ORIGINAL

IN THE SUPREME COURT OF FLORIDA

KIMBERLI JORDAN,

Petitioner,

v. CASE NO. 92,702

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS:

Respondent rejects Petitioner's statement of the case and facts, as it contains record citations to the trial court proceedings. For purposes of determining conflict jurisdiction, the Supreme Court is limited to the facts which appear within the four corners of the decision allegedly in conflict. Hardee v. State, 534 So. 2d 706, 708 n. (Fla. 1988); Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986). Respondent therefore substitutes the following facts, taken from the decision allegedly in conflict:

Petitioner was convicted of DUI manslaughter, two counts of DUI damage to a person, and driving with a suspended or revoked license. Jordan v. State, 23 Fla.L.Weekly D536 (Fla. 5th DCA February 20, 1998). DUI manslaughter is a second degree felony, punishable by up to 15 years in prison. Id. at D537. Petitioner was sentenced pursuant to the sentencing guidelines. Her sentencing scoresheet resulted in a recommended sentence of 203 months, a minimum of 152.25 months and a maximum of 253.75 months (21.1 years). Id. The trial court imposed a sentence of 21.1 years. Id.

On appeal, petitioner argued that her sentence exceeded the statutory maximum of fifteen years for the offense of DUI manslaughter. Jordan, 23 Fla. L. Weekly at D537. The Fifth District Court of Appeal affirmed petitioner's sentence pursuant to Section 921.001(5), Florida Statutes (1995), holding:

> 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.

Id. The district court cited as authority Mays v. State, 693 So.2d 52 (Fla. 5th DCA) rev. granted, 700 So.2d 686 (Fla. 1997), and Green v. State, 691 So.2d 502 (Fla. 5th DCA), rev. granted, 699 So.2d 1373 (Fla. 1997).

SUMMARY OF ARGUMENT

POINT OF LAW: The Fifth District Court of Appeal affirmed petitioner's sentence, citing as authority two decisions which are currently pending review in this Court. It thus appears that this Court has jurisdiction to review the district court's opinion below.

ARGUMENT

POINT OF LAW

IT APPEARS THAT THIS COURT HAS JURISDICTION, AS THE FIFTH DISTRICT COURT OF APPEAL AFFIRMED PETITIONER'S SENTENCE, CITING AS AUTHORITY TWO DECISIONS WHICH ARE CURRENTLY PENDING REVIEW IN THIS COURT.

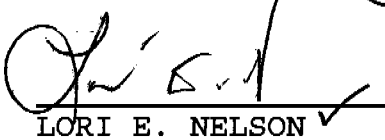
In the instant case, the Fifth District Court of Appeal affirmed petitioner's sentence, citing as authority Mays v. State, 693 So.2d 52 (Fla. 5th DCA) rev. granted, 700 So.2d 686 (Fla. 1997), and Green v. State, 691 So.2d 502 (Fla. 5th DCA), rev. granted, 699 So.2d 1373 (Fla. 1997). Jordan v. State, 23 Fla.L.Weekly D536, D537 (Fla. 5th DCA February 20, 1998).

This Court has held that where a district court affirms, citing as authority a prior decision which is pending review in this Court, this Court has conflict jurisdiction to review the district court's decision. Jollie v. State, 405 So.2d 418 (Fla. 1981); See also Difilippo v. Rayle, 684 So.2d 819 (Fla. 1996). In the instant case the Fifth District Court of Appeal cited, as authority, two cases which are currently pending review in this Court. It thus appears that this Court has jurisdiction to review the decision of the Fifth District below.

CONCLUSION

Based on the argument and authorities presented herein, respondent acknowledges that this honorable Court may accept jurisdiction in the instant case.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished by delivery to Brynn Newton, Assistant Public Defender, this 14th day of April, 1998.

Lori E. Nelson
Of Counsel

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.

[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 District. 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