ORIGINAL

IN THE SUPREME COURT OF FLORIDA

KIMBERLI JORDAN,

Petitioner,

versus

CASE NO. 92,702

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida. In the Brief the Respondent will be referred to as "the State" and the Petitioner will be referred to as she appears before this Honorable Court of Appeal.

In the brief the following symbols will be used:

"R" - Record on appeal

"T" - Transcript of trial proceedings, Volumes I through V, as numbered by the Court Reporter

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of St. Johns County, Florida, with committing manslaughter by driving under the influence of alcohol or drugs; two counts of driving under the influence resulting in serious bodily injury to another; and driving while her license was suspended. (R 1-2) She entered a plea of nolo contendere to driving while license suspended and on October 28 and 30 through 31, 1996, she was tried by a jury and found guilty of DUI manslaughter and two counts of causing personal damage by driving under the influence. (T 574-576, Vol. V; R 61-63) On December 13, 1996, she was sentenced to concurrent prison and county jail terms totaling 253.75 months, and it was announced that her license to drive would be permanently revoked. (R 205-206, R 108-113)

On February 20, 1998, the Fifth District Court of Appeal affirmed her convictions and sentences, citing as authority its decisions in Mays v. State, 693 So. 2d 52 (Fla. 5th DCA), review granted, 700 So. 2d 686 (Fla. 1997); and Green v. State, 691 So. 2d 502 (Fla. 5th DCA), review granted, 699 So. 2d 1373 (Fla. 1997). Jordan v. State, 23 Fla. L. Weekly D536 (Fla. 5th DCA February 20, 1998). (APPENDIX). Her notice of seeking this Honorable Court's review was filed on March 23, 1998.

STATEMENT OF THE FACTS

About 10:30 p.m. on May 15, 1996, Jennifer Sadow was killed when her car, driven by her boy friend eastbound on State Road 312 in St. Johns County, was struck by Petitioner's car which witnesses said had not stopped at an intersection with the highway. (T 119, 120, 122, 123, 126, 129-131, 133, 137, 138, 140, 141, 144-146, 149, 150, 154, 155, 157, 160, 161, 170, 243, 244, Vol. II; T 252, 324, 325, Vol. III; T 361, 362, Vol. IV) Petitioner's four-year-old daughter and her daughter's friend each received a facial cut that required stitching, and Petitioner was cut on her head. (T 147, 151, 162, 179, 182-184, 190, 193-196, 202, 205, 222, 230, 231, 233-235, Vol. II; T 305, 440, Vol. III)

Some witnesses who were at the scene of the accident testified that Petitioner appeared to them to be under the influence of alcohol or drugs. (T 150, 161, 162, 164, 167-170, 172-174, Vol. II) Her ex-husband who came to the scene testified that Petitioner was agitated but that nothing suggested to him that she was under the influence of intoxicants. (T 187, 188, Vol. II) A deputy, a nurse, and a Florida Highway Patrolman who saw Petitioner at the hospital described her as exhibiting an odor of alcohol, a flushed face, bloodshot eyes, slightly slurred speech, clear speech, a staggering gait, a normal manner of walking, and extreme nervousness, and each believed that she was under the influence. (T 199, 201, 203-205, Vol. II; T 266, 267, 277, 305, 306, 312, 326, 327, 340, Vol. III) Witnesses said that Petitioner told them that night that "They hit us" or "He ran into me." (T 147, 160, Vol. II; T 265, Vol. III)

An emergency room doctor who treated Petitioner at the hospital noted in his report that she was intoxicated with alcohol, in his professional opinion. (T 212, 213, 216, 222, 225, Vol. II) He was also permitted to testify that he noted that she displayed toxic nystagmus, over defense counsel's objections. (T 214, 218, 219, 220, 225, Vol. II)

Petitioner initially refused and then submitted to have blood drawn by a hospital nurse. (T 243, Vol. II; T 264-266, 278, 279, Vol. III) The blood kit was returned to the Highway Patrolman who kept it in his trunk, inside the county jail, the Florida Highway Patrol station in St. Johns County, and overnight in his residence, until he delivered it to the Florida Highway Patrol station in Putnam County a day and a half later from whence it was mailed to the Florida Department of Law Enforcement laboratory in Jacksonville where it arrived six and a half days after the blood was drawn. (T 268, 270, 272, 275, 276, 283-285, 287-291, 294-296, 303, 309, Vol. III; T 375, 388, Vol. IV) A forensic toxicologist testified that her examination of the sample revealed a blood alcohol level of .19%. (T 367, 383, 404, Vol. IV) She said that the blood did not appear to be coagulated or to have been exposed to extreme heat, but she conducted no chemical tests to determine whether the sample's not being refrigerated until it reached the laboratory had affected it. (T 380, 381, 394, Vol. IV)

Petitioner, who had taken a hiatus from being a registered nurse to rear a family, had spent the day in her neighborhood, at a park, and at the beach with her children, and had consumed one and a half glasses of wine over the course of the afternoon.

(T 429, 430, Vol. IV; T 191, 192, 196, 235-238, 240, 241, Vol. II; T 431-434, Vol. IV) She testified that she drank no more alcohol after she took some Tranxene, a tranquilizer that had been prescribed for her since her home burned down. (T 434, 440, 441, 444-447, 452, 453, 456, Vol. IV) About nine-thirty she took the rambunctious four-year-olds for a ride and, on the way back home, the accident occurred and she hit her head on the steering wheel. (T 434-436, 447-451, Vol. IV)

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision in this cause cites as controlling authority decisions which have been accepted for and are pending review in Supreme Court Cases Number 90,696 and Number 90,826.

ISSUE

THE DISTRICT COURT OF APPEAL'S DECISION CITES AS CONTROLLING AUTHORITY ITS DECISIONS IN MAYS V. STATE, 693 So. 2d 52 (Fla. 5th DCA); AND GREEN V. STATE, 691 So. 2d 502 (Fla. 5th DCA), WHICH ARE PENDING REVIEW BY THIS HONORABLE COURT.

Petitioner was tried by a jury, found guilty of DUI manslaughter and two counts of causing personal damage by driving under the influence, and was sentenced to concurrent prison and county jail terms totaling 253.75 months. (T 574-576, Vol. V; R 61-63, 108-113, 205-206)

In its decision affirming Petitioner's convictions and sentences, the Fifth District Court of Appeal wrote:

> Jordan argues that section 921.005(5) does not permit a court to sentence outside the statutory maximum unless the entire range exceeds it. We have previously rejected this interpretation. *See Mays v. State*, 693 So. 2d 52 (Fla. 5th DCA), *rev. granted*, 700 So. 2d 686 (Fla. 1997); *Green v. State*, 691 So. 2d 502 (Fla. 5th DCA), 699 So. 2d 1373 (Fla. 1997). We have taken the view that if the sentencing range encompasses and includes the statutory maximum, thereby exceeding the statutory maximum at the upper range, the trial judge may sentence a defendant within the full range set forth in the guidelines.

Jordan v. State, 23 Fla. L. Weekly D536 (Fla. 5th DCA February 20, 1998). (APPENDIX). Mays, supra, and Green, supra, have been accepted for review in Florida Supreme Court Cases Number 90,826 and Number 90,696, respectively.

Because the decision in this case cites decisions, Mays and Green, which are pending review by the Florida Supreme Court, this Honorable Court has jurisdiction of

this appeal and should grant review in this cause. See Jollie v. State, 405 So. 2d 418 (Fla. 1981), wherein this Honorable Court held that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court constitutes prima facie conflict and allows the Supreme Court to exercise its jurisdiction.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Ms. Kimberli Jordan, P. O. Drawer 430, Monticello, Florida 32345-0430, this 25th day of March, 1998.

ATTORNEY

sufficiently diverse that the term "moral turpitude" no longer carries a sufficient warning to indicate what activities are proscribed. Further, what is contrary to morals has changed over time, and can vary from community to community. In my view, the legislature should spell out which categories of crimes warrant imposition of sanctions against a broker or salesperson.

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[1]*Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (Stewart, J., concurring).

* * *

Criminal law—DUI manslaughter—Jury instructions—Evidence—Argument that jury instruction that defendant could be convicted of DUI/manslaughter if she "caused or contributed" to death lessened state's burden of proof in DUI/manslaughter charge, where statute provides that defendant must have "caused" death, not preserved for appeal—Any error not fundamental, where defense counsel acknowledged that defendant caused the accident leading to victim's death—No error in admission of "toxic nystagmus" test where evidence established that test is generally reliable and accepted in medical community and that witness was qualified and trained to administer it—Even it test were not admissible, admission would have been harmless error, where witness also testified he smelled alcohol on defendant and that she had blood shot eyes and appeared to be intoxicated, and defendant had blood alcohol level of .19—No error in admitting results of blood test taken at hospital after accident where defendant failed to show that there was a probability, rather than mere possibility, of tampering—Sentencing—No merit to argument that trial court may not sentence outside statutory maximum unless entire range of sentencing guidelines exceeds it—Where sentencing range encompasses and includes statutory maximum, thereby exceeding statutory maximum at upper range, trial judge may sentence defendant within full range set forth in guidelines

KIMBERLI JORDAN, Appellant, v. STATE OF FLORIDA, Appellee. 5th Dist. Case No. 96-3589. Opinion filed February 20, 1998. Appeal from the Circuit Court for St. Johns County, Richard O. Watson, Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Lori E. Nelson, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Jordan appeals from her adjudication for DUI manslaughter,[1] two counts of DUI damage to a person,[2] and driving with a suspended or revoked license.[3] She was sentenced to 253.75 months for manslaughter (the maximum under the guidelines), 364 days concurrent for the damage counts, and 60 days concurrent for the license count. We affirm.

Jordan's first point on appeal is that the standard jury instruction given in the case,[4] redefines the crime of DUI/manslaughter and lessens the state's burden of proof. Section 316.193 provides that a person commits this crime if he or she operates a vehicle while impaired and *causes* the death of any human being. The instruction adds the phrase, "caused *or contributed to the cause of the death,*" of the victim.

We could decline to consider Jordan's argument on this point because defense counsel did not object to the instruction at trial. Absent a timely objection at trial, an issue concerning jury instructions can be raised on appeal only if fundamental error occurred. *State v. Delva,* 575 So.2d 643 (Fla. 1991); *Castor v. State,* 365 So.2d 701 (Fla. 1978). *See also* § 924.051(3), Fla. Stat. (Supp. 1996) (an appeal may not be taken from a judgment unless a prejudicial error is alleged and has been properly preserved or constitutes fundamental error).

In any event, we do not think this, if it is in fact an error, constitutes fundamental error in this case. Failure to instruct on an element of a crime about which there is no dispute, does not rise to the level of fundamental error. *Delva,* 575 So.2d at 645; *State v. Austin,* 532 So.2d 19 (Fla. 5th DCA), *rev. denied,* 537 So.2d 568 (Fla. 1988). In his closing argument to the jury, defense counsel acknowledged that Jordan had caused the accident in which the passenger of the car hit by Jordan's vehicle suffered injuries leading to her death. He said: "We know my client ran through the stop sign and caused the crash. Nobody's contesting that. She is at fault in this accident." Causation was not an issue in this case.

As her second point on appeal, Jordan contends that Dr. Foster, the emergency room physician who treated her after the accident, should not have been permitted to testify that she had "toxic nystagmus,"[5] or jerky eye movements caused by intoxication with sedative drugs (*i.e.,* alcohol), because the state presented an insufficient predicate to establish the general reliability of a medical test known as "HGN." This test measures the onset of nystagmus by assessing the ability of the eyes to maintain visual fixation as they are turned to the side. The result indicated Jordan was impaired.

Dr. Foster described the HGN test and stated it was common knowledge and common practice for physicians to administer the test and that it is a scientifically reliable and accepted test in the medical community. He conservatively estimated he has performed the test 10,000 times. He admitted he did not know the accuracy rate of the test.

We think this testimony was sufficient to establish a predicate for the test and its results. The evidence established that the test is generally reliable and accepted in the medical community and that Dr. Foster was qualified and trained to administer it. *See Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). The defense offered no counter-evidence or testimony on these points. Further, the test has been ruled to be scientific and thus admissible in courts of law in this state. *See Meador; Melvin.*

Even if this test were not admissible, we think its admission in this case would have been harmless error. *See Melvin.* Dr. Foster also testified he smelled alcohol on Jordan while treating her in the emergency room, shortly after the accident. He noted she had blood shot eyes and appeared to him to be intoxicated. Other witnesses likewise testified they could smell alcohol on Jordan and that she had other physical appearances of intoxication such as blood shot eyes, slurred speech, and she was staggering and belligerent. Further, the blood test showed her alcohol level was .19.

Jordan's third point on appeal is that the results of her blood test taken at the hospital after the accident should not have been admitted because the state failed to establish a proper chain of custody. Jordan points out there was no evidence of the conditions under which the blood sample was stored while it was in the custody of the Florida Highway Patrol, or in the custody of the United States Post Office en route to the Department of Florida Law Enforcement for testing.

In order to bar the introduction of relevant evidence due to a gap in the chain of custody, the defendant must show that there was a *probability* of tampering with the evidence. *State v. Taplis,* 684 So.2d 214 (Fla. 5th DCA 1996), *rev. dismissed,* 703 So.2d 453 (Fla. 1977). A mere possibility of tampering is insufficient. *Id.*

Here, Jordan failed to establish a probability of tampering with her blood sample. The nurse who obtained the blood sample from Jordan testified that she could not remember whether there was anything in the blood sample tubes when she took the blood sample from Jordan. However, she did state that the tubes had a gray stopper. The state's toxicologist testified that kits that have gray stopper tubes contain an anti-coagulant. The state trooper who supplied the blood sample kit, the nurse who obtained the sample and the state's toxicologist all testified that the kit did not appear to have been tampered with. According to the state trooper, the kit had not expired (perhaps being only a month old) and the kit contained ingredients to preserve blood and did not need to be refrigerated. According to the toxicologist, there was no indication of clotting in the blood. It appeared to be in good condition, and did not appear to have been exposed to heat. Since this evidence failed to show a probability (as opposed to a mere possibility) that the evidence had been tampered with while in the

custody of the trooper or in the U.S. mail, the trial court properly admitted this evidence. *See Taplis* (evidence did not establish probability that vehicle had been tampered with and thus samples taken from vehicles should not have been excluded from evidence based on a gap in the chain of custody where officers and employees of a secure parking lot where the vehicle had been stored all testified that no material changes occurred to the vehicle prior to obtaining samples from it).

Jordan's last point on appeal is that the sentence of 21.1 years, which she received for DUI/manslaughter, exceeds the statutory maximum sentence for that crime. DUI/manslaughter is a second degree felony punishable by up to 15 years in prison. §§ 316.193(3)(c)(3)(a); 775.082(3)(c), Fla. Stat. (1995). Jordan was sentenced pursuant to the sentencing guidelines. Her sentencing score resulted in a recommended sentence of 203 months, a minimum of 152.25 months and a maximum of 253.75 months (21.1 years). For offenses committed after January 1, 1994 (this incident occurred in 1996), section 921.001(5), Florida Statutes (1995) provides:

> If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by section 775.082, the sentence under the guidelines must be imposed, absent a departure.

Jordan argues that section 921.005(5) does not permit a court to sentence outside the statutory maximum unless the entire range exceeds it. We have previously rejected this interpretation. *See Mays v. State,* 693 So.2d 52 (Fla. 5th DCA), *rev. granted,* 700 So.2d 686 (Fla. 1997); *Green v. State,* 691 So.2d 502 (Fla. 5th DCA), *rev. granted,* 699 So.2d 1373 (Fla. 1997). We have taken the view that if the sentencing range encompasses and includes the statutory maximum, thereby exceeding the statutory maximum at the upper range, the trial judge may sentence a defendant within the full range set forth in the guidelines.

AFFIRMED. (DAUKSCH and THOMPSON, JJ., concur.)

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[1]§ 316.193(1) and (3)(a), (b), and (c)3, Fla. Stat. (1995).
[2]§ 316.193(1) and (3)(a), (b), and (c)1, Fla. Stat. (1995).
[3]§ 322.34(1), Fla. Stat. (1995).
[4]Fla. Std. Jury Instr. (Crim.) 71.
[5]"Nystagmus" is a physiological condition which refers to involuntary rapid movement of the eyeball, and may be either horizontal, vertical or rotary. Inability of the eyes to maintain visual fixation, as they are turned from side to side is known as horizontal gaze nystagmus. *See State v. Meador,* 674 So.2d 826, 835 (Fla. 4th DCA), *rev. denied,* 686 So.2d 580 (Fla. 1996); *Melvin v. State,* 677 So.2d 1317 (Fla. 4th DCA 1996).

* * *

Criminal law—First degree murder—Evidence—Collateral crimes—No abuse of discretion in admission of evidence concerning cattle thefts, where evidence was relevant to establish motive for murders—Evidence sufficient to establish that cattle theft had in fact occurred—Fact that victim had instituted cattle-indexing system and had restricted defendant's activities on ranch raised inferences she suspected defendant had been stealing cattle, and disappearance of cattle index cards following murders was evidence that murders and cattle thefts were connected—No abuse of discretion in disallowing impeachment of state witness with criminal prosecution in which he had received light sentence by cooperating with police, where bank robbery committed by witness took place 17 years ago, and it was not clear that evidence would establish bias on witness's part—Error to allow state to impeach defense witness with prior statement without giving witness opportunity to admit, deny or explain making statement—Error harmless where statement was relevant to show witness's bias in favor of defendant, based on balance of evidence

RUSSELL CHAUDOIN, JR., Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2736. Opinion filed February 20, 1998. Appeal from the Circuit Court for Lake County, Jerry T. Lockett, Judge. Counsel: James B. Gibson, Public Defender, and Stephanie H. Park, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Chaudoin appeals his convictions for two counts of first degree murder and two concurrent life sentences. He argues that the trial court erred by allowing the jury to consider evidence Chaudoin committed collateral crimes (cattle theft), that the trial court erred by preventing defense counsel from cross-examining a state witness concerning his past cooperation as a state witness in an earlier case, and that the trial court erred when it allowed the state attorney, during the rebuttal case, to impeach a defense witness with a prior statement without a proper foundation. We affirm.

It was established at the trial that Chaudoin was the foreman of the Seminole Woods Ranch, a 6,000-acre parcel of property owned by Ted and Althea Strawn. He was paid a small salary and was allowed to live on the ranch property. Ted had promised him a 68-acre tract to live on, for his retirement, and on December 29, 1993, Ted and Althea signed a deed purporting to convey to him and his wife the 68-acre tract.

In March of 1994, the Strawns' only daughter, Pat Doyle, and her husband, Jack, moved from California to Florida to care for the Strawns and to supervise the ranch operations. Althea was ill and Ted (who was nearly ninety years old) was blind.

Pat and Jack suddenly disappeared. It turned out that on June 13, they were shot and killed. They were found buried in a hay lot on the ranch, with hay bales piled on top of their graves. They were discovered missing on June 21, 1995. A search of the ranch began June 29th. On June 30th, the investigators received information from Ohio, which caused them to put Chaudoin under surveillance and to interview Danny and Shannon Nichols. Ultimately Chaudoin was arrested and charged with the murders.

Danny testified at trial that Chaudoin asked him to help move a red Isuzu Trooper to a secluded Flagler County area so that he could dispose of it. The Doyles had driven such a vehicle, but Danny testified he did not know that, at the time. Chaudoin drove the Trooper and Danny followed in his car. They left the Trooper and returned in Danny's car.

The next week, Chaudoin asked Danny to come back to the ranch. Danny drove Chaudoin to where the Trooper was hidden. Chaudoin went into the woods, exiting shortly. He had placed electrical tape on the bottom of his boots. Later, Danny led the police to where the vehicle was hidden.

A murder weapon was not recovered or identified. The Doyles had been shot with a shotgun. Spent casings were buried with the bodies and in the hay above the grave sites. Investigators searched Chaudoin's mobile home on the ranch, and found a large number of guns and ammunition, including a shotgun, and a 2/3 quarter-inch shotgun shell of the same type used to murder the Doyles. However, it could not be established that the shotgun pellets used to murder the Doyles, also came from the same box found in Chaudoin's home, or that they had been fired from the same gun.

Also presented at trial was evidence that in March of 1993, after requesting permission from a friend, Charles Simmons, Chaudoin sold 20 head of cattle, using Simmons' name. In February of 1994, without getting Simmons' permission, Chaudoin again sold cattle using Simmons' name. Another friend was surprised at the number of cattle being sold. When questioned as to why so many, Chaudoin answered: "They owe it to me."

Yelvington, a cattle hand, testified there were 400 head of cattle on the ranch and that 35 head were missing. The list of cattle sold by Chaudoin under Simmons' name roughly matched the missing cattle, with regard to weight and sex.

The evidence supported an inference that after discovering or suspecting the theft of cattle from the ranch, Pat Doyle confronted Chaudoin and threatened to go to the police. A witness testified that she overheard Pat Doyle state that they were going to confront Chaudoin "very soon." The Doyles said they wanted him off the ranch "immediately." Further, Pat had instituted a system to inventory the cattle, including marking each animal