standard does not require absolute or one hundred percent certainty. Absolute or one hundred percent certainty is an impossibility. The trial judge's comments were not error, fundamental or otherwise.

ARGUMENT

ISSUE I

THE TRIAL COURT'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT ERROR.

The Fourth District found the following comments to be fundamental error (R 53-55):

> Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, you must be satisfied the State must demonstrate to you beyond and to the exclusion of every reasonable doubt that the Defendant is, in fact, guilty. That's what's known as the standard of proof and that's a landmark concept, that's a bedrock foundation of our American criminal jurisprudence system. And that is whenever a jury anywhere, whether San Diego, California to Bangor Maine, from Seattle, Washington to Key West, whenever any jury ever finds any Defendant guilty of any crime, whether it be stealing a six pack of beer, first degree murder, robbery, rape, drug trafficking, arson burglary, no matter what the charge is, if that jury finds the Defendant guilty that means they have been satisfied and has been demonstrated to them by the State that the Defendant is guilty beyond and to the exclusion of every reasonable doubt.
>
> Now, I'll give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of trial. But suffice it to say, it's a very heavy burden about the State shoulders whenever it charges somebody with committing a crime in order to secure a

conviction. And even though it's a heavy burden however, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt.

You do not have to be one hundred percent satisfied the Defendant's guilty in order to find him guilty. The only thing that's absolutely certain in life is death and taxes. So the State does not have to convince you to 100 percent certainty of the Defendant's guilt but merely beyond and to the exclusion of reasonable doubt.

And as I told you, I will give you a more elaborate definition of what that phrase means later during the instructional phrase of the trial. But suffice it to say it's a very heavy burden that the State has.

Now, the point I'm trying to make is that at the conclusion of this trial if you have a doubt as to the Defendant's guilt, you must find him guilty, unless it's a reasonable doubt. If you have a doubt you must find him guilty unless it's a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason to, that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt , an imaginary doubt, or a forced doubt, that's not a reasonable doubt. And if the State otherwise convinces you that the elements of these crimes are present, you must find the Defendant guilty (emphasis supplied).

Initially, Petitioner notes that the "instruction" found to be fundamental error in this case and in Jones v. State, 656 So.

2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995), was a ***preliminary*** statement made to prospective jurors before a jury was selected or sworn and before any evidence was taken. These potential jurors had no legal duty to heed the preliminary statements made prior to their being sworn as jurors. United States v. Dilg, 700 F.2d 620, 625 (11th Cir. 1983). There is no legal basis to assume that they did follow these statements Id.

Even if these preliminary comments could somehow be considered equivalent to formal instructions to which the later selected and sworn jury was bound, Jones is incorrect. In Jones, the Fourth District held that a preliminary jury "instruction" on reasonable doubt constituted fundamental error because it indicated "absolute" or "one hundred percent" certainty was not required. 656 So. 2d at 490.

The trial judge's comment was an accurate statement of the law. It is undeniable that the reasonable doubt standard does not require absolute or one hundred percent certainty. It is undeniable that absolute or one hundred percent certainty is an impossibility. In fact, if a prospective juror demands one hundred percent proof by the State, that is grounds to strike the prospective juror. See Drew v. State, 743 S.W. 2d 207, 209-10 (Tex.Cr.App. 1987) and cases cited therein (prospective juror

properly struck by State where he said he would require "one hundred percent" proof as that level of proof exceeded the reasonable doubt standard); Ruland v. State, 614 So. 2d 537, 538 (Fla. 3d DCA), rev. denied, 626 So. 2d 207 (Fla. 1993)(same) and United States v. Hannigan, 27 F. 3d 890, 894 (3rd Cir. 1994) n. 3 (reasonable doubt standard does not require 100 percent probability). The trial judge's statement is completely accurate.

Moreover, the trial judge's preliminary comment was balanced. The trial judge repeatedly stated that it was a very heavy burden (R 54). The trial judge stated that a reasonable doubt was a doubt one can attach a reason to, so long as it was not a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt (R 55). The latter portion of this statement is taken directly from approved standard instruction on reasonable doubt. See Florida Standard Jury Instruction 2.03. If anything, the language equating reasonable doubt with *any* doubt one can attach a reason to, *overstates* the quantum of proof required. See Victor v. Nebraska, 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583, 597 (1994)(a reasonable doubt at a minimum, is one based upon reason).

The trial court's comments also repeatedly stressed and

emphasized that the proof must be beyond and to the exclusion of every reasonable doubt (R 53, 54). "Reasonable doubt" has a self-evident meaning. See Butler v. State, 646 A. 2d 331, 336 (D.C.App. 1994) (term "reasonable doubt" has self-evident meaning comprehensible to lay juror). Taken as a whole, the preliminary comment did not understate the burden of proof required. See Victor, 127 L. Ed. 2d at 597, 601 (instructions must be read as a whole).

Additionally, Jones did not mention that as in this case, the complete, approved, standard jury instructions on reasonable doubt were given to the sworn jury at the end of the case. See Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994)(approving the standard jury instruction on reasonable doubt, citing Victor). The State had been arguing in the many cases affected by Jones, that the Fourth District overlooked the fact that the complete, approved, standard instructions were given. However, subsequent cases make it clear that the Fourth District did not overlook that fact, it simply refused to consider the "balancing effect" of the standard instructions because they were not given until the end of the case:

> In addition, as in Jones, **there were no proper balancing instructions.** In both cases, the instructions were given to the

> venire, and the standard instructions were not given until the jury was being instructed before retiring. Without these balancing instructions, the error was fundamental.

McInnis v. State, 671 So. 2d 803, 804 (Fla. 4th DCA 1996)(emphasis supplied).

The Fourth District's holding that it would not consider the standard, complete, approved standard jury instructions as "balancing instructions" because they were not given until the end of the case, is directly contrary to rudimentary, black-letter law. In Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944), this Court held:

> It is a recognized rule that a single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail (emphasis supplied).

This elementary principle of law has not changed since Higginbotham. See Austin v. State, 40 So. 2d 896, 897 (Fla. 1949)(same); Batson v. Shelton, 13 So. 2d 453, 456 (Fla. 1943)(same); Johnson v. State, 252 So. 2d 361, 364 (Fla. 1971)(same); Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994)(same); McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977)(same); Krajewski v. State, 587 So. 2d 1175, 1180 (Fla. 4th

DCA 1991) and Sloan v. Oliver, 221 So. 2d 435 (Fla. 4th DCA 1969).

Petitioner also notes that the trial judge specifically incorporated by reference the complete, approved, standard instruction on reasonable doubt ***while*** making the preliminary comments on reasonable doubt (R 54):

> Now, I'll give you a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of trial. But suffice it to say, it's a very heavy burden about the State shoulders whenever it charges somebody with committing a crime in order to secure a conviction.
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> * * *
>
> And as I told you, I will give you a more elaborate definition of what that phrase means later during the instructional phrase of the trial. But suffice it to say it's a very heavy burden that the State has.

The trial judge then said (R 61):

> Now, the fifth phase of the trial consists of the instructions. That's where I give you the law you apply to the evidence in this case. Any pre-conceived ideas you have as to what the law is or what the law should be must be disregarded by you. The only law you apply to the evidence in this case is the law that I give you (emphasis supplied).

The Fourth District in Jones stated that "At bar, the trial judge's instructions ***were accurate*** as far as they went." Id. at 491 (emphasis supplied). It is extremely difficult to see how the preliminary comments, which the Fourth District acknowledged were "accurate as far as they went," could be fundamental error when considered with the standard, approved, complete jury instructions on reasonable doubt, incorporated by reference into the preliminary comments on reasonable doubt. Jones as clarified in McInnis, directly conflicts with Esty, Higginbotham, and all other cases holding that instructions must be considered as a whole. This Court should quash this far-reaching misapplication of the law by disapproving Jones and reversing this case.

The Fourth District relied on Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), in finding the statement in Jones to be fundamental error. Id. at 490-91. Cage does not support the Fourth District's holding. In that case the instruction equated a reasonable doubt with an "actual substantial doubt," "such doubt as would give rise to a grave uncertainty." See Victor, 127 L. Ed. 2d at 590.

Saying that absolute certainty is not required, a completely accurate statement, is world's apart from the "grave uncertainty" language in Cage. The comments in this case were accurate and

went further by including the full, approved, standard instructions on reasonable doubt and presumption of innocence. See Higginbothem, 19 So. 2d at 830; Victor, 127 L. Ed. 2d at 597, 601 (instructions must be read as a whole). Those instructions included the "abiding conviction of guilt" language (R 2078), which Victor specifically held correctly states the Government's burden of proof. Id. at 596. Victor held that when that language was combined with the challenged language in that case, any problem with the instruction was cured. Id. at 596, 600.

In both Victor and Cage, the challenged instructions included virtually identical language to that found to be fundamental error in this case and Jones. Both the Victor and Cage instructions stated that an "absolute or mathematical certainty" was not required. Victor, 127 L. Ed. 2d at 590-91, 598. Neither case held that portion of the instruction was in any way incorrect. This was made clear in Victor, where the Court highlighted the portion of the Cage instruction it found problematic. Victor at 590-91. The "absolute or mathematical certainty" language was not in any way found faulty in either opinion. Id. at 590-91, 598. See also Pilcher v. State, 214 Ga.App. 395, 448 S.E.2d 61, 63 (1994)(in neither Victor nor Cage did the Court find anything objectionable in a trial judge's

defining reasonable doubt by stating that mathematical certainty was not required). Accordingly, Cage does not support the Fourth District's holding.

Moreover, Victor makes clear that Cage was incorrect in that it employed the wrong standard of review. In Victor, the Court corrected its standard of review from that relied on in Cage. The Court admitted that "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." Id. at 591 (emphasis in original, quoting from Estelle v. McGuire, 502 U.S. ___, ___, and n.4, 112 S. Ct. 475, 116 L. Ed. 2d 385). Nevertheless, the Fourth District continues to apply the overruled Cage standard. See Bove v. State, 670 So. 2d 1066, 1069 (Fla. 4th DCA 1996)(finding fundamental error because the jury "could have" misunderstood the standard).

In Victor, the Court noted that Cage was the ***only*** time in history that it had found a definition of reasonable doubt to violate due process. Victor at 590. The Court then reviewed two reasonable doubt instructions, finding neither improper.

Jones faults the preliminary comments because they indicated "certitude was not required," suggesting the jury may base a

guilty verdict on a "probability of guilt so long as it was a remarkably strong probability." Id. at 490.

In Victor, the Defendants made a similar claim. One Defendant argued that using "moral certainty" in the instruction was error because a dictionary defined "moral certainty" as "resting upon convincing grounds of probability." Id. at 595. The United States Supreme Court rejected that argument:

> But the beyond a reasonable doubt standard is itself probabilistic. '[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.
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> * * *
>
> The problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.

Id. at 595-96 (emphasis added). See also United States v. Williams, 20 F. 3d 125, 127, 131 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 246, 130 L. Ed. 2d 168 (1994) (relying on Victor to reject challenge to instruction equating reasonable doubt to a "real possibility.")

In Victor, the Court found no error in the following instruction:

> 'Reasonable doubt' is such doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction *to a moral certainty*, of the guilt of the accused. At the same time, ***absolute or mathematical certainty is not required.*** *You may be convinced of the truth of the fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken.* You may find an accused guilty upon ***strong probabilities*** of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* arising from the facts or circumstances shown by the evidence, or from lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Id. at 598 (some emphasis added).

The language in this case is not nearly as questionable as that in Victor. Unlike Victor, this case and Jones, involve ***preliminary*** comments, made before a jury was even chosen or sworn. The complete, standard, approved instructions on reasonable doubt were given at the end of the case and incorporated by reference into the preliminary instructions. The comments in this case and Jones merely stated that absolute certainty was not required. Absolute certainty is not required. It is an impossibility.

Petitioner has been unable to locate any cases decided since

Victor (other than Jones and its progeny) that have found statements remotely similar to the ones given here to be error, let alone fundamental error. In fact, many cases with formal instructions that are much more questionable have been affirmed under Victor. See, e.g., Harvel v. Nagle, 58 F.3d 1541 (11th Cir. 1995) (equating reasonable doubt with an "actual and substantial" doubt not error under Victor); People v. Reyes, 615 N.Y.S.2d 450, 451 (A.D.2), appeal denied, 84 N.Y.2d 871, 642 N.E. 2d 336, 618 N.Y.S.2d 17 (1994) (instruction referring to reasonable doubt as "something of consequence" and "something of substance" not improper under Victor.); Strong v. State, 633 N.E.2d 296 (Ind.App. 5 Dist. 1994) (instruction defining reasonable doubt as "fair, actual and logical doubt" was proper under Victor); State v. Bryant, 446 S.E.2d 71 (N.C. 1994) (instruction defining reasonable doubt as a "substantial misgiving" was not improper under Victor); State v. Smith, 637 So.2d 398 (La.), cert. denied, ___ U.S. ___, 115 S. Ct. 641, 130 L. Ed. 2d 546 (1994) (instruction including terms "substantial doubt" and "grave uncertainty" not improper under Victor); People v. Gutkaiss, 614 N.Y.S. 2d 599, 602 (A.D. 3 1994) (use of terms "substantial uncertainty" and "sound substantial reason" not error under Victor); Butler v. U.S., 646 A.2d 331, 336-37

(D.C.App. 1994) (instruction that defines reasonable doubt as one that leaves juror so undecided that he cannot say he is "firmly convinced" of defendant's guilt, was not error under Victor); Minor v. United States, 647 A.2d 770, 774 (D.C.App. 1994) (trial judge's misstatement that government was not required to prove defendant's guilt beyond a reasonable doubt was not reversible error under Victor when considered with full instructions) and Weston v. Ieyoub, 69 F.3d 73, 75 (5th Cir. 1995)("grave uncertainty" language not error under Victor when combined with "abiding conviction" language). See also Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (instruction 21)("There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.") and Devitt, Blackmar, Wolff, and O'Malley, Federal Jury Practice and Instructions, Section 12.10 (1992)("it is not required that the government prove guilt beyond all possible doubt.").

The Fourth District's holding on this subject is an anomaly. This Court should disapprove Jones and reverse this case.

ISSUE II

THE TRIAL JUDGE'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT FUNDAMENTAL ERROR.

In finding *fundamental* error by the "[f]ailure to give a complete and accurate instruction," Jones, 656 So. 2d at 491, the Fourth District improperly ignored the fact that this was a preliminary comment made at the start of voir dire. The complete, approved, standard jury instructions on reasonable doubt and burden of proof were given at the close of evidence in Jones and in this case (R 2077-78). The jury was told that it *must* follow those instructions (R 2081). It is difficult to see how the preliminary comment, which the Fourth District acknowledged was "accurate as far as it went," could be fundamental, when the trial judge gave the complete approved standard jury instruction at the close of the case. See Rojas v. State, 552 So. 2d 914, 915 (Fla. 1989)(an error during reinstruction is not fundamental and requires an objection to preserve the error). See also People v. Reichert, 433 Mich. 359, 445 N.W. 2d 793 (1989) (trial court's remarks during voir dire did not mislead jurors concerning their power to convict or acquit).

The preliminary comment properly informed prospective jurors

that absolute certainty was not required in a criminal trial. It is not unusual for inexperienced prospective jurors to believe that the State must prove its case beyond all doubt. If prosecutors think these people may be pro-defense, they might then strike these prospective jurors for cause. The obvious purpose of the instruction was to prevent the exclusion of otherwise qualified prospective jurors who might initially think that the prosecution's proof must be beyond all doubt. This *preliminary* comment was obviously designed to prevent the defense from losing prospective jurors it felt may be desirable. See Drew, 743 S.W. 2d at 209 (prospective juror properly struck by State where he said he would require "one hundred percent" proof as that level of proof exceeded the reasonable doubt standard) and Ruland, 614 So. 2d at 538 (same). It is hardly surprising that Respondent did not object to a comment that helped him during voir dire. He should not be allowed to take advantage of the comment in the trial court and then claim fundamental error on appeal.

In finding *fundamental* error, the Fourth District distinguished Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991) because in that case the Court also gave extensive and proper jury instructions on reasonable doubt and presumption of

innocence. That distinction is illusory. In this case and in Jones, the trial judge gave the complete, approved, standard instructions on reasonable doubt and presumption of innocence (R 454-56). See McInnis, 671 So. 2d at 804 (acknowledging that the standard instructions were given in Jones).

In the area of jury instructions, to be fundamental, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Jackson v. State, 307 So. 2d 232, 233 (Fla. 4th DCA 1975); State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991). See also United States v. Merlos, 8 F. 3d 48 (D.C. Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1635, 128 L. Ed. 2d 358 (1994) (instruction equating reasonable doubt with "strong belief" in defendant's guilt did not constitute fundamental error); Perez v. State, 639 So. 2d 200 (Fla. 3d DCA 1994) (no fundamental error shown by unobjected to reasonable doubt instruction, citing Victor); Minshew v. State, 594 So. 2d 703, 713 (Ala.Cr.App. 1991) (Cage claim not preserved where no objection made below).

In Esty v. State, 642 So. 2d 1074 (Fla. 1994), the defendant objected to the standard reasonable doubt instruction on the basis that it used certain terms, including "possible doubt."

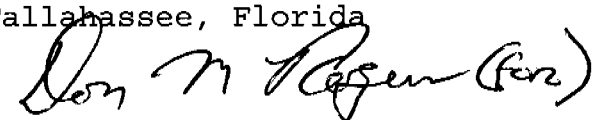
Id. at 1080. This Court found the issue unpreserved because defense counsel never requested or submitted an alternate instruction. This Court went on to hold that the standard jury instruction (the one given here) was proper under Victor. Id. at 1080.

There was no error, fundamental or otherwise, in this case. This Court should reverse this case and disapprove Jones.

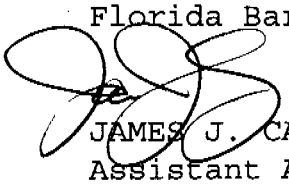
CONCLUSION

The number of cases affected by the Fourth District's decision in Jones is huge and continues to grow. The decision is without support in the law. The trial judge's comments were not erroneous. This Court should reverse this case and disapprove the decision in Jones.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510



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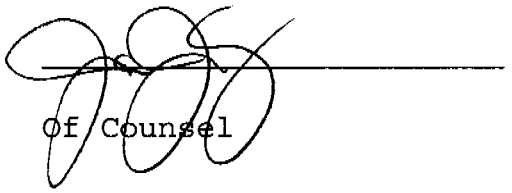
Certificate of Service

I CERTIFY that a true copy has been furnished by courier to Tanja Ostapoff, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach, FL 33401, this 25 day of July 1996.



Of Counsel

In *Crossley*, the court held that the two crimes were "entirely independent," even though they occurred within a few hours of each other, a few miles apart, and the defendant was driving the car stolen from the first robbery when he committed the second robbery. 596 So.2d at 450. The court held that the trial court abused its discretion in failing to sever the offenses. Like *Crossley*, the offenses here occurred within a short time frame and in the same geographical area, and like *Crossley*, appear to be entirely independent of each other. Accordingly, we reverse Porter's judgment and sentence and, upon remand, direct the trial court to try counts I and II separately from count III.

Reversed and remanded.

CAMPBELL, A.C.J., and QUINCE, J., concur.

Kenneth M. PIERCE, Appellant/Cross–Appellee,

v.

STATE of Florida, Appellee/Cross–Appellant.

No. 93–1302.

District Court of Appeal of Florida, Fourth District.

March 13, 1996.

Rehearing and Certification of Question Denied April 24, 1996.

Defendant was convicted of vehicular homicide and leaving scene of accident, following jury trial by the Circuit Court, Broward County, Mark A. Speiser, J. Defendant appealed. The District Court of Appeal, Brown, Associate J., held that: (1) minimization of reasonable doubt standard and jury instruction violated due process; (2) computer animation could be used as demonstrative exhibit to illustrate accident reconstruction expert's opinion as to how fatal accident occurred; and (3) jury should be explicitly instructed on knowledge required for leaving the scene conviction.

Reversed and remanded.

1. Constitutional Law ⇐268(11)

Criminal Law ⇐789(4)

Trial court's minimization of reasonable doubt standard in its extemporaneous jury instruction deprived defendant of defense and violated due process. U.S.C.A. Const. Amend. 14.

2. Criminal Law ⇐438(8)

Frye requirement that scientific evidence be admitted only if derived from principles of procedures that have achieved general acceptance in relevant scientific field, did not apply to computer animation offered as demonstrative exhibit to illustrate expert's opinion how automobile accident giving rise to vehicular homicide prosecution occurred.

3. Criminal Law ⇐404.36

In order to admit demonstrative exhibit illustrating expert opinion, proponent must show that: opinion evidence would be helpful to trier of fact; witness is qualified as expert; opinion evidence applies to evidence offered at trial; exhibit does not present substantial danger of unfair prejudice that outweighs its probative value, the facts or data on which expert relied in forming opinion are of type reasonably relied upon by experts in subject area, and exhibit is fair and accurate depiction of what it purports to be. West's F.S.A. § 90.704.

4. Criminal Law ⇐438(8)

Computer generated animation was properly used in vehicular homicide prosecution as demonstrative exhibit to illustrate detective's reconstruction of motor vehicle accident.

5. Automobiles ⇐357

In prosecution for leaving scene of accident, jury should be instructed of requirement of proof that driver either knew of resulting injury or death or reasonably should have known of injury or death from nature of accident. West's F.S.A. § 316.027.

Appeal and cross-appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge.

Richard L. Jorandby, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant/cross-appellee.

Robert A. Butterworth, Attorney General, Tallahassee, Joan Fowler, Senior Assistant Attorney General, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee/cross-appellant.

BROWN, Associate Judge.

On March 9, 1993, a jury found Appellant guilty of vehicular homicide/leaving the scene of an accident involving death of a six year old child; leaving the scene of an accident involving injury to two other children; driving while his license was suspended or revoked and causing death; and two counts of tampering with physical evidence, by removing a camper top from, and by altering front-end damage to, a pickup truck. Appellant was sentenced to a total of sixty years in prison, thirty years of which related to the vehicular homicide count. During the trial, a computer generated animation, illustrating the lead traffic homicide investigator's reconstruction of the motor vehicle accident, was published to the jury as a demonstrative exhibit. The admissibility of this exhibit presents us with an issue addressed by no appellate court in Florida, and by few in other jurisdictions. For reasons set forth below, we find the trial court did not abuse its discretion in permitting the jury to view the computer generated accident reconstruction animation. On other grounds, however, we reverse and remand for a new trial based on fundamental error.

FACTS

On the evening of June 23, 1992, three children were walking home through a residential neighborhood in Dania, Florida. At approximately 9:00 p.m., a pickup truck hit the three children. The six year old child later died as a result, and the two older children were both seriously injured. Eyewitnesses reported that the same vehicle had collided with some garbage cans earlier that evening, shortly before 9:00 p.m., dragging a can fifteen to twenty feet without swerving. The vehicle fled both scenes without stopping.

One eyewitness chased the vehicle and believed it to be a Silverado Chevrolet truck. Other eyewitnesses gave similar descriptions of the vehicle as a pickup truck with a camper top, darker in color on the bottom than on the top.

When the police arrived, a neighbor found a piece of grille from a vehicle in a shallow section of a water puddle close to the six year old child's body. A piece of plastic turn signal lens was also found at the scene. In addition, the medical examiner suggested that there might be a dent in the vehicle caused by the impact on the six year old victim's head.

Approximately three weeks after the accident, the police located Appellant's truck, which had a dent where the hood meets the grille. At that time, the grille was not original equipment and the headlight lens cover had been cut to make it fit. Although the truck did not have a camper top, neighbors stated that Appellant had recently removed a camper top from the vehicle.

Based on an affidavit alleging the above facts, along with the identification of the grille piece found at the accident scene as belonging to a 1980 Silverado truck, a search warrant was issued and Appellant's truck was seized. Thereafter, Appellant was arrested and charged with vehicular homicide/leaving the scene of an accident involving death, as well as leaving the scene of an accident causing injury, driving with a suspended or revoked license and causing death,

and two counts of tampering with physical evidence.

BACKGROUND

Before trial, the State Attorney's Office filed a Notice of Intent to offer a computer generated animation of its expert's accident reconstruction. A pretrial hearing concerning admissibility was held in which the state presented three expert witnesses. Detective Bjorndale–Hull, an expert in accident reconstruction, testified that her use of metal tapes and a wheel was reasonably relied upon by accident reconstruction experts in the field. In addition, the AUTOCAD computer program Bjorndale–Hull used was established as accepted in the engineering field as one of the leading CAD (computer aided design) programs in the world. Finally, Detective Bjorndale–Hull's measurements were drawn directly onto a computer, such that they were input with no human contamination of her measurements.

Second, the state presented Detective Babcock, an accident reconstruction expert, who testified that the data he used was of a type reasonably relied upon by experts in the field of accident reconstruction in formulating opinions as to how motor vehicle accidents occur. Babcock supervised every aspect of the animation from inception. His testimony established that the computer animation fairly and accurately reflected his opinion of how the accident occurred. The computer animation was thus established to be a visualization of Babcock's opinion as to how the accident occurred.

The third witness presented by the state was Jack Suchocki, a computer animation expert, who explained that computer animation consists of individual pictures shown in a rapid sequence to indicate motion. He testified that the two-dimensional drawings entered directly onto AUTOCAD were then directly transferred into three-dimensional drawings, thus eliminating the possibility of human error in the translation. Suchocki testified the animation was a fair and accurate representation of what it purported to depict, and that the data, information, and evidence utilized was of a type reasonably relied upon by experts in the field of forensic animation.

The state then proffered the computer animation as a demonstrative exhibit to help Detective Babcock explain his opinion to the jury, and also as substantive evidence. The trial court ruled the computer animation admissible as a demonstrative exhibit only. As a preliminary fact, pursuant to section 90.105, Florida Statutes (1991), the trial court found that the original source data, the basis of the State's computer animation, was "reasonably trustworthy and reliable." Noting the issue to be one of first impression, the trial court determined that the proffered computer animation was "merely a device or means to express an expert's opinion." Additionally, the trial judge concluded that in this context the video exhibit was a new form of *expression*, not a scientific or experimental test (such as a DNA test or a blood spattering analysis) and therefore was not subject to the test of *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). Thus, the animation was permitted to be used during the expert's testimony at trial for the purpose of aiding the jurors in understanding the complex issues, and to illustrate the opinions of the expert witness, Detective Babcock. However, because it was ruled inadmissible as substantive evidence, it was not permitted to be taken to the jury room during deliberations.

ANALYSIS

A) REASONABLE DOUBT INSTRUCTION

[1] Initially, we reverse and remand for a new trial due to fundamental error created when the trial court minimized the reasonable doubt standard in its extemporaneous jury instruction, thus depriving Appellant of his defense. *See Jones v. State*, 656 So.2d 489 (Fla. 4th DCA 1995), *rev. denied*, 663 So.2d 632 (Fla.1995); *see also McInnis v. State*, No. 94–2792, — So.2d — (Fla. 4th DCA January 24, 1996); *Poole v. State*, No. 94–2731, — So.2d — (Fla. 4th DCA January 24, 1996); *Variance v. State*, No. 94–

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> And even though it's a very heavy burden however, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt.
>
> You do not have to be one hundred percent satisfied the Defendant's guilty in order to find him guilty.... So the State does not have to convince you to 100 percent certainty of the Defendant's guilt but merely beyond and to the exclusion of every reasonable doubt.

As we found in *Jones*, we agree with Appellant that the reasonable doubt standard, a component of due process of law in criminal proceedings was diminished by the trial court's statement that certitude was not required. *See Jones*, 656 So.2d at 490. This kind of minimization of the reasonable doubt standard violates the due process clause of the federal and state constitutions. *See Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Thus, this minimization of the reasonable doubt standard constituted fundamental error because it deprived Appellant of his defense, the reliance on the reasonable doubt standard. *See Jones*, 656 So.2d at 491. Accordingly, we reverse and remand for a new trial on this ground. Nevertheless, because we are faced with an issue of first impression for any court in this state, we write to address the dynamic aspect of computer animations as substantive and demonstrative evidence.

B) ADMISSION OF COMUPTER ANIMATION AS A DEMONSTRATIVE EXHIBIT

[2] Computer animations have been used in the courtroom by civil litigators for reconstructing accidents, including automobile and truck accidents, aircraft collisions, construction equipment accidents, and industrial accidents, as well as in patent litigation. *See* "*State v. Pierce:* Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?" 19 Nova L.Rev. 374 (1994) at Section II, *citing* David W. Muir, "Debunking the Myths about Computer Animation," Securities Litigation 1992 at 591, 596, 597 (PLI Litig. & Admin. Practice Course Handbook No. 444, 1992). As demonstrative aids to illustrate and explain testimony of witnesses to the fact finder, such exhibits have been useful. Computer animations have also been offered as substantive evidence to supply missing information for the purpose of proving a material fact in dispute. In this context, unlike the case at bar, the expert uses the computer not to illustrate the expert's opinion, but to perform calculations and obtain results which form the basis of the expert opinion. *See generally*, Kathleen M. O'Connor, "Computer Animations in the Courtroom: Get with the Program," 67 Fla. B.J. 20 (1993). Several cases have been decided in other jurisdictions that deal with the admissibility of computer animations as substantive scientific evidence. The *Frye* requirement that scientific evidence be admitted only if derived from principles and procedures that have achieved general acceptance in the scientific field to which they belong has been applied to such computer animations introduced as substantive evidence. *See Starr v. Campos*, 134 Ariz. 254, 655 P.2d 794 (Ariz.Ct.App.1982); *see also Schaeffer v. General Motors Corp.*, 372 Mass. 171, 360 N.E.2d 1062 (1977).

Because the computer animation in the instant case was admitted solely as an illustration of Detective Babcock's opinion of how the accident occurred, we do not now decide the standards applicable to computer animations introduced as substantive evidence. The trial court, following a lengthy pretrial

hearing, determined that the demonstrative exhibit was not subject to the *Frye* analysis. We agree, and now turn to address the precise issue before us, whether the trial court abused its discretion in permitting the computer generated accident reconstruction animation to be shown to this jury as a demonstrative exhibit.

In one of the few reported cases addressing this issue, a New York trial court allowed a criminal defendant to introduce a computer animation to illustrate his expert's view of how a fatal crash occurred. Finding, as we have, the *Frye* test inapplicable, the court stated:

> A Computer is not a gimmick and the court should not be shy about its use when proper. Computers are simply mechanical tools—receiving information and acting on instructions at lightening speed. When the results are useful, they should be accepted, when confusing, they should be rejected. What is important is that the presentation should be relevant . . ., that it fairly and accurately reflect the oral testimony offered and that it be an aid to the jury's understanding of the issue.

People of the State of New York v. Michael McHugh, 124 Misc.2d 559, 476 N.Y.S.2d 721, 722 (1984). Thus, in admitting the animation as a demonstrative exhibit only, the *McHugh* court merely required defense counsel to establish "the proper ground work and qualify the expert." *Id.*

[3] In order to admit a demonstrative exhibit, illustrating an expert's opinion, such as a computer generated animation, the proponent must establish the foundation requirements necessary to introduce the expert opinion. Specifically, (1) the opinion evidence must be helpful to the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion evidence must be applied to evidence offered at trial; and (4) pursuant to section 90.403, Florida Statutes (1991), the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value. *Kruse v. State*, 483 So.2d 1383, 1384 (Fla. 4th DCA 1986).

In addition, the proponent must establish that the facts or data on which the expert relied in forming the opinion expressed by the computer animation are of a type reasonably relied upon by experts in the subject area. The facts or data need not themselves be admissible in evidence. § 90.704, Fla. Stat. (1991). The reasonableness of the expert's reliance upon the facts and data may be questioned in cross-examination. *See First Fed. Sav. and Loan Ass'n v. Wylie*, 46 So.2d 396, 400 (Fla.1950).

Finally, the computer animation must be a fair and accurate depiction of that which it purports to be. This is, of course, the same foundation which must be established to admit any pictorial representation, be it videotape, motion picture or photograph. *Paramore v. State*, 229 So.2d 855 (Fla.1969), *vacated as to sentence only*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972)(videotape admission); *Grant v. State*, 171 So.2d 361 (Fla.1965), *cert. denied*, 384 U.S. 1014, 86 S.Ct. 1933, 16 L.Ed.2d 1035 (1966)(motion picture).

[4] All preliminary facts, constituting the foundation for admissibility of evidence, must be proven to the court only by a preponderance of the evidence, even in a criminal case. *Charles W. Ehrhardt*, Florida Evidence, § 105.1 (1995 Ed.). In the case at bar, the trial court made appropriate findings of preliminary facts which were supported by the evidence adduced at the pretrial hearing. Detective Babcock was found to be qualified as an expert. His opinion as to how the accident occurred was in fact applied to evidence offered at trial, and the trial court found that the data relied on by the expert to form his opinion was of a type reasonably relied upon by experts in the field. Further, the trial court specifically found the computer animation tape was a fair and accurate depiction of the expert's opinion as to how the accident occurred, and found that the opinion, as well as the computer animation, would be helpful to the jury in understanding the issues in the case. Our review of the record has revealed no abuse of the trial court's discretion in these preliminary findings.

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Furthermore, our review of the computer animation videotape in the context of this record convinces us that the trial court appropriately exercised its discretion in its balancing analysis pursuant to section 90.403, Florida Statutes (1991). *See Sims v. Brown*, 574 So.2d 131, 133 (Fla.1991)(trial court has broad discretion in determining whether evidence should be admitted when there is a section 90.403 objection). Although evidence in this case indicated a bloody scene with screaming victims, the computer animation videotape demonstrated no blood and replicated no sound. Further, the mannequins used in the computer animation videotape depicted no facial expressions. Although some testimony indicated that the truck was traveling up to twice the posted speed limit, the videotape depicted the truck travelling at the posted speed limit.

Moreover, we find there was no undue emphasis placed upon the computer animation videotape, which was shown to the jury for a total of approximately six minutes in the course of an eleven day trial. The judge appropriately explained to the jury that the videotape was being used only to illustrate the expert's opinion. Cross-examination was permitted and the record demonstrates it was made clear to the jury that if the information entered into the computer was inaccurate, then the computer animation itself was inaccurate.

Accordingly, we find no error in the trial court's decision to permit the computer generated animation to be shown to the jury as a demonstrative exhibit illustrating Detective Babcock's reconstruction of the motor vehicle accident.

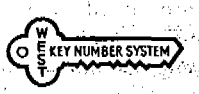
C) JURY INSTRUCTIONS CONCERNING KNOWLEDGE REQUIREMENT UNDER SECTION 316.027, FLORIDA STATUTES (1991)

[5] Briefly, we advise that it would be prudent for the trial court to conform, upon remand, to the requirements of *State v. Mancuso*, 652 So.2d 370 (Fla.1995). The Florida Supreme Court has held that criminal liability under section 316.027, Florida Statutes (1991), requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed. *Id.* at 372. Even though we have not found reversible error as to the specific instruction given below, we find the better approach would be for the trial court to more strictly comply with *Mancuso* upon remand.

All other issues raised are either affirmed or rendered moot by this opinion.

REVERSED AND REMANDED FOR NEW TRIAL.

STONE and WARNER, JJ., concur.



Robert OFFER and Offer & Associates International, Inc., Appellants,

v.

LADY ALICE CORP., a Delaware Corporation, et al., Appellees.

No. 95-1419.

District Court of Appeal of Florida, Fourth District.

March 13, 1996.

Clarification Denied April 23, 1996.

Broker brought suit against buyer of yacht, seeking commissions. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Paul M. Marko, III, J., dismissed complaint for lack of jurisdiction and appeal was taken. The District Court of Appeal, Klein, J., held that: (1) claim of nonpayment of commission fees, if established, would constitute tortious conduct within Florida satisfying long-arm statute requirements, and (2) contacts between principal of buyer corpora-