IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,
Cross-Respondent,

v. **CASE NO. 89,769**

TODD E. DUMAS,

Respondent,
Cross-Petitioner.

PETITIONER'S REPLY BRIEF/
CROSS-RESPONDENT'S ANSWER BRIEF

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STATEMENT OF FACTS

The State relies on the Statement of Facts set forth in its Initial Brief.

SUMMARY OF ARGUMENT

ISSUE I: The trial court's instruction on knowledge did not result in Dumas being convicted of a crime not charged, nor did it violate his right to a unanimous verdict. The court's instruction fully complied with the language and intent of the statute, and the certified question should be answered in the negative.

ISSUE 11: **No** jury view took place in this case. While an alternative courtroom was briefly used, this alternative was reasonable and necessary, as there was no other way the jury could view the murder weapon -- the car. The trial court did not abuse its discretion by allowing the admission of this relevant evidence, and even if it should not have been admitted any error was harmless.

ISSUE 111: Dumas was properly sentenced under the clear language of the guidelines. Scoring victim injury points for the death of the victim does not violate double jeopardy. Dumas was not subjected to multiple convictions or sentences just because his crime resulted in two numbers on his scoresheet.

ISSUE IV: The trial court properly denied Dumas' motion for judgment of acquittal. The record reflects that the State presented overwhelming evidence that Dumas was driving recklessly, causing the death of James Vaughn. Dumas was driving over the speed limit, after consuming alcohol, and he ran into the victim while the victim was *walking* in *the* ***grass*** along the interstate. Such conduct is clearly beyond mere inattentiveness, and Dumas' conviction was properly upheld by the district court.

ARGUMENT

ISSUE I:

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE, AS THE AMENDMENT TO THE STATUTE WAS NEVER INTENDED TO CHANGE THE KNOWLEDGE REQUIREMENT.

In response to the State's argument that the jury instruction given by the trial court fully complied with the language of the statute and the Legislature's intent, Dumas argues that "[w]hatever the Legislature's intent, it is clear that the Legislature may not enact a statutory charging scheme that allows an accused to be convicted and sentenced for a crime he or she was not charged with." (Answer Brief at p. 27). The State submits that this argument was waived below and is without merit.

In discussing the jury instructions to be given in this case, the defense specifically requested that the jury be instructed on leaving the scene of an accident with injury as a lesser included offense of the crime of leaving the scene of an accident with *death*. (T. 754-55). The State had no objection to the inclusion

of this instruction, as leaving with injury clearly constitutes a necessarily lesser included offense of the greater crime.[1]

In light of this fact, it is plain that the State's argument as to intent in no way allows a conviction for a crime not charged or amends the charges in any way. Whether the knowledge element is the same for the two offenses, as the State submits, or greater for the greater offense, as the district court held, the crime of leaving the scene with injury is clearly a lesser included offense of the crime of leaving the scene with death, as Dumas recognized in the trial court. Dumas' argument should therefore be rejected.

Dumas also argues that the State's theory of intent violates his right to a unanimous jury verdict, as some jurors may have believed that Dumas was aware only of an injury to the victim, while others may have believed he was actually aware of the victim's death. This argument should also be rejected.

Under the statute the State must prove that the defendant was aware his duties had been triggered -- that he was (or should have

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[1]If the State establishes the elements of leaving the scene of an accident with death -- that the defendant was in an accident involving a death, that he knew or should have known of the accident and the injury (or, in the district court's view, that he knew or should have known of the death), and that he failed to stop and provide information and render any necessary assistance -- it has necessarily also established the elements of leaving the scene of an accident with injury (death being the most severe form of injury possible).

been) aware he had injured the victim, whether he was aware of the ultimate severity of the injury or not. Once such proof is established, the mens rea element of the statute is satisfied.[2]

Accordingly, whether the individual jurors believed that the defendant was aware of the death of the victim or only aware of an injury to the victim is irrelevant, as long as each individual juror believed that the defendant did in fact have the necessary mens rea. It is not necessary for the jurors to agree on the specific facts of the crime or to have but a single theory as to how the crime occurred, as long they agree that each element of the crime was established. It is the "bottom line" on which the jurors must agree, not on the details of the specific evidence or theories. See Schad v. Arizona, 501 U.S. 624, **631-32** (1991).

Therefore, it did not violate Dumas' right to a unanimous jury if two of the jurors believed he *knew* Vaughn was *injured,* two believed he *should* have *known* Vaughn was *injured,* and two believed he knew Vaughn was *dead.* As long as each of the jurors found this

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[2]Of course, the State must also prove that the defendant was in the accident, that he was aware of the accident itself, and that he failed to fulfill his statutory responsibilities.

element of the offense to have been established, it does not matter which specific facts they found.[3]

Dumas finally argues that the trial court's instruction was obviously erroneous in light of the standard jury instruction subsequently adopted by this Court. See Standard Jurv Instructions in Criminal Cases (95-2), 665 So. 2d 212, 215 (Fla. 1995). First of all, the State notes that this opinion was published four months after the trial in this case, so the trial court did not have the benefit of this instruction. More importantly, the State submits that if the instruction does intend that knowledge be instructed upon as the district court suggested, it is incorrect.

As discussed in the State's Initial Brief, the knowledge requirement for the second degree felony of leaving the scene of an accident with death is no different from the knowledge requirement for the third degree felony of leaving the scene of an accident with injury. Once the driver is aware that his responsibility to stay at the scene has been triggered, whether by a death or by an

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[3]This is true even if this Court ultimately finds the district court's interpretation of the statute to be correct. The jurors had to have found that Dumas at *least* knew the victim was injured in order to convict him under the instructions given. The district court therefore correctly upheld Dumas' conviction on the lesser crime of leaving the scene with injury, should the State decide not to retry him on the greater charge.

injury, the failure to fulfill this responsibility constitutes a "willful" violation of the statute and a felony offense.

The degree of that felony does not depend on whether the State can prove the driver knew the victim was dead, injured, or comatose, as the district court held. Rather, as the Legislature set forth in the statute, the degree of the felony depends on the result of the accident.

The district court's decision overturning Dumas' conviction should be reversed by this Court, and the certified question answered in the negative.

ISSUE II

NO 'JURY VIEW" WAS HELD IN THIS CASE; RATHER, THE PROCEEDINGS WERE BRIEFLY MOVED INTO *AN* ALTERNATIVE COURTROOM TO ALLOW THE JURY TO EXAMINE THE MURDER WEAPON.

As his first point on cross-appeal, Dumas contends that the trial court erred in allowing testimony during a "jury view." This issue, resolved without comment by the district court, lies beyond the scope of the certified question and need not be addressed by this Court. See, e.g., Goodwin v. State, 634 So. 2d 157 (Fla. 1994) (declining to address issues beyond the scope of certified question).

Should this Court exercise its discretion and choose to address this issue, the State submits that Dumas' argument is based on an erroneous premise and should be rejected, as there was no jury view in this case.

As one of its pre-trial motions, the State filed a 'Motion for Jury View" of the defendant's car, noting that this would provide the jury with valuable information allowing for a full understanding of the accident reconstructionist's testimony. (R. 1098). When the motion was heard, however, the State immediately corrected any possible notion that this was in fact a formal

request for a jury view pursuant to section 918.05, Florida Statutes. Rather, the motion was filed in order to call the court's attention to the fact that the car was going to be admitted into evidence, which entailed some practical problems that needed to be discussed before trial. (R. 41-44).

In discussing this issue at the pre-trial hearing, the trial court noted that during a typical jury view no one is allowed to testify. In this case, however, the proceeding was not in fact a jury view, but a physical relocation of the court proceedings. (R. 42, 47). As the court explained, "*this* is not a view. This is just like your college classroom where you sat out under the tree on a spring day. We're going to move the courtroom to the location of the evidence, because we can't bring the evidence to the courtroom." (R. 47) (emphasis added).

Because this was not a jury view, the statutory requirements and attendant case law relating to jury views, cited by Dumas in his Initial Brief, are simply not relevant here. The jury was not taken to the scene of the accident or any other place relevant to the crime; rather, the courtroom was moved to the garage in order to allow the jury to view admitted evidence, since the evidence was too big to be brought into the regular courtroom.

Dumas also argues that the trial court erred in preventing objections during the testimony in the garage and in allowing the vehicle to become a "feature of the trial." Again, neither of these arguments have merit.

Nothing in the record shows that Dumas was prevented from making objections at the garage or that the defense attorneys merely "stood by as muzzled spectators." Rather, the record clearly reflects that defense counsel was allowed to make objections at the garage. However, the court reporter was unable to hear their "bench conferences" with the **judge**, since her equipment would not function on the incline where the parties and the judge consulted outside the hearing of the jury. In order to preserve the record, then, the judge put the defense objections on the record the next day, when they were back in the regular courtroom, (T. 537-39).

The procedure employed by the trial court fully protected Dumas' rights. The defense was given both the opportunity to object **during** the proceedings and the opportunity to protect their record after the proceedings, as defense counsel acknowledged post-trial. (R. 201). There was no error in this procedure, given the circumstances, and certainly no prejudicial error.

Finally, Dumas' "feature of the trial" argument is apparently an argument that the evidence was overly prejudicial, as the fact that any piece of evidence is a "feature of the trial" forms a basis for reversal only where collateral crimes evidence is admitted. See State v. Richardson, 621 So. 2d 752, 755 (Fla. 5th DCA 1993) (cited by Dumas) (collateral *crimes evidence* cannot become a feature of the trial). The evidence in the present case in no way involved a collateral crime. Moreover, the evidence was not overly prejudicial and was properly admitted.

It is well-established that all relevant evidence is admissible, unless there is some specific evidentiary provision requiring its exclusion. § 90.402, Fla. Stat. (1995). The trial court has great latitude in determining the relevance of evidence, and its determinations will not be disturbed on appeal absent an abuse of discretion. See, e.g., Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991), vacated on other grounds, 112 S.Ct. 3022 (1992); Morales v. State, 451 So, 2d 941, 943 (Fla. 5th DCA 1984).

Here, the car was clearly relevant evidence, in the same way that the gun is relevant in a shooting case or the knife is relevant in a stabbing case -- the car was the murder weapon. Cf. Ramirez v. State, 542 *So.* 2d 352, 355 (Fla. 1989) (knife was

relevant evidence in murder case since it could have caused the victim's wounds).

Of course, even relevant evidence may be inadmissible "if its probative value is substantially *outweighed* by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (1995) (emphasis added). However, the trial court has broad discretion to make this determination. See Charles W. Ehrhardt, Florida Evidence § 403.1 (1996 Edition); Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991) (weighing of relevance versus prejudice or confusion is best performed by trial judge, who is present and best able to compare the two); State v. McClain, 525 So. 2d 420, 422 (Fla. 1988) (quoting Ehrhardt).

Here, the trial court found that the probative value of the evidence outweighed any prejudice, and Dumas has failed to demonstrate an abuse of discretion in the court's ruling. Contrary to Dumas' argument, the car was not admitted solely to 'shock" the jury. The most disputed issue in this case concerned the circumstances of the accident. The car was admitted in order to elucidate the State's theory as to how the accident occurred, allowing the State's expert to explain to the jury how the victim's

injuries coincided with the specific damage to the car. (T. 529-32).

Viewing the car in person also allowed the jury to more properly evaluate Dumas' contention that he had no idea, from looking at the car, that anyone had been hurt. As the court stated in making its ruling admitting the car into evidence, there was a great difference between merely viewing the pictures and actually seeing the car in person, as the three-dimensional view provided a much more accurate means of assessing the damage. (T. 516-18).

Simply because the car was prejudicial does not mean it was inadmissible, for 'almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant." Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988). Admitting the car was not erroneous and did not deprive Dumas of a fair trial. Cf. Brown v. State, 532 So. 2d **1326** (Fla. 3d DCA 1988) (no error in admission of 2 foot by **3** foot photograph of victim lying on bed covered in blood, where picture was useful in corroborating witness' testimony).

Finally, even if the car should not have been admitted, any error was harmless. The evidence in this case was overwhelming, and numerous pictures of the car were introduced into evidence. There is no reasonable possibility that the error complained of

here contributed to the jury's verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

ISSUE III:

SCORING VICTIM INJURY POINTS DID NOT VIOLATE DUMAS' DOUBLE JEOPARDY RIGHTS.

As his next point on cross-appeal, Dumas argues that the trial court violated double jeopardy by scoring victim injury points. Once again, this issue was resolved without comment by the district court, lies beyond the scope of the certified question, and need not be addressed by this Court.

Should this Court exercise its discretion and choose to address this issue, the State contends that Dumas' claim should be rejected. According to Dumas, the scoring of victim injury points for the death of the victim as a result of the vehicular homicide violates double jeopardy, because death of the victim is an inherent component of vehicular homicide.[4] Because points were scored for the crime, Dumas contends, scoring more points for the death is a second punishment for the same conduct. This argument is a misconstruction of the guidelines.

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[4]Dumas cites Carawan v. State, 515 So. **2d** 161 (Fla. 1987), in support of his argument. The double jeopardy analysis in Carawan was overridden by the Legislature immediately after the case was decided, as this Court recognized in 1989. State v. Smith, 547 So. 2d **613** (Fla. **1989).**

Under the current sentencing guidelines, felony offenses are listed in an "Offense Severity Ranking Chart." § 921.0012, Fla. Stat. (1993). Offenses range from level 1 (the least severe) to level 10 (the most severe), according to the Legislature's determination of the severity of the offense and the harm or potential harm to the public. See Fla. R. Crim. P. 3.702(c). Points are assigned according to the level of crime.

In addition to points for the offense level, the guidelines require the addition of extra points in certain circumstances, such as where a firearm was used, where the defendant was already on probation, and where the victim was injured. Where, as in this case, the injury is death, 60 points are added to the scoresheet total. § 921.0014(1), Fla. Stat. (1993).[5]

The end result of such a scoring structure, of course, is that offenses wherein the death of the victim is an essential element will always end up scoring more than just their "level" points. That points are registered on more than one line of the scoresheet, however, does not demonstrate a double jeopardy violation.

There can be little question that the Legislature could have chosen to simply assign 102 points to the offense of vehicular

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[5]This scoring procedure is clear and unambiguous, so there is no necessity for a construction in favor of the accused, as Dumas contends.

homicide, and this is, in effect, what the Legislature did -- only the points are listed as 42 (for level 7) plus 60 (for death), rather than as 102.

Splitting up the score in this manner is not double punishment -- it is a method of structuring the scoresheet so it can apply generically to all criminal offenses.[6] Dumas is not being punished twice for his offense simply because it results in two numbers on his scoresheet -- any more than a person who commits an offense inherently involving a firearm (such as carrying a concealed weapon) is punished twice because that crime results in "level" points plus "extra" firearms points. See State v. Davidson, 666 So. 2d 941 (Fla. 2d DCA 1995); Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995).

Dumas has been convicted of one crime and punished with one sentence. Adding points for victim injury does not create a new crime or punishment.

Dumas also briefly argues that scoring points for victim injury constitutes an illegal departure based on factors already taken into account by the sentencing guidelines. If the trial

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[6]Further, such a structure also keeps this crime as a level 7 offense, which affects other "level" considerations, such as the scoring of this offense in the future (as Prior Record the offense will simply be scored as level 7).

court had in fact departed from the guidelines in this case, and had listed the death of the victim as its reason for departure, Dumas' argument would perhaps have merit. The record reflects, however, that the trial court did not depart from the guidelines, but sentenced Dumas within the recommended range. There was no improper departure in this case.

The clear and unambiguous statutory language was correctly applied by the trial court. Dumas was properly sentenced under the guidelines, and his sentence should be affirmed by this Court.

ISSUE IV:

THE TRIAL COURT PROPERLY DENIED DUMAS' MOTION FOR JUDGMENT OF ACQUITTAL.

Dumas finally contends that the trial court erred in denying his motion for judgment of acquittal as to the vehicular homicide charge. Once again, this issue lies beyond the scope of the certified question and need not be addressed by this Court. Should this Court exercise its discretion and choose to address this issue, the State asserts that Dumas' claim should be rejected.

A motion for judgment of acquittal admits not only the facts in evidence, but every reasonable inference from the evidence favorable to the State. The credibility and probative force of conflicting testimony may not be determined on a motion for judgment of acquittal, and such a motion may be granted only where there is no view of the evidence which can sustain a conviction. Lynch v. State, 293 So. 2d 44, 45 (Fla. **1974).**

Moreover, the State is not required to conclusively rebut every version of events which can possibly be inferred from the evidence, but is only required to "introduce competent evidence which is inconsistent with the defendant's theory of events." State v. Law, 559 So. 2d 187, 189 (Fla. 1989). See also Orme v.

State, 677 So. 2d 258, 262 (Fla. 1996) (sole function of trial court on JOA motion is to determine "whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories").[7]

The record in this case reflects overwhelming evidence of Dumas' guilt of vehicular homicide, and the trial court properly denied his motion for judgment of acquittal.

In order to establish the crime of vehicular homicide, the State must show that the defendant operated a motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to, another, and that the recklessness caused the victim's death. s 782.071, Fla. Stat. (1993). The standard of "recklessness" is less than culpable negligence (as in manslaughter) but more than the mere failure to use ordinary care. McCreary v State, 371 so. 2d 1024, 1026 (Fla. 1979).

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[7]The State disagrees with Dumas' contention that the case against him was purely circumstantial. The record reflects that there was ample direct evidence as well as circumstantial evidence -- including Dumas' own admissions, physical evidence connecting his car with the victim and the scene of the crash, and eyewitnesses who saw Dumas' car on the side of the road, who saw the smashed condition of the car, and who saw Dumas' behavior and condition after the accident. See Orme, 677 So. 2d at 261. At any rate, whether deemed a purely circumstantial case or not, there was clearly sufficient evidence to convict.

In this case, Dumas contends that the State failed to prove that he operated his vehicle in a reckless manner. The evidence at trial, construed in the light most favorable to the State, clearly refutes this argument.

The record reflects that Dumas was traveling at a high rate of speed, between 60 and 75 mph, at the time of the collision. The speed limit in that area was 55 mph. Moreover, Dumas had been consuming alcohol that evening, and one of the toll booth operators testified that Dumas appeared to be intoxicated.[8]

Most importantly, the State's evidence showed that the collision took place completely off the paved road in *the* grass, and there was absolutely no need to travel on the grass in order to get off the highway, as there was a nice paved shoulder in the area. The road was straight, the weather was clear, and there was no evidence that Dumas used his brakes before hitting the victim.

This evidence, when considered in totality, was clearly sufficient for the jury to conclude that Dumas was not merely inattentive or negligent, but was driving recklessly. While Dumas attempts to find fault with the State's case, the evidence on appeal must be considered in the light most favorable to the State.

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[8]Even if Dumas was not legally intoxicated, his consumption of alcohol is still a factor in determining recklessness, as alcohol increases reaction and perception time. (T. 605).

The arguments Dumas makes now regarding the "speculation" of the State's expert and the State's case in general are jury arguments, and the jury obviously rejected them.[9]

The State's evidence clearly established that Dumas was driving recklessly, resulting in the death of James Vaughn. Dumas' vehicular homicide conviction should be affirmed by this Court. See McCreary, 371 So. 2d at 1026-27 (upholding conviction where defendant, who had been drinking, drove through clearly marked intersection at or near maximum speed without slowing down); Wright v. State, 573 So. 2d 998, 999-1000 (Fla. 1st DCA 1991) (upholding conviction where defendant, who had been drinking, was speeding and drove into oncoming lane); Byrd v. State, 531 So. 2d 1004, 1005-06 (Fla. 5th DCA 1988) (upholding conviction where defendant was

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'Specifically, as to the testimony of the State's accident reconstructionist, Detective Bass, the State notes that she testified as an expert with no objection by the defense. Detective Bass based her conclusions on the physical evidence she personally observed at the scene, applying scientifically accepted theories as well as knowledge gained through her extensive experience. (See Petitioner's Initial Brief at pages 9-13.) While Dumas' expert disagreed with Detective Bass' methodology and conclusions, this does not render her findings incompetent. The State further notes that it was defense counsel, not Bass, who labeled her speed conclusion a "guesstimate." (T. 599-600).

traveling twice the posted **speed,** not paying attention, and swerved into oncoming traffic).[10]

[10]Cf. State V. Esposito, 642 So. 2d **25** (Fla. 4th **DCA 1994)** (reversing conviction where trolley driver was in full control of vehicle, had not been drinking, and was driving at less than the posted speed; evidence showed simple inattentiveness); W.E.B. v. State, 553 So. 2d 323 (Fla. 1st DCA **1989)** (reversing conviction where defendant, although drinking, was not impaired to *any* degree, was driving near the speed limit, and veered into oncoming traffic only because of "over correcting" caused by slipping off unusually steep shoulder drop-off on curved road).

CONCLUSION

Based on the arguments and authorities presented herein and in its Initial Brief, the State respectfully requests this Court reverse the district court's decision, answer the certified question in the negative, and reject the issues raised by Dumas on cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true **and correct** copy of the **above Reply** Brief/Cross-Appeal **Answer Brief has been furnished by U.S. mail** to H. **Manuel Hernandez, P.O. Box 916448, Longwood, Florida 32791, this** 14th **day** of **April,** 1997.

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