IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-506
Lower Tribunal Nos. 3D18-165;
132014CF0129410001XX

ROBERT VELAZCO,

Petitioner,

STATE OF FLORIDA,

Respondent,

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

PETITIONER'S APPENDIX TO JURISDICTIONAL BRIEF

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Third District Court of Appeal

State of Florida

Opinion filed February 19, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-0165
Lower Tribunal No. 14-12941

Robert Velazco,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Cristina Miranda, Judge.

Michael Mirer, for appellant.

Ashley Moody, Attorney General, and Rachel Kamoutsas (Tallahassee) and Asad Ali, Assistant Attorneys General, for appellee.

Before EMAS, C.J., and FERNANDEZ, and MILLER, JJ.

MILLER, J.

Appellant, Robert Velazco, challenges his convictions and sentences for leaving the scene of an accident involving personal injuries, driving under the influence ("DUI") causing serious bodily injury, and DUI causing property damage. On appeal, Velazco contends his dual convictions for DUI serious bodily injury and DUI property damage, arising out of the same criminal incident, are violative of double jeopardy. He further asserts the lower tribunal reversibly erred in admitting the perpetuated testimony of a nontestifying witness at trial. For the reasons explicated below, we affirm in all respects and certify conflict with the decision rendered by our esteemed sister court in Anguille v. State, 243 So. 3d 410 (Fla. 4th DCA 2018).[1]

FACTS AND BACKGROUND

On June 4, 2014, shortly after midnight, a white pickup truck collided with a scooter operated by Alexander Concepcion Rodas in an intersection abutting the cities of West Miami and Coral Gables. The driver of the errant truck fled the scene, thus, his identity was not readily ascertainable. Rodas sustained transformative personal injuries and his scooter was severely damaged.

[1] Asserting direct conflict with opinions from the Second District Court of Appeal and our high court, both the State and Anguille have sought review by the Florida Supreme Court. The proceedings of the case have been stayed, pending the disposition in State of Florida v. Elizabeth Francis Marsh a/k/a Elizabeth Frances Marsh, Case No. SC18-1108.

Shortly after the incident, Leticia Suri informed authorities that Velazco was the driver of the pickup truck. Suri contended that she was seated in the front passenger seat of the truck at the time of the impact.

Law enforcement officers traveled to Velazco's home and discovered a white pickup truck, matching the description of the vehicle involved in the earlier crash, parked in the driveway. The officers noted visible damage on the exterior of the truck, along with shattered glass on the passenger side.

Velazco was present at the residence. Although appearing uninjured, he exhibited signs of alcohol impairment, including slurred speech and bloodshot eyes. After having been informed that a traffic investigation was underway, Velazco uttered a profanity-laced, tacit admission. Ensuing blood testing revealed an alcohol concentration exceeding the legal limit, and a urinalysis indicated the presence of cocaine.

Velazco was charged with both DUI serious bodily injury and DUI property damage.[2] The operative charging document alleged, in the former count, Velazco caused serious bodily injury to Rodas, and in the latter count, caused damage to the property or person of another, to wit: "damage to the motorcycle and/or scooter

[2] As noted previously, Velazco was also charged with leaving the scene of an accident involving personal injuries.

and/or moped of" Rodas. The parties participated in discovery and trial was scheduled to commence in October 2017.

In the spring of 2017, citing various physical ailments, precipitated by the recent excision of an intercranial tumor and ongoing dialysis treatments, the State sought to perpetuate Suri's testimony. The trial court granted the motion, the testimony was duly secured and preserved, and eventually, published to the jurors at trial. Velazco was convicted on all counts, as charged, and sentenced, accordingly. The instant appeal ensued.

STANDARD OF REVIEW

"A determination of whether double jeopardy is violated based on undisputed facts is a legal determination; thus, [our] review is de novo." State v. Drawdy, 136 So. 3d 1209, 1213 (Fla. 2014) (citation omitted). "The decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court." Cherry v. State, 781 So. 2d 1040, 1054 (Fla. 2000) (citation omitted).

LEGAL ANALYSIS

I. Double Jeopardy

A. Constitutional Prohibition Against Double Jeopardy

The double jeopardy clause of the Fifth Amendment provides "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Amend. V, U.S. Const. Similarly, the Constitution of the State of Florida specifies

"[n]o person shall . . . be twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const. The origin of this guarantee significantly predates its constitutional codifications, having been traced "at least back to Roman times." Harlan R. Harrison, Federalism and Double Jeopardy: A Study in the Frustration of Human Rights, 17(3) U. Miami L. Rev. 306, 307 (1963).

In principle, double jeopardy extends protection to the accused from the "vast power of the sovereign," Currier v. Virginia, 138 S. Ct. 2144, 2149, 201 L. Ed. 2d 650 (2018), by restraining the power of "courts and prosecutors." Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977). We are mindful that "[i]t is not a second jeopardy for the same act, but a second jeopardy for the same offense" that is explicitly prohibited by our Constitution. State v. O'Brien, 170 A. 98, 100 (Vt. 1934); see also Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 798-805, 114 S. Ct. 1937, 1955-59, 128 L. Ed. 2d 767 (1994) (Scalia, J., dissenting) ("'To be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions . . . the Due Process Clause keeps punishment within the bounds established by the legislature . . . Multiple punishment is . . . restricted only by the Double Jeopardy Clause's requirement that there be no successive criminal prosecution, and by the Due Process Clause's requirement that the cumulative punishments be in accord with the law of the land, i.e., authorized by the

legislature.").[3] Nevertheless, under binding precedent, the prohibition on double jeopardy proscribes not only a second trial for the same offense, but also unendorsed "multiple punishments for the same offense." Brown, 432 U.S. at 165, 97 S. Ct. at 2225 (citation omitted).

Thus, "[i]n the context of multiple punishments, the purpose of double jeopardy is simply to 'ensur[e] that the total punishment [does] not exceed that authorized by the legislature.'" Stoddard v. Sec'y, Dep't of Corr., 600 F. Appx. 696, 703 (11th Cir. 2015) (second alteration in original) (quoting Jones v. Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 2525, 105 L. Ed. 2d 322 (1989)); see Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535 (1983) ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); Brown, 432 U.S. at 165, 97 S. Ct. at 2225 ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense."). Consequently, "the question [of] whether punishments imposed by a court after a defendant's

[3] "The term 'legislative power' as used in [a]rticle III [of the Florida Constitution] most particularly embraces statutes defining criminal offenses; and in the field of criminal law, the concept of separation of powers is directly linked to the Constitutional guarantee of due process . . . Likewise, due process is implicated because article I, section 9 requires that a criminal statute reasonably apprise persons of those acts that are prohibited." B.H. v. State, 645 So. 2d 987, 992 (Fla. 1994).

conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980) (citations omitted); see Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) ("[T]he power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch.") (citation omitted).

B. Section 775.021(4), Florida Statutes (2019)

Hence, in the instant case, we examine whether the legislature has authorized cumulative punishments for DUI serious bodily injury and DUI property damage. Under Florida law, "a trial court has discretion to impose separate sentences, either concurrently or consecutively, for each separate criminal offense arising out of a single criminal transaction or episode." Lifred v. State, 643 So. 2d 94, 96 (Fla. 4th DCA 1994). Criminal offenses are separate, and do not offend double jeopardy principles, if they meet the "same elements" test, first articulated in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and later codified in section 775.021(4)(a), Florida Statutes. This test is satisfied "if each offense requires proof of an element that the other does not." § 775.021(4)(a), Fla. Stat.

Here, both crimes involve operating or exerting actual physical control over a vehicle while impaired or with a prohibited blood alcohol level,[4] however, DUI serious bodily injury imposes a separate requirement that the accused "cause[d] or contribut[ed] to causing . . . *[s]erious bodily injury* to another." § 316.193(3)(c)(2), Fla. Stat. (emphasis added). Conversely, DUI property damage necessitates proof the accused "cause[d] or contribute[d] to causing . . . *[d]amage to the property* . . . of another." § 316.193(3)(c)(1), Fla. Stat. (emphasis added). Accordingly, the two criminal acts fulfill the "same elements" test, as "each offense contains an element not contained in the other." United States v. Dixon, 509 U.S. 688, 696 & 710, 113 S. Ct. 2849, 2856 & 2863, 125 L. Ed. 2d 556 (1993) ("The second prosecution was allowed, because 'these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other.'") (quoting King v. Vandercomb, 2 Leach. 708, 717, 168 Eng. Rep. 455, 460 (K.B. 1796)).

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[4] Section 316.193, Florida Statutes (2019), criminalizing DUI-related offenses, states, in relevant part:

> (3) Any person:
> (a) Who is in violation of subsection (1);
> (b) Who operates a vehicle; and
> (c) Who, by reason of such operation, causes or contributes to causing:
> 1. Damage to the property or person of another commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
> 2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Nonetheless, this does not end our analysis. In the landscape of double jeopardy jurisprudence, absent express contrary legislative intent, "the rule of lenity . . . dictates that a single criminal transaction should not result in charges for multiple offenses." State v. Liberty, 370 S.W.3d 537, 547 (Mo. 2012) (citing Bell v. United States, 349 U.S. 81, 83-84, 75 S. Ct. 620, 622, 99 L. Ed. 905 (1955)). In Florida, our legislature has declared that "the principle of lenity" should not undermine the intent to "convict and sentence [separately] for each criminal offense committed in the course of one criminal episode or transaction," save under the following circumstances:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§775.021(4)(b), Fla. Stat. (2019). In determining whether any of these exceptions are applicable to a given prosecution, the "analysis must . . . be conducted without regard to the accusatory pleading or the proof adduced at trial, even where an alternative conduct statute is implicated." Roughton v. State, 185 So. 3d 1207, 1211 (Fla. 2016). For that reason, "when considering a statute that proscribes conduct in the alternative (offenses that can be committed in more than one way), the analysis must consider the entire range of conduct prohibited by the statutes, not the specific

conduct charged or proven at trial." Tambriz-Ramirez v. State, 213 So. 3d 920, 923 (Fla. 4th DCA 2017), approved by 248 So. 3d 1087 (Fla. 2018) (citing Roughton, 185 So. 3d at 1210-11).[5]

1. Distinct Elements of Proof

In the instant case, none of the three codified exceptions apply. Firstly, as previously discussed in conjunction with our Blockburger analysis, the elements comprising DUI property damage are distinct from those of DUI serious bodily injury. Thus, the two offenses do not "require identical elements of proof." § 775.021(4)(b)(1), Fla. Stat.

2. Degree-Variant

Secondly, the degree-variant "exception is . . . to apply narrowly. It prohibits separate punishments only when a criminal statute provides for variations in degree of the same offense, so that the defendant would be punished for violating two or more degrees of a single offense." Valdes v. State, 3 So. 3d 1067, 1076 (Fla. 2009) (citation omitted). It is axiomatic that, "[t]he term 'degree' has a plain meaning . . . —'a level based on the seriousness of an offense.'" Id. (quoting *Degree*, Black's

[5] Other jurisdictions are not limited to the statutory provisions, without regard for the charging document, in determining a double jeopardy violation. See, e.g., United States v. Brandon, 17 F.3d 409, 422 (1st Cir. 1994) ("The central question for determining [a violation of double jeopardy] is 'whether a jury could plausibly find that the actions described in the [disputed] counts of the indictment, objectively viewed, constituted separate executions of the [bank fraud] scheme.'") (second and third alterations in original) (citation omitted).

Law Dictionary (8th ed. 2004)). Consequently, "the only offenses that fall under subsection (4)(b)(2), are those that constitute different degrees of the same offense, as *explicitly* set forth in the relevant statutory sections." Id. at 1077 (emphasis added).

Here, the legislature chose not to classify any DUI-related crimes by "degree." Thus, a faithful textualist approach to interpretation belies the proposition that the offenses "are degrees of the same offense as provided by statute." § 775.021(4)(b)(2), Fla. Stat.; see 50 Am. Jur. § 274 ("The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have so presumed. Under this rule, where language is used in one section of the statute different from that used in other sections of the same chapter it is to be presumed that the language is used with a different intent. Accordingly, the presence of a provision in one section of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted.").

Nevertheless, as aptly noted by Chief Judge Emas in his dissent, we are cognizant that, having held "[i]t is not necessary for the Legislature to use the word 'degree' in defining the crime in order for the degree variant exception to apply," our high court has historically engaged a broader interpretive method. Valdes, 3 So.

3d at 1076. Thus, we scrutinize the statutory scheme anew, in light of binding precedent.

In his seminal concurrence in State v. Paul, 934 So. 2d 1167 (Fla. 2006), later adopted by a majority of the Florida Supreme Court in Valdes, 3 So. 3d at 1068, Justice Cantero provided three examples of degree-variants, consistent with the plain language of section 775.021(4)(b)(2):

> One example is the theft statute, which expressly identifies three degrees of grand theft and two degrees of petit theft. See § 812.014, Fla. Stat. (2005). Another is the homicide statute, which expressly identifies three degrees of murder, as well as multiple forms of manslaughter. See id. §§ 782.04, 782.07. Yet another is arson, which has two degrees. See id. § 806.01. *It is in such cases, and only such cases, that the exception was intended to apply.*

Paul, 934 So. 2d at 1177 (emphasis added) (footnote omitted). In each cited illustration, the relevant statute references the word "degree," and embraces a graduated system of penalty, increasing the sanction, as a single harm inflicted on a given victim intensifies. Conversely, here, the DUI statute omits any reference to "degree," and delineates varying penalties for separate, distinct, non-overlapping harms.

In recognition of this carefully-constructed statutory structure, our supreme court and sister tribunals have consistently and unequivocally determined that multiple convictions imposed in conjunction with a single DUI episode, resulting in separate death or injury, do not run afoul of double jeopardy principles. See Bautista

v. State, 863 So. 2d 1180, 1187 (Fla. 2003) ("[A] 'DUI driver may sustain multiple convictions because the violation causes injury to each victim.'") (citing Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996)); State v. Salazar, 679 So. 2d 1183, 1183 (Fla. 1996) ("Melbourne applies to parts 1, 2, and 3 of section 316.193(3)(c), Florida Statutes."); Melbourne, 679 So. 2d at 765 (finding double jeopardy principles did not preclude defendant's convictions for two counts of DUI manslaughter and one count of DUI with serious bodily injury, even though convictions arose from single violation of DUI statute, where defendant caused the death of two persons and injury to a third); McHugh v. State, 160 Fla. 823, 824, 36 So. 2d 786, 787 (1948) (stating that the great weight of authority supports the view that under the DUI manslaughter statute "[t]here is an offense for each unlawful homicide"); State v. Miller, 700 So. 2d 1253 (Fla. 1st DCA 1997) (finding multiple convictions for DUI with injuries or property damage may be obtained against a defendant where there are several persons injured and different property damaged, caused by a defendant driving under the influence as the result of one driving episode); Hosford v. State, 682 So. 2d 218, 218-19 (Fla. 5th DCA 1996) ("Had [the defendant] been charged . . . with two counts of DUI bodily injury . . . and one count of DUI property damage, the convictions would have been proper.") (citation omitted); State v. Wright, 546 So. 2d 798, 799 n.2 (Fla. 1st DCA 1989) ("The prosecution of multiple counts of DUI manslaughter [arising from a single DUI incident is] commonplace, and not open to serious

question."); Pulaski v. State, 540 So. 2d 193, 194 (Fla. 2d DCA 1989) ("[O]ne count of manslaughter is permissible for *each* death sustained during a drunk driving episode.") (citation omitted); State v. Naumowicz, 535 So. 2d 702, 702 (Fla. 1st DCA 1988) (permitting separate counts of DUI manslaughter based on separate deaths in a single DUI incident); State v. Lowe, 130 So. 2d 288, 289 (Fla. 2d DCA 1961) ("This Court holds that where two or more persons are killed by a single [DUI crash], there are as many separate and distinct offenses as there are persons killed by the unlawful act."). Implicit, at a minimum, in each of these decisions is a rejection of the notion that separate, non-imbricating harms emanating from a single act constitute degree-variants.

The sole factor differentiating the instant case from the aforecited body of established jurisprudence is that, here, in addition to suffering personal injuries, the victim owned the damaged scooter. The mere happenstance that property ownership was vested in the same critically wounded individual cannot be logically construed to insulate the accused from the prosecution of a separate, legislatively-proscribed crime. Accordingly, we conclude that, as the resultant injuries are entirely distinguishable and do not overlap, "neither offense is an aggravated form of the other," and the crimes do not constitute degree-variants. Valdes, 3 So. 3d at 1077; see also Melbourne, 679 So. 2d at 765 ("In the case of DUI, . . . the driver's

intoxication results in his or her inability to drive safely. The DUI driver may sustain multiple convictions because the violation causes injury to each victim.").

3. Subsumed-Within Exception

Thirdly and lastly, the subsumed-within exception set forth in section 775.021(4)(b)(3), applies "only if the greater offense *necessarily* includes the lesser offense." State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991); see Dixon, 509 U.S. at 718, 113 S. Ct. at 2868 (Rehnquist, J., concurring in part, dissenting in part) ("A lesser included offense is defined as one that is 'necessarily included' within the statutory elements of another offense.") (citations omitted). A crime constitutes a necessarily lesser included offense "if, on the face of the statute[] . . . a defendant cannot possibly avoid committing the offense when the other crime in question is perpetrated." State v. Weller, 590 So. 2d 923, 925 (Fla. 1991).

DUI serious bodily injury requires proof of a resultant "physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ," whereas, DUI property damage, criminalizes separate harm inflicted upon real or personal property. § 316.1933(1)(b), Fla. Stat. (2019). Although "property" is not legislatively defined, "[t]he traditional legal meaning of the term is 'a right over a determinate thing, either a tract of land or a chattel.'" *Property*, Garner's Dictionary of Legal Use (3d ed. 2011); see Fla. State Racing Comm'n v. Bourquardez, 42 So.

2d 87, 88 (Fla. 1949) ("The legislature is presumed to know the meaning of words . . . the only way the court is advised of what the legislature intends is by giving the generally accepted construction . . . to the phraseology.") (citation omitted). Consequently, property damage cannot be subsumed within serious bodily injury, and the third exception is inapplicable. Accordingly, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." Moore v. Illinois, 55 U.S. 13, 20, 14 L. Ed. 306 (1852).

II. Perpetuation of Testimony

Finally, as Suri was subject to cross-examination and the State sufficiently demonstrated her unavailability at the time of trial, we find no abuse of discretion in the admission of the perpetuated testimony. See Fla. R. Crim. P. 3.190(i)(1) ("After the filing of an indictment or information on which a defendant is to be tried, the defendant or the state may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness . . . may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice."); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177 (2004) ("The historical record also supports a second proposition: that the Framers would not have allowed

admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); Mattox v. United States, 156 U.S. 237, 244, 15 S. Ct. 337, 340, 39 L. Ed. 409 (1895) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of.").

CONCLUSION

Today, in accord with legislative prerogative and a body of well-entrenched jurisprudential precedent, we conclude that the lower tribunal did not exceed legislative authority in separately sentencing Velazco for DUI property damage and DUI serious bodily injury. Consequently, there has been no violation of the restraint against double jeopardy. We hereby certify direct conflict between our decision and the Fourth District Court of Appeal's decision in Anguille. As we further decline to embrace any assignment of error in conjunction with the perpetuation of testimony, we affirm in all respects.

Affirmed.

FERNANDEZ, J., concurs.

EMAS, C.J., concurring in part and dissenting in part.

INTRODUCTION

I concur with that portion of the majority opinion holding that the trial court committed no error in admitting at trial the perpetuated testimony of an unavailable witness. However, I respectfully dissent from that portion of the majority opinion holding that principles of double jeopardy do not prohibit dual convictions and sentences for DUI property damage/bodily injury and DUI serious bodily injury arising from the commission of a single act. I conclude that these two offenses are degree-variant offenses and aggravated forms of the basic DUI offense and that, pursuant to section 775.021(4)(b)2., Florida Statutes (2014), we must reverse the conviction and sentence for the misdemeanor offense of DUI bodily injury.

BACKGROUND

Velazco was charged with, and convicted of, two subsections of section 316.193, Florida Statutes (2014), entitled "Driving under the influence; penalties." The State alleged that Velazco violated these two subsections by committing a single act of driving a vehicle while under the influence and running into the victim, causing injury to the victim and damage to the victim's scooter. Velazco was

charged with committing a first-degree misdemeanor under section 316.193(3)(c)1., and a third-degree felony under section 316.193(3)(c)2.

Under section 316.193(3)(c)1., it is a first-degree misdemeanor for any person to:

• operate a vehicle while under the influence;

• and, by reason of such operation, cause or contribute to causing;

• **damage to the property or person** of another.

Under section 316.193(3)(c)2. it is a third-degree felony for any person to:

• operate a vehicle while under the influence;

• and, by reason of such operation, cause or contribute to causing;

• **serious bodily injury** to another.

As can readily be seen, the only difference between the two offenses is the final essential element: the former requires proof of damage to person (or property) of another; the latter requires serious bodily injury to another.

ANALYSIS AND DISCUSSION

Applying well-settled double jeopardy principles, including the Florida Supreme Court's construction of section 775.021(4)(b)2., Velazco's convictions and sentences for both a first-degree misdemeanor under section 316.193(3)(c)1., and a third-degree felony under 316.193(3)(c)2., are prohibited.

***Blockburger* and the Statutory Exceptions**

In deciding whether a defendant may, consistent with principles of double jeopardy, be convicted and sentenced for violating two subsections of section 316.193(3)(c) through the commission of a single act, we must apply the "same elements" analysis set forth in Blockburger v. United States, 284 U.S. 299 (1932), taking into consideration the exceptions to Blockburger established by the Florida Legislature in section 775.021(4)(b), Florida Statutes (2014). That statute provides:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Degree Variants of the Same Offense (Section 775.021(4)(b)2.)

The majority and I agree on the proper framework for the analysis. We also agree that two of the three exceptions under section 775.021(4)(b) are inapplicable: the two offenses do not "require identical elements of proof" (section 775.021(4)(b)1.), nor are the two offenses necessarily "lesser included offenses the

statutory elements of which are subsumed by the greater offense" (section 775.021(4)(b)3.).[6]

It is at this point, however, that the majority and I part ways because, unlike the majority, I conclude that the misdemeanor DUI bodily injury/property damage and the felony DUI serious bodily injury are degree-variants of each other. Stated another way, DUI bodily injury/property damage and DUI serious bodily injury are "aggravated forms" of the basic DUI offense. See Valdes v. State, 3 So. 3d 1067, 1076 (Fla. 2009); State v. Paul, 934 So. 2d 1167, 1178 n. 5 (Fla. 2006) (Cantero, J. specially concurring). Double jeopardy prohibits separate convictions and sentences for these two offenses arising from a single act because, pursuant to section 775.021(4)(b)2., they are "[o]ffenses which are degrees of the same offense as provided by statute."

As the majority notes, the Florida Supreme Court announced the test in Valdes, 3 So. 3d at 1076 (adopting Justice Cantero's concurrence in Paul, 934 So.

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[6] As discussed *supra*, the misdemeanor offense is an "alternative conduct" statute, because it can be committed by causing bodily injury or by causing property damage. In analyzing such a statute for double jeopardy purposes, we are required to consider the entire range of conduct prohibited by statute. See Valdes v. State, 3 So. 3d 1067 (Fla. 2009). Had the misdemeanor merely prohibited DUI bodily injury (without the alternative conduct of property damage), misdemeanor DUI bodily injury would indeed be a necessarily-lesser included offense of felony DUI serious bodily injury, and dual convictions and convictions from a single act would be prohibited as "lesser offenses the statutory elements of which are subsumed by the greater offense." § 775.021(4)(b)3., Fla. Stat. (2014).

2d at 1176). As the Valdes Court observed, the degree-variant exception "prohibits separate punishments only when a criminal statute provides for variations in degree of the same offense, so that the defendant would be punished for violating two or more degrees of a single offense." Id. at 1076.

In the instant case, the majority spends two pages explaining why the degree-variant exception does not (or at least should not) apply, because the statute does not classify these DUI offenses by using the word "degree." Maj. Op. at 10-12. In reaching this conclusion, the majority quotes from a portion of Justice Cantero's specially concurring opinion in Paul, 934 So. 2d at 1177-78, which provided examples of degree-variant offenses:

> One example is the theft statute, which expressly identifies three degrees of grand theft and two degrees of petit theft. See § 812.014, Fla. Stat. (2005). Another is the homicide statute, which expressly identifies three degrees of murder, as well as multiple forms of manslaughter. See id. §§ 782.04, 782.07. Yet another is arson, which has two degrees. See id. § 806.01. It is in such cases, and only such cases, that the exception was intended to apply.

Addressing the above-quoted portion of the Paul opinion, the majority observes:

> In each cited illustration, the relevant statute references the word "degree", and embraces a graduated system of penalty, increasing the sanction as a single harm inflicted on a given victim intensifies. Conversely, here, the DUI statute omits any reference to "degree," and delineates varying penalties for separate, distinct, non-overlapping harms.

Maj. Op. at 12. The majority opines:

> Here, the legislature chose not to classify any DUI related crimes by "degree." Thus, a faithful textualist approach to interpretation belies the proposition that the offenses are "degrees of the same offense as provided by statute."

Maj. Op. at 11.

"Faithful textualism" aside, any such approach would require us to ignore Justice Cantero's express disavowal of the very premise urged by the majority:

> I do not mean to imply that the Legislature must use the magic word "degree" in defining the crime in order for the degree-variant exception to apply. Other statutory designations could also evince a relationship of degree, such as when a crime has an ordinary form and an aggravated form.

Paul, 934 So. 2d at 1178 n. 5 (J. Cantero, specially concurring). More to the point, three years later, the Florida Supreme Court in Valdes adopted Justice Cantero's special concurrence, including the fact that no magic words are required:

> It is not necessary for the Legislature to use the word "degree" in defining the crime in order for the degree variant exception to apply. There are other statutory designations that can evince a relationship of degree—for example, when a crime may have aggravated forms of the basic offense.

Valdes, 3 So. 3d at 1076.

Thus, the legislature's failure to use the term "degree" in classifying and distinguishing the two instant offenses is not determinative of whether the offenses are degree variants. And as can be seen from a review of the statutory provisions of section 316.193, the felony DUI serious bodily injury offense and the DUI bodily injury/property damage are degree-variants and aggravated forms of the basic

offense. The degree-variant exception applies to bar dual convictions and sentences where both offenses are committed by a single act.

Analyzing Whether the Misdemeanor Offense (DUI Bodily Injury/Property Damage) and the Felony Offense (DUI Serious Bodily Injury) Are Degree Variants

In order to determine whether DUI serious bodily injury and DUI bodily injury/property damage are degree variants, it is helpful to compare and contrast the two statutory offenses:

1. The two statutory provisions are contained in the very same subsection of 316.193(3)(c), the misdemeanor listed in subsection (3)(c)1., and the felony in subsection (3)(c)2. See Gil v. State, 118 So. 3d 787 (Fla. 2013) (holding that driving with a suspended license (§ 322.34(2)) and unlawful driving as a habitual traffic offender (§ 322.34(5)) were degree variants of the same offense, and noting as one consideration the fact that the two provisions are contained in the same statutory section);
2. DUI bodily injury/property damage punishes the violation as a first-degree misdemeanor. DUI serious bodily injury punishes the violation as a third-degree felony;
3. Both offenses contain these identical essential elements of proof: the defendant operated a vehicle, while under the influence, and by reason of such operation, caused or contributed to causing certain harm;

4. The first-degree misdemeanor requires, as an additional element of proof, bodily injury to another or property damage to another; the third-degree felony requires, as an additional element of proof, serious bodily injury to another.

Analyzing Whether the Two Offenses Are Aggravated Forms of the "Basic" DUI Offense

Finally, in analyzing whether the offenses are aggravated forms of the basic DUI offense, it is helpful to review these two subsections in the context of the DUI statutory framework. Below are excerpted portions of the DUI statute (section 316.193) with emphasis added for those portions most relevant to our discussion:

316.193. Driving under the influence; penalties

(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

(2)(a) Except as provided in paragraph (b), subsection (3), or subsection (4), any person who is convicted of a violation of subsection (1) shall be punished:
1. By a fine of:
a. Not less than $500 or more than $1,000 for a first conviction.

b. Not less than $1,000 or more than $2,000 for a second conviction; and
2. By imprisonment for:
a. Not more than 6 months for a first conviction.
b. Not more than 9 months for a second conviction.
3. For a second conviction, by mandatory placement for a period of at least 1 year, at the convicted person's sole expense, of an ignition interlock device approved by the department in accordance with s. 316.1938 upon all vehicles that are individually or jointly leased or owned and routinely operated by the convicted person, when the convicted person qualifies for a permanent or restricted license. The installation of such device may not occur before July 1, 2003.

***

(b) 1. Any person who is convicted of a third violation of this section for an offense that occurs within 10 years after a prior conviction for a violation of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In addition, the court shall order the mandatory placement for a period of not less than 2 years, at the convicted person's sole expense, of an ignition interlock device approved by the department in accordance with s. 316.1938 upon all vehicles that are individually or jointly leased or owned and routinely operated by the convicted person, when the convicted person qualifies for a permanent or restricted license. The installation of such device may not occur before July 1, 2003.

2. Any person who is convicted of a third violation of this section for an offense that occurs more than 10 years after the date of a prior conviction for a violation of this section shall be punished by a fine of not less than $2,000 or more than $5,000 and by imprisonment for not more than 12 months. The portion of a fine imposed in excess of $2,500 pursuant to this subparagraph shall be remitted by the clerk to the Department of Revenue for deposit into the General Revenue Fund. In addition, the court shall order the mandatory placement for a period of at least 2 years, at the convicted person's sole expense, of an ignition interlock device approved by the department in accordance with s. 316.1938 upon all vehicles that are individually or jointly leased or owned and routinely operated by the convicted person, when the

convicted person qualifies for a permanent or restricted license. The installation of such device may not occur before July 1, 2003.

3. Any person who is convicted of a fourth or subsequent violation of this section, regardless of when any prior conviction for a violation of this section occurred, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, the fine imposed for such fourth or subsequent violation may be not less than $2,000. The portion of a fine imposed in excess of $1,000 pursuant to this subparagraph shall be remitted by the clerk to the Department of Revenue for deposit into the General Revenue Fund.

(c) In addition to the penalties in paragraph (a), the court may order placement, at the convicted person's sole expense, of an ignition interlock device approved by the department in accordance with s. 316.1938 for at least 6 continuous months upon all vehicles that are individually or jointly leased or owned and routinely operated by the convicted person if, at the time of the offense, the person had a blood-alcohol level or breath-alcohol level of .08 or higher.

(3) Any person:
(a) Who is in violation of subsection (1);
(b) Who operates a vehicle; and
(c) Who, by reason of such operation, causes or contributes to causing:

1. Damage to the property or person of another commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. The death of any human being or unborn child commits DUI manslaughter, and commits:

a. A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

b. A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:
(I) At the time of the crash, the person knew, or should have known, that the crash occurred; and
(II) The person failed to give information and render aid as required by s. 316.062.

For purposes of this subsection, the term "unborn child" has the same meaning as provided in s. 775.021(5). A person who is convicted of DUI manslaughter shall be sentenced to a mandatory minimum term of imprisonment of 4 years.

(4) Any person who is convicted of a violation of subsection (1) and who has a blood-alcohol level or breath-alcohol level of 0.15 or higher, or any person who is convicted of a violation of subsection (1) and who at the time of the offense was accompanied in the vehicle by a person under the age of 18 years, shall be punished:

(a) By a fine of:
1. Not less than $1,000 or more than $2,000 for a first conviction.
2. Not less than $2,000 or more than $4,000 for a second conviction.
3. Not less than $4,000 for a third or subsequent conviction.

(b) By imprisonment for:
1. Not more than 9 months for a first conviction.
2. Not more than 12 months for a second conviction.

As can readily be seen, section 316.193 is a comprehensive DUI statute. Subsection (1) establishes the elements of the basic DUI offense. Subsections (2) and (3) contain at least nine separate provisions in which certain additional/aggravating conduct subjects the offender to correspondingly increased punishment.

Notably though, in each of those offenses involving additional/aggravating conduct, the offender must first have committed the elements of the basic DUI offense as set forth in section 316.193(1):

• driving (or in actual physical control of) a vehicle;

• while under the influence of alcoholic beverages (or a chemical or controlled substance);

• when affected to the extent that the person's normal faculties are impaired (or the person has an unlawful blood-alcohol (or breath-alcohol) level)

Although the language of the statute may not include use of the term "degree" to distinguish these offenses (like the murder and theft examples cited in Paul and Valdes, as discussed earlier), the statutory framework nonetheless evinces a "degree relationship," providing graduated imprisonment sentences (six months, nine months, one year, five years, fifteen years, thirty years), increased fines ($500-$1000, $1000-$2000, $2000-$4000, $4000 or more), and other escalating penalties (e.g., restriction, suspension or revocation of driving privileges) based upon the existence and establishment of certain aggravating conduct: the number of prior DUI convictions; the recency of those prior DUI convictions; the level of intoxication/impairment; the presence of a minor in the offender's vehicle while DUI; the nature of any resulting harm caused by an offender while DUI; and the

seriousness of any resulting harm (bodily injury, serious bodily injury, death) caused by the offender while DUI.

This final aggravating conduct—seriousness of the resulting harm—when viewed in the context of section 316.193, most clearly establishes that the instant offenses meet the degree-variant exception and compels the conclusion that felony DUI serious bodily injury and DUI bodily injury/property damage are merely aggravated forms of the basic DUI offense.

Below are the misdemeanor and felony DUI provisions at issue, placed in the context of other graduated, aggravated DUI-related offenses contained in the very same subsection of 316.193(3)(c)1., 2. and 3.:

> (3) Any person:
> (a) Who is in violation of subsection (1);
> (b) Who operates a vehicle; and
> (c) Who, by reason of such operation, causes or contributes to causing:
>
> 1. **Damage to the property or person of another** commits a **misdemeanor of the first degree**, punishable as provided in s. 775.082 or s. 775.083.
>
> 2. **Serious bodily injury to another**, as defined in s. 316.1933, commits a **felony of the third degree**, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> 3. The **death of any human being or unborn child** commits DUI manslaughter, and commits:
> a. A **felony of the second degree**, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
> b. A **felony of the first degree**, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, **if**:

(I) At the time of the crash, the person knew, or should have known, that the crash occurred; and
(II) The person **failed to give information and render aid** as required by s. 316.062.

All of these provisions address, criminalize and punish the act of operating a vehicle while impaired (or with an unlawful breath/blood alcohol level), and by operation of that vehicle and while in such a condition, causing certain harm. Where the harm caused while DUI is bodily injury or property damage, it is a first-degree misdemeanor, punishable by up to a year imprisonment. Where the harm caused while DUI is serious bodily injury, it is a third-degree felony, punishable by up to five years' imprisonment. Where the harm caused while DUI is death it is a second-degree felony, punishable by up to fifteen years' imprisonment. Where the harm caused while DUI is death, and is combined with the offender's failure to give information and render aid, it is a first-degree felony, punishable by up to thirty years' imprisonment.

CONCLUSION

A review of the language and framework of section 316.193(1) reveals a basic offense of DUI. Subsections (2) and (3) build upon the elements of the basic DUI offense, creating a series of additional escalating offenses (with correspondingly graduated levels of punishment) each based upon an act of increasingly serious aggravating conduct. Section 316.193(3)(c), which contains the two offenses at issue, evinces a "relationship of degree," Valdes, 3 So. 3d at 1076, such that felony

DUI serious bodily injury and misdemeanor DUI bodily injury/property damage are degree variants of each other and aggravated forms of the basic DUI offense. As a result, these offenses meet the exception in section 775.021(4)(b)2., and double jeopardy bars convictions and sentences for both offenses arising from a single act.

I therefore respectfully concur in part and dissent in part.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and provided via the ePortal to Assistant Attorney General Rachel Kamoutsas, PL-01, The Capitol, Tallahassee, Florida 32399, at crimappmia@myfloridalegal.com, this 30th day of April, 2021.

/s/ Michael Mirer

MICHAEL MIRER, ESQ.