No Request Case

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 THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

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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.

In the brief the following symbols will be used:

"R" - Record on appeal, including transcript of sentencing proceedings (Volume I)

"T" - Transcript of trial proceedings (Volumes II through IV)

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, Vol. I) 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. IV; R 61-63, Vol. I) On December 13, 1996, she was sentenced to concurrent prison and county jail terms totalling 253.75 months, and it was announced that her license to drive would be permanently revoked. (R 205-206, R 108-113, Vol. I)

On February 20, 1998, her convictions and sentences were affirmed by the Fifth District Court of Appeal. Jordan v. State, 707 So. 2d 816 (Fla. 5th DCA 1998). (APPENDIX). Jurisdiction of this cause was accepted by this Honorable Court on May 19, 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, 361, 362, Vol. III) 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, 375, 388, Vol. III) A forensic toxicologist testified that her examination of the sample revealed a blood alcohol level of .19%. (T 367, 383, 404, Vol. III) 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. III)

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, 191, 192, 196, 235-238, 240, 241, Vol. II; T 431-434, Vol. III) 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. III) 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. III)

SUMMARY OF ARGUMENT

POINT I: Because a portion of Petitioner's sentencing range recommended by the sentencing guidelines fell within the statutory maximum penalty for DUI manslaughter, the provision of Section 921.001(5), that a recommended sentence exceeding the maximum statutory penalty must be imposed, was not triggered, and Petitioner's sentence which exceeds the statutory maximum by more than six years should be reduced to within the sentencing guidelines range which fell within the statutory maximum. In the alternative, because Petitioner's specific "recommended sentence" of 203 months exceeds the statutory maximum penalty of 15 years for a second-degree felony, the trial court was precluded from utilizing the 25%-increase provision of Section 921.0014(2) to extend her sentence further beyond the statutory maximum term.

POINT II: The standard jury instruction on DUI manslaughter which allows a jury to find a defendant guilty if they find his operation of a motor vehicle while under the influence of alcohol "contributed" to another person's death violates due process in that it substantively amends a criminal statute. The DUI manslaughter statute requires the State to prove that a defendant caused another's death by virtue of driving under the influence of alcohol. The information likewise charged that Petitioner caused the decedent's death and the State was therefore required to prove

causation, not mere contribution. The standard jury instruction delivered in this case effectively amended a criminal statute to reduce the State's burden of proof and, because it redefined an element of the crime, constituted fundamental error.

ARGUMENT

POINT I

PETITIONER'S SENTENCE OF 253.75 MONTHS IN PRISON EXCEEDS THE STATUTORY MAXIMUM PENALTY, OF 15 YEARS IN PRISON, FOR DUI MANSLAUGHTER.

Petitioner was convicted of DUI manslaughter, two counts of causing personal damage by driving under the influence, and driving while her license was suspended. (T 574-576, Vol. IV; R 61-63, Vol. I) Her sentencing guidelines scoresheet point total placed her recommended sentence at 203 months in prison and her presumptive sentence, decreased by 25% and increased by 25%, within the range of 152.25 months to 253.75 months in prison. Rule 3.990, Fla. R. Crim. P. (R 117, 161-162, Vol. I) Circuit Judge Richard Watson sentenced her to spend 253.75 months, or 21.15 years in prison. (R 205-206, R 108-113, Vol. I)

DUI manslaughter is a second-degree felony and punishable by up to 15 years in prison. ss. 316.193(3)(c)(3.)(a.), 775.082(3)(c), Fla. Stat. (1995). The presumptive sentencing guidelines range for Petitioner's offense included imprisonment of 15 years, or 180 months, in prison. (R 117, Vol. I)

Section 921.001(5) provides:

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

In its decision herein, the District Court wrote:

> . . . 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, 707 So. 2d 816, 819 (Fla. 5th DCA 1998), citing 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). Green held that what the Legislature really meant to say was:

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

Id. Petitioner maintains, however, that the paraphrased provision of Section 921.001(5) merely authorizes a sentencing judge to exceed the statutory maximum in order to impose a sentence within the *range* recommended by the sentencing guidelines, *if* the entire range exceeds the statutory maximum. If the entire range exceeds the statutory maximum, then to impose a sentence *within* the statutory maximum would require a downward departure. (" . . . absent a departure.")

In Myers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), the Fourth District Court of

Appeal characterized the Fifth District Court of Appeal's "clarification" of Section 921.001(5) as "effectually [rewriting] the statute." Id., 696 So. 2d at 900. Under Myers, Petitioner's sentence would be limited to no more than 203 months, or 16.9 years, in prison because 203 months is the **recommended** sentence which, the Fourth District Court held, is a specific, fixed, precise sentence and cannot be increased by the "plus 25%" provision of Section 921.0014(2) any further beyond the Section 775.082 statutory maximum for a given offense.

As the Myers Court recognized, a reviewing court must apply the rule of lenity and choose from among competing statutory constructions the meaning favoring a defendant. Id., 696 So. 2d at 897; §775.021(1), Fla. Stat. (1995). The result in this instance should be that because part of a defendant's sentencing guidelines range includes the traditional statutory maximum, then the sentence imposed should be limited to the statutory maximum.

Petitioner's sentencing guidelines range included penalties beyond the statutory maximum of 15 years but, because the range also included penalties within the statutory maximum, Section 921.001(5) did not require or authorize a penalty that exceeded the statutory maximum. She should be resentenced to a term within the range of 152.25 to up to 180 months in prison.

POINT II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT PETITIONER COULD BE GUILTY OF DUI MANSLAUGHTER IF SHE CAUSED OR CONTRIBUTED TO THE CAUSE OF THE DECEDENT'S DEATH.

The information charging Petitioner with DUI manslaughter alleged that by her operation of a vehicle while under the influence of alcohol she "did . . . cause the death of JENNIFER SADOW, a human being." (R 1) Section 316.193(3) makes it a felony of the second degree for anyone who is under the influence of alcohol to cause the death of a human being. The trial court, however, instructed Petitioner's jury:

> THE COURT: . . . Number two, that Kimberli Anne Jordan by reason of such operation caused or contributed to the cause of death of Jennifer Sadow.
>
> * * *

(T 542) (Emphasis supplied.)

In its affirmance of Petitioner's conviction for DUI manslaughter, the District Court wrote:

> 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 a 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.

Petitioner's counsel did not object to the trial court's proposal to read the jury instruction as it was given but, when it pertains to the definition or elements of a crime or compromises an accused's affirmative defense, a misleading jury instruction constitutes fundamental reversible error. Rojas v. State, 522 So. 2d 914 (Fla. 1989); Pugh v. State, 624 So. 2d 277 (Fla. 2d DCA 1993); Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985). (T 462, 463, Vol. III) A trial court has a fundamental responsibility to give the jury full, fair, complete, and accurate instructions on the law. Foster v. State, 603 So. 2d 1312 (Fla. 1st DCA 1992).

Although the standard jury instructions are presumed to be correct, they not always are. See, e. g., Yohn v. State, 476 So. 2d 123 (Fla. 1985) (standard jury instruction concerning law of

insanity incorrect); Jackson v. State, 648 So. 2d 85 (Fla. 1994) (standard jury instruction on cold, calculated and premeditated aggravating factor unconstitutional). As the First District Court of Appeal noted in Steele v. State, 561 So. 2d 638, 645 (Fla. 1st DCA 1990):

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

Interestingly, the fact that the standard jury instructions are not absolute was observed by the judge in this case when he proposed to revise the standard language regarding blood alcohol level:

> THE COURT: . . . or had a blood alcohol level of .08. I think that should say .08 or greater. Well, that instruction as it reads is erroneous. It had a blood alcohol level of .08 or greater; isn't that correct?
>
> MS. WILLIAMS [Prosecutor]: Correct.

> THE COURT: I mean, otherwise it sounds like if she doesn't have .08 she can't be found guilty. That's wrong. Well, I'm not saying that the book is right, but if you look, I'm just saying that instruction as it's written is wrong and I'd like that changed. I don't care what the book says.
>
> * * *

(T 463, Vol. III) (Emphasis supplied.)

The error in both Delva v. State, supra, and State v. Austin, supra, was the trial court's failure to instruct the jury on whether the defendants in those cases knew that the substance each, respectively, possessed or trafficked in was cocaine. The error was in those cases merely a deficiency in elaborating on the elements of the crimes charged. The standard jury instruction on DUI manslaughter, however, improperly redefines the crime. The statutory language does not make it a crime to "contribute" to the cause of someone's death by driving under the influence but to cause the death. s. 316.193(3)(c), Fla. Stat. (1995). The standard jury instruction adding the phrase "or contributed to the cause of" violates due process because it in effect substantively amends the statute and lowers the State's burden of proof. It also varies from what the information charged Petitioner with doing, i.e., *causing* Jennifer Sadow's death. (R 1)

Even though the DUI manslaughter statute was amended in 1986 to require a showing of causation, the standard jury instruction

renders the offense, once again, a strict liability crime. See, e. g., Baker v. State, 377 So. 2d 17 (Fla. 1979). This Honorable Court in Magaw v. State, 537 So. 2d 564 (Fla. 1989) found that the legislature clearly intended to introduce causation as an element of DUI manslaughter, adding:

> . . . We caution, however, that the statute does not say that the operator of the vehicle must be the sole cause of the fatal accident. Moreover, the state is not required to prove that the operator's drinking caused the accident. The statute requires only that the operation of the vehicle should have caused the accident. Therefore, any deviation or lack of care on the part of a driver under the influence to which the fatal accident can be attributed will suffice.

Id., 537 So. 2d at 567. The standard jury instruction purportedly based on Magaw, however, tells the jury that they need only find that the defendant's operation of a motor vehicle while his faculties were impaired somehow contributed to another person's death, in order to convict him of DUI manslaughter. There is no requirement that they find even that his operation of the motor vehicle substantially contributed to the other person's death, as would be the case if the jury were hearing a civil case and determining mere negligence by a preponderance of the evidence. Rather, a jury may be deemed to have found beyond a reasonable

doubt that a defendant is guilty of a homicide if they find that he simply "contributed" to the death. See, for example, then-Judge Anstead's dissent in Bowman v. State, 618 So. 2d 763 (Fla. 4th DCA 1993):

> . . . An example of a neutral and balanced instruction on causation is contained in the civil jury instruction on legal causation, which provides:
>
> a. Legal cause generally:
>
> Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.
>
> Fla. Std. Jury Instr. (Civ.) 5.1(a). This instruction obviously requires, in a civil setting, that a defendant's fault contribute "substantially" to producing the injury. It is doubtful that the legislature would require less in a criminal prosecution.

Id., 618 So. 2d at 765. Justice Anstead also stated in Bowman:

> . . . Hence, the holding of the case was that Magaw's conviction under the prior strict liability statute would stand. However, I do not believe the supreme court in *Magaw* intended its comments in dicta to be used as jury instructions.

Id., 618 So. 2d at 764. But see Melvin v. State, 677 So. 2d 1317 (Fla. 4th DCA 1996), wherein the District Court judges discerned in

the standard jury instruction an "explicit" requirement that the jury determine that the defendant "had to cause the death by reason his operation of his vehicle." Id., 677 So. 2d at 1318.

Petitioner's right to due process of law was violated by the trial court's delivering a jury instruction which, although included in the standard jury instructions, constitutes a substantive amendment to a criminal statute and improperly relieves the State of a significant portion of its burden of proof.

In addition, Petitioner was prejudiced by the giving of the standard jury instruction allowing her "contribution" to the cause of Jennifer Sadow's death to convict her, where the State had charged that she committed DUI manslaughter by causing Jennifer Sadow's death. Analogous to this situation in this case is the case of Ankiel v. State, 479 So.2d 263 (Fla. 5th DCA 1985). In Ankiel, the State charged the defendant with trafficking in more than 400 grams of cocaine. Under Section 893.135(1)(b)3, the penalties for possessing cocaine are greater if the amount of cocaine is more than certain defined amounts. The threshold for greater penalties can be reached even though the substance possessed is not "pure" cocaine but is a mixture merely containing cocaine. Ankiel had been found in possession of a substance that weighed 439 grams that was more than half cocaine but contained impurities. This Honorable Court found that the evidence would

have supported a conviction for possession of 400 or more grams of a mixture containing cocaine, but the State had chosen to charge Ankiel with possessing cocaine. The Court wrote:

> This case is more like Booker v. State, 93 Fla. 211, 111 So. 476 (1927), where the defendant was charged and convicted of breaking and entering a smoke house. The evidence at trial, however, established that the defendant had entered a fowl house and had stolen chicken and turkeys. The supreme court held that this evidence was insufficient to sustain the conviction explaining as follows:
>
> > It may not have been necessary for the pleader to have alleged in the indictment with such particularity the elements of the offense charged, but, having done so, he is required to establish the allegations beyond a reasonable doubt by appropriate evidence; otherwise a person charged with an offense would be seriously embarrassed in defending himself, and placed at a disadvantage which the law does not contemplate shall be taken of him. [Citation omitted.] The statute provides a penalty for acts in the disjunctive. The indictment may have alleged them in the conjunctive, and proof of one would have sufficed. [Citation omitted.] But if one set of facts is alleged, it cannot be established by proof of the other.

> 111 So. at 477. See also Jiminez v. State, 231 So.2d 26 (Fla. 3d DCA 1970) (proof of sale of morphine, a derivative of opium, not sufficient to sustain an information charging sale of heroin, also a derivative of opium).

Id., 479 So.2d at 264-265.

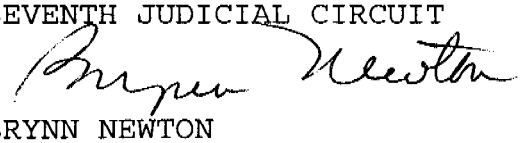
Here, the State might have chosen to charge Petitioner with "contributing" to the cause of Jennifer Sadow's death, as would constitute a crime if the standard jury instruction were a correct statement. Instead, the State chose to allege that Petitioner violated a statute which was specifically amended to require the prosecution to prove that the defendant caused another person's death by virtue of operating a motor vehicle while under the influence. The reasoning of Ankiel, supra, and the presumption that the Legislature does not enact purposeless legislation support the conclusion that giving the standard jury instruction, particularly under the manner in which Petitioner was charged in this case, was error. Petitioner is entitled to a new trial.

CONCLUSION

For the reasons expressed in Point II herein, Petitioner respectfully requests that this Honorable Court quash the District Court's decision herein, reverse her conviction for DUI manslaughter and order that this cause be remand to the trial court for a new trial. In the alternative, and for the reasons expressed in Point I herein, Petitioner respectfully requests that this Honorable Court quash the District Court's decision herein and order that her sentence for DUI manslaughter be vacated and this cause remanded to the trial court for resentencing within the statutory maximum term of 15 years in prison.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

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, this 15th day of June, 1998.

ATTORNEY

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
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A P P E N D I X

*66571 NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Kimberli JORDAN, Appellant,
v.
STATE of Florida, Appellee.

No. 96-3589.
District Court of Appeal of Florida,
Fifth District.
Feb. 20, 1998.

Appeal from the Circuit Court for St. Johns County; Richard O. Watson, Judge.

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.

W. SHARP, Judge.

**1 Jordan appeals from her adjudication for DUI manslaughter, (FN1) two counts of DUI damage to a person, (FN2) and driving with a suspended or revoked license. (FN3) 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, (FN4) 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," (FN5) 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.

**2 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).

****3.** 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.

FN1. § 316.193(1) and (3)(a), (b), and (c)3, Fla. Stat. (1995).

FN2. § 316.193(1) and (3)(a), (b), and (c)1, Fla. Stat. (1995).

FN3. § 322.34(1), Fla. Stat. (1995).

FN4. Fla. Std. Jury Instr. (Crim.) 71.

FN5. "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).