IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-890

FLOYD THOMAS ROBERTSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, Floyd Thomas Robertson, was the Appellant in the District Court and was the Defendant in the trial court. The State of Florida was the Appellee in the District Court and was the prosecution in the trial court. In this brief, the parties will be referred to as they stood in the trial court. The symbols R., S.R., and T. will refer to the record on appeal, supplemental record on appeal and the transcripts of the proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an information with the second degree murder of his live-in girlfriend. (R. 1). Defendant pled not guilty and requested a jury trial.

Prior to trial, defense counsel took Susan Robertson's, the Defendant's ex-wife's, deposition. In this deposition, the ex-wife testified that during the course of her marriage to Defendant, he had threatened her with an AK-47. The ex-wife also testified that she called the police about this incident and a police report was written. (S.R. Ex. A.-32).

At trial, the State's theory of prosecution was that the shooting was not an accident and was the result of domestic violence. (T. 247-55). The Defense Attorney characterized the case in his opening statement as not being about domestic violence but instead being an accident. (T. 255-258).

The evidence at trial established that on September 16, 1996, Defendant shot his live in girlfriend, Maria Nelson. The Defendant and the victim had been living together for three months. (T. 729). On the day in question, Sunday, September 16, 1996, the victim went to work at her job as manager of the Cabana Apartments where she and Defendant lived together. (T. 731). Meanwhile Defendant picked up his son from his ex-wife's house and took him to the Everglades to go shooting for the day. (T. 729).

The victim worked from 10 a.m to about 6 p.m. At about 5

p.m., the victim asked her secretary, Shirley Baumgartner to stay after hours to talk to her. (T. 365). Shirley had noticed that the victim had not seemed herself all day and it appeared as if the victim was nervous about something. (T. 364). The victim was very upset when she talked to Shirley and became very teary eyed. (T. 365). The victim told Shirley that she and Defendant were having problems and that she was going to ask him to move out of the apartment that night. (T. 837).

About 6:45 p.m., the victim's neighbors, Mr. and Mrs. Serrano who were watching T.V. heard some loud thuds coming from the victim's apartment. (T. 385). Mrs. Serrano stated that the thuds sounded like someone was being thrown against the wall. (T.385). A few minutes later, Mr. Serrano heard a gunshot also from the victim's apartment. (T. 398).

Another neighbor, Connie Alvarado, at approximately 6:45 p.m., saw Defendant out on his balcony. (T. 406). Defendant was waving his arms around to someone inside the apartment. (T. 406). The Defendant went inside the apartment and Maria came out onto the balcony. (T. 415). A few minutes after Maria went back into the apartment, Connie heard a gunshot. (T. 416).

About 7:51 p.m., Defendant called fire rescue stating that he had shot someone. (T. 749). The police arrived a few minutes later. (T.287). Upon arrival, Detective Dominguez walked into the Defendant's home. (T.285). He accompanied Defendant into the

bedroom and observed the firearm laying on the floor about 4 or 5 feet away from the bed. (T. 292). The magazine was laying next to the gun and the slide was locked. (T. 292). The Detective found it unusual that the weapon had been secured. (T. 292). The Detective then went over to the victim who was lying on the bed. (T. 294). The Detective tore off the victim's shirt to see if he could provide medical help to the victim. (T. 294). There was no evidence that Defendant had tried to perform any kind of aid on the victim. (T. 295). There was no blood on Defendant's clothes or hands. (T. 472). At that point, the victim was semiconscious and still had a pulse. (T. 299). Fire rescue arrived and airlifted the victim to the hospital. (T.298-299).

Detective Melgarejo, the crime scene technician arrived and began his investigation. (T. 451). He observed emergency medical technician type uniforms in Defendant's closet. (T. 453).

The lead Detective, Enrique Chavarry took Defendant to the station and read him his Miranda Rights. (T. 483, 489). The Defendant gave a statement. (T. 483). Detective Chavarry observed that Defendant had a calm demeanor. (T. 483). The Defendant told the Detective that Maria and he had argued when he got home from dropping off his son. (T. 498). According to Defendant, Maria was jealous of his ex-wife. (T. 498). The Defendant told the Detective that he was taking out his .40 caliber Ruger to clean it. (T. 499). However, the Detective did not find any cleaning materials. (T.

498). The Defendant then proceeded to make spontaneous statements that he had never gotten physical with Maria. (T. 503). The Detective testified that he charged Defendant with second degree murder based on several factors. These factors were that the trigger has to be pulled in order for the gun to fire, Defendant's calm demeanor, the fact Defendant gave a different statement to the police at the apartment than he told Detective Chavarry at the station, Defendant was very familiar with guns, he had a medical background as a paramedic and there were no signs that he had tried to help the victim after she had been shot. (T. 522-525).

The Defendant's friend, Steve Angene testified that he had gone shooting with Defendant about 10-15 times. (T. 560) The gun that was used to shoot the victim belonged to Steve. (T. 570). Steve had shown Defendant how to use the gun and the safety features. (T. 575). The Defendant called Steve from prison and explained the reason why his gun was cocked the night of the shooting. The Defendant described a night prior to the incident when he had heard high winds outside the door and it had sounded like someone was trying to get into the house. (T. 591). The Defendant had taken out the Ruger and cocked the gun to go investigate the noise. (T. 591). Steve testified that winds did not access the front door because it is an interior door. (T. 591). The Defendant also told Steve that on the day of the shooting, he had a dispute with the victim and the victim had followed

Defendant into the bedroom. (T. 593). Steve was aware of other disputes between the victim and Defendant. (T. 597). The Defendant requested for Steve not to mention the fights that Defendant and the victim had been having to the police. (T. 597). Steve was also aware that the victim wanted Defendant out of the apartment. (T. 617).

The medical examiner testified that with the type of injury the victim had she would have been able to survive about 30 minutes to an hour. (T. 647). He reconstructed the crime scene during his testimony. The medical examiner testified that Defendant's story to the police was not consistent with the angle of the bullets path or the angle of the bed. The Defendant's story was that he was five feet away from the victim and had taken the gun out of the closet to clean it. (T.695). The Defendant alleged that he went to grab the extra magazine which had fallen and the gun discharged. (T.695). This was not consistent with the angle of the bullet on the bed. (T. 695).

The Defendant's theory on defense was that the victim's death was an accident. The Defendant testified that he had happy relationship with his girlfriend, that he accidentally stored his gun cocked and that it accidentally went off and hit his girlfriend killing her. The Defendant testified that he and the victim were not arguing the day of the shooting. (T. 740, 742). The Defendant also testified that he was not very familiar with the gun that shot

and killed his girlfriend.(T. 746, 759). He testified that he accidentally stored the gun in a single action, cocked manner and as he went to show the gun to his girlfriend, his finger slipped on the trigger.(T. 753, 755). The Defendant moved the gun after he called 911 because he did not want it lying on the floor by the victim when the police arrived. (T. 750).

During cross-examination, the State questioned Defendant about his knowledge and training with various weapons. (T. 760-766). The Defendant was questioned about his military experience and his previous use of big and small weapons including such weapons as M-16 rifles, handguns, M60's, sporting guns, and a Russian Dragnov rifle. After this questioning, the State asked Defendant if he had purchased an AK-47? (T. 766). The Defense attorney objected stating, "irrelevant, It's outside the scope of direct." (T. 766). The Defendant responded he had purchased an AK-47. The State then asked Defendant if he had ever threatened anyone with an assault rifle? To this question, the Defendant responded he had not. The State then asked the Defendant, "You have never threatened anybody close to you with an AK-47?" (T. 767). The Defendant responded, "I have never threatened anybody close to me with a weapon, anybody, period, with a weapon, sir."(T. 767). The Defendant's ex-wife was later called on rebuttal to testify to a prior incident where the Defendant threatened her with a weapon.

The Court allowed the state to call rebuttal witnesses to

impeach Defendant. "If your client lied on the witness stand and he has proof that your client lied on the witness stand, he is entitled to show that. That is the dangers of testifying." (T. 826). The Defendant's ex-wife was called as a rebuttal witness.(T. 824). She testified that after Hurricane Andrew, Defendant became angry with her and her daughter because they could not carry some heavy boxes off the truck. (T. 829). The ex-wife testified that Defendant returned to his room and she heard the sound of a magazine being loaded into a gun. (T. 824). When the wife turned to look at Defendant he had the AK-47 pointed at her back. (T. 829).

The jury found Defendant guilty of second degree murder. He was then sentenced to life imprisonment. (T. 950, R. 131, 134-38).

On appeal to the Third District, the panel reversed finding that the ex-wife's testimony was improper other crimes evidence. The majority further held that said testimony was improper impeachment and thus inadmissible on this ground. The dissent would have found that the testimony was admissible evidence of other crimes since it was relevant to the issue of intent and also would have found that it was proper impeachment.

The State's motion for rehearing en banc was granted. The Third District vacated the panel opinion and affirmed the conviction. Judge Gersten, joined by Judges Cope, Goderich and Green, found that the State's questioning of Defendant about prior

armed threats was proper impeachment thereby allowing his ex-wife's rebuttal testimony concerning his armed threat against her. In addition Judge Gersten found that the ex-wife's testimony of the prior armed threat was proper other crimes evidence because it was relevant and not too remote to be probative on the issue of whether the shooting was intentional or accidental.

Chief Judge Schwartz wrote a specially concurring opinion, joined by Judges Jorgenson and Levy where he agreed with those portions of Judge Gersten's opinion which found that Defendant's prior threat was proper other crimes evidence. Finding no impediment to the use of the evidence of Defendant's prior threat as other crimes evidence, Chief Judge Schwartz did not join Judge Gersten's opinion on the impeachment issue.

Judge Sorondo, joined by Judges Fletcher, Shevin and Ramirez, dissented. Judge Sorondo first recognized that the holding of the Court was that the evidence was proper other crimes evidence. However, he addressed the impeachment dicta in case this Court granted discretionary review. Slip opinion at p.18 n.9. Judge Sorondo then found that impeachment was improper and the ex-wife's testimony was improper other crimes evidence since the trial court was never presented with this issue and thus did not determine that the prior crime was ever committed and that even if it was committed, it to remote to be relevant.

Defendant then sought the discretionary jurisdiction of this Court. His main ground was the impeachment issue. He raised the other crimes issue as his second ground but failed to cite any cases whatsoever. This Court then exercised its discretionary jurisdiction and accepted the case for review.

SUMMARY OF THE ARGUMENT

The opinion of the Third District which was joined by a majority of the Court is that the ex-wife's testimony concerning Defendant's prior armed threat against her was proper other crimes evidence since it was relevant to established that Defendant's shooting of his wife was intentional and not accidental. This holding is not in conflict with *Williams v. State*, 110 So.2d 654 (Fla. 1959) or any cases decided thereunder.

Further, the impeachment dicta is not a proper basis for this Court's jurisdiction since it is not the holding of the case and any ruling thereon by this Court would merely be an unauthorized advisory opinion. Thus, jurisdiction was improvidently granted.

Assuming the impeachment dicta is properly before the Court, no error occurred by allowing the challenged impeachment. The Defendant testified he never threatened anyone with a gun. This statement was intended to buttress his theory of defense and his contention that he shot his wife by mistake while cleaning the gun. Having testified that he had never threatened anyone with a gun, Defendant opened the door to questioning about the prior incident where he had threatened his ex-wife with a gun. With the door opened, it was then permissible for the State to impeach Defendant's statements and to show that he was not being truthful on the stand.

ARGUMENT

I.

WHETHER THE EN BANC DECISION OF THE THIRD DISTRICT WHICH HELD THAT DEFENDANT'S EX-WIFE'S REBUTTAL TESTIMONY THAT DEFENDANT HAD THREATENED HER WITH A GUN DURING A DOMESTIC DISPUTE WAS PROPERLY ADMITTED AS OTHER CRIMES EVIDENCE WHERE THE DEFENDANT'S DEFENSE TO THE SHOOTING DEATH OF HIS PRESENT WIFE WAS THAT IT WAS UNINTENTIONAL AND WAS THE RESULT OF AN ACCIDENTAL DISCHARGE WAS CORRECT?

The opinion of the Third District which was joined by a majority of the Court is that the ex-wife's testimony concerning Defendant's prior armed threat against her was proper *Williams* rule evidence since it was relevant to established that Defendant's shooting of his wife was intentional and not accidental. The State submits that this holding is not in conflict with *Williams v. State*, 110 So.2d 654 (Fla. 1959) or any cases decided thereunder. Further, the impeachment dicta is not a proper basis for this Court's jurisdiction since it is not the holding of the case and any ruling thereon by this Court would merely be an unauthorized advisory opinion. Thus, jurisdiction was improvidently granted.

The Defendant's ex-wife testified on rebuttal that Defendant had threatened her with a loaded gun during a domestic dispute. This evidence was admissible as relevant under Section 90.404(2)(a), Florida Statutes (1997), which provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

It is well established that evidence is admissible if it is relevant to prove a material fact at issue, and if it is not precluded by a specific rule of exclusion. *See* § 90.402(2)(a), Fla. Stat. (1997); *Heiney v. State,* 447 So.2d 210 (Fla.1984); *Williams v. State,* 110 So.2d 654 (Fla.1959).

The test for relevancy is whether such evidence "casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried." *Williams v. State,* 110 So.2d at 662.

Here, the critical issue at trial was whether Defendant accidentally shot his wife. Since there were no eyewitnesses to the shooting, the credibility of Defendant and his story, were crucial to the outcome of the case. *Duffey v. State*, 741 So.2d 1192 (Fla. 4th DCA 1999). The evidence that Defendant had previously threatened someone close to him during a domestic dispute with a firearm, directly related to the central issue of

Defendant's claim that he was cleaning the gun which accidentally discharged while arguing with his wife, as opposed to threatening his wife with the gun when she was shot and killed.

Since intent is often the most difficult element to prove in an unwitnessed crime where the victim is dead, evidence reflecting on Defendant's intent is clearly probative with regard to a claim of accidental shooting. The ex-wife's testimony that Defendant threatened her with a gun during a domestic dispute tends to negate the likelihood that the shooting was accidental. The prior incident admitted into evidence through the ex-wife's rebuttal testimony involved significant similarities to the facts of this case. In both incidents, Defendant chose to use a semi-automatic weapon, which requires the weapon to be cocked with safety off and loaded in order to be fired. Both incidents involved a woman with whom the defendant was having an intimate relationship. Both incidents involved acts of violence taking place in a relationship context and circumstances involving domestic disputes. Thus the ex-wife's testimony was relevant in ascertaining Defendant's motive and intent with regard to the claim that his present wife's shooting was accidental.

Inasmuch as the ex-wife's testimony was relevant, its admission into evidence can be precluded only by a specific rule of exclusion. In this regard, the trial court has broad discretion not only in determining the relevance of evidence, but also in

determining whether its probative value outweighs any prejudicial effect, thereby rendering such evidence admissible. See § 90.403, Fla. Stat. (1997); *Rodriguez v. State,* 753 So.2d 29 (Fla.2000); *Williamson v. State,* 681 So.2d 688 (Fla.1996). Such a determination will not be disturbed on appeal absent an abuse of discretion. *Heath v. State,* 648 So.2d 660 (Fla.1994). Keeping these standards in mind, the Third District correctly determined that the trial court did not abuse its discretion in admitting this evidence.

Section 90.404(2)(a) prohibits the introduction of similar fact evidence of other crimes, wrongs, or acts, where such evidence is relevant *solely* to prove bad character or to show the defendant possesses a propensity for criminal behavior. Section 90.404(2)(a) specifically allows the admissibility of similar fact evidence to prove a material fact in issue, such as "intent" and "absence of mistake or accident." Accordingly, a trial judge has the discretion to admit similar fact evidence when it is relevant as to a non-character aspect in the case.

Here, the evidence of a threat against a previous partner involving a gun had the purpose of assisting the jury to understand Defendant’s conduct at the time of the shooting with regard to Defendant’s intent and his claim of accident. The evidence was admitted for the appropriate purpose of showing Defendant’s motive and intent at the time of the shooting he claims was accidental.

Duffey v. State, 741 So.2d 1192 (Fla. 4th DCA 1999).

In *Duffey*, the defendant was charged with second degree murder of Deborah Helenius which occurred on October 6, 1966. The defendant's theory of defense was that Helenius, after an unsatisfactory consensual encounter with the defendant, started hitting the defendant in the face and chest and bit his finger. During the attack, the defendant grabbed Helenius by her neck and pushed her up against the wall , but she continued to assault her. He then claimed she suddenly passed out and he could not resuscitate her. The defendant after determining that she was dead, panicked because he thought that because of his prior record no one would believe him that the death was accidental. Defendant then disposed of the body. During trial Maria Cicocca testified about a prior attack the defendant perpetrated on her. Cicocca testified that she met the defendant on June 30, 1984 when she accepted a ride from him. When in the car defendant asked for a kiss and she kissed him on the cheek and then on the lips. Cicocca refused to do anything further and starting to get out of the car. The defendant pulled her back into the car and forced her to shut the door. He then placed his hands around her neck and started to strangle her. Fortunately, Cicocca was able to ultimately get away from the defendant.

On appeal the defendant challenged the admissibility of Cicocca's testimony as improper similar fact evidence. The Fourth

District rejected this challenge finding it was relevant to rebut his claim of accident. The court found the testimony relevant because the defense at trial was that defendant accidently choked the victim to death and the defendant's testimony was the only eyewitness account. Therefore, Cicocca's testimony of the prior attack was probative of defendant's state of mind during he attack on Helenius, the victim who did not survive.

The *Duffey* court based its holding its prior case of *Rossi v. State*, 416 So.2d 1166 (Fla. 4th DCA 1982) that held that similar fact evidence is admissible if probative of a defendant's mental condition, when that mental condition is material to an issue at trial. In *Rossi*, a defendant charged with kidnapping, sexual battery, and attempted second degree murder contended that his actions were the result of an isolated and temporary breakdown. The Court held that the jury was entitled to know that the defendant engaged in virtually the identical conduct on a prior occasion because evidence of the defendant's mental state during the earlier attack was relevant at his trial for the more recent attack.

The Fourth District then recognized that this Court approved of *Rossi* in *Street v. State*, 636 So.2d 1297 (Fla 1994). In *Street*, this Court sustained the admission of another crime to rebut the defense of voluntary intoxication. The defendant was on trial for shooting and killing two police officers after they confronted him

about a disturbance at a trailer park. During a struggle, the defendant took one officer's gun and shot both of the officers. The defendant claimed that he was so intoxicated through the use of cocaine that he was unable to form the specific intent to commit first degree murder. On rebuttal, the state called Officer DeCarlo who testified that on another occasion he and a fellow officer attempted to arrest the defendant for disorderly conduct; the defendant resisted and tried to pull DeCarlo's gun out of his holster. DeCarlo was able to hold on to his pistol and the officers subdued the defendant. DeCarlo testified that the defendant was not under the influence of cocaine. This Court held that DeCarlo's testimony of an encounter similar to defendant's involvement with the officers in the case before the Court was admissible in rebuttal of the contention that the defendant's actions were the result of the influence of cocaine.

Herein, just as the aborted attempt at stealing DeCarlo's weapon was probative of the defendant's intent in the completed murders in *Street* and the interrupted attack on Cicocca relevant to the defendant's state of mind in the completed murder of Helenius in *Duffey*, so was Defendant's prior armed threat against his ex-wife probative to Defendant's state of mind in the completed murder of his present wife.

The relevance of the ex-wife's rebuttal testimony regarding the prior armed assault is not affected by the remoteness doctrine.

This incident occurred during the clean up after Hurricane Andrew which places it sometime shortly after August 1992. The present incident occurred on September 16, 1996 a mere 4 year hiatus between incidents. Remoteness is not determined by the passage of time alone but the effect of the passage of time on the evidence. Remoteness in terms of the passage of time precludes the use of evidence that has become unverifiable through the loss of memory, unavailability of witnesses and the like. *Heuring v. State*, 513 So.2d 122 (Fla. 1987). Here the passage of time is a only 4 years and the ex-wife was available and certain in her testimony. Thus, the remoteness aspect of the relevancy of the similar fact evidence is not at issue herein.

The fact that the State failed to give the Defendant the 10 days notice required by § 90.404 (2)(b), Fla. Stat. (1997) does not preclude admissibility of the similar fact evidence if the Defendant was not surprised or prejudiced therefrom. *State v. Paille*, 601 So.2d 1321, 1324 (Fla. 2d DCA 1992). In *Paille*, the State introduced evidence of other sexual acts engaged in by the defendant. The State failed to provide notice of intent to offer similar fact evidence at trial. The trial court granted a new trial on the ground that it had erred by admitting similar fact evidence. The Court, after finding the similar fact evidence relevant, reversed. The State's failure to provide notice of its intent to offer similar fact evidence at trial did not

automatically prevent its use. Rather, the Court, citing to *Garcia v. State*, 521 So.2d 191 (Fla 1st DCA 1988), held that the lack of notice is subject to harmless error analysis. The Court found that since defense counsel took the victim's deposition prior to trial, at which she testified to the similar acts in question, that the defendant failed to establish actual prejudice or unfair surprise. *See also Davis v. State*, 537 So.2d 1061 (Fla. 1st DCA 1989). Therefore, the admission of the similar fact evidence was harmless error in spite of the State's failure to give notice under § 90.404(2)(b)1. *Barbee v. State*, 630 So.2d 655(Fla 5th DCA 1994)(State's failure to strictly comply with the 10 day notice requirement with respect to similar fact evidence was not fatal per se to admissibility of that evidence and harmless error rule applied).

In the instant case, the ex-wife, Susan Robertson's deposition was also taken prior to trial. In this deposition, the ex-wife testified to the incident involving the Defendant threatening her with an AK-47, that she testified to at trial. The Defendant, therefore, was not prejudiced or surprised by this testimony. In fact, the Defendant used this deposition testimony in an attempt to impeach the ex-wife's credibility by asking her how her relationship with the Defendant ended, bringing out the fact that she caught him in bed with another woman. (T. 832). Thus, it is clear from the record that the Defendant knew about the prior AK-47

incident involving the wife and Defendant and therefore was not surprised or prejudiced therefrom. In the instant case, the failure to give notice of intent to introduce this evidence does not preclude its admissibility.

In accordance with the foregoing, the majority decision of the Third District that the ex-wife's rebuttal testimony of Defendant's prior armed assault was admissible similar fact evidence was a correct application of the facts to the law. As such this holding does not conflict with any decisions of this Court or any decisions of the other District Court's. *Mancini v. State*, 312 So.2d 732 (Fla. 1975) (The Supreme Court has jurisdiction to review decisions of the district courts because of alleged conflict only when the decision (1) announces a rule of law which conflicts with a law previously announced by the Supreme Court or another district court, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as a prior case.) Inasmuch as conflict does not exist with the en banc holding, a ruling on by this Court on the impeachment dicta made by a minority of the judges of the Third District would be an unauthorized advisory opinion. *Interlach Lakes Estates v. Brooks,* 341 So.2d 993 (Fla. 1976) (The Supreme Court may render advisory opinions only to the governor.) Since conflict does not exist and there is no other valid basis for jurisdiction, review herein has been improvidently granted and the petition should be dismissed.

Salser v. State, 613 So.2d 471 (Fla. 1993).

The State does waive its position that review was improvidently granted on the similar fact holding and that jurisdiction does not exist independent thereof to review the impeachment dicta. However, the State will address the propriety of the impeachment dicta.

Florida Statute Section 90.608(5), provides that once a defendant takes the stand and testifies, he or she places credibility at issue and prosecutors are allowed to impeach that credibility with "proof by other witnesses that material facts are not as testified to by the witness being impeached." § 90.608(5), Fla. Stat. (1997); Charles W. Ehrhardt, Florida Evidence § 608.1 at 385 (1997 ed.).

Our courts have long recognized that the truth-seeking purpose of the adversary system is promoted by cross-examination which appropriately challenges the witness's credibility through eliciting testimony favorable to the cross-examining party. *Chandler v. State,* 702 So.2d 186 (Fla.1997); *Shere v. State,* 579 So.2d 86 (Fla.1991). Specifically, with regard to impeachment cross-examination, prosecutors are to be allowed "wide leeway" in order to prevent defendants from being able to "frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Lebowitz v. State,* 343 So.2d 666, 667 (Fla. 3d DCA 1977); *Geralds v. State,* 674 So.2d 96 (Fla.1996) (cross examination not confined to identical details testified to in chief; extends to all matters that may supplement,

contradict, rebut, or make clearer facts testified to in chief).

Applying these principles to the facts of this case, it is clear Defendant placed his credibility at issue by taking the stand. After giving oath and presenting testimony to the jury, Defendant was then subject to cross-examination and potential impeachment like any witness in any case. *Ivey v. State,* 180 So. 368 (Fla.1938); *C.M. v. State,* 698 So.2d 1306 (Fla. 4th DCA 1997); *Ashcraft v. State,* 465 So.2d 1374 (Fla. 2d DCA 1985).

The Defendant testified he never threatened anyone with a gun. Clearly this statement was intended to buttress his theory of defense and his contention that he shot his wife by mistake while cleaning the gun. Having testified that he had never threatened anyone with a gun, Defendant opened the door to questioning about the prior incident where he had threatened his ex-wife with a gun. *Fletcher v. State,* 619 So.2d 333 (Fla. 1st DCA 1993); *Hernandez v. State,* 569 So.2d 857 (Fla. 2d DCA 1990). With the door open, it was then permissible for the State to impeach Defendant's statements and to show that he was not being truthful on the stand. *Allred v. State,* 642 So.2d 650 (Fla. 1st DCA 1994); *Lusk v. State,* 531 So.2d 1377 (Fla. 2d DCA 1988); *Howard v. State,* 492 S.E.2d 683 (Ga. App. 1997) (evidence defendant shot prior girlfriend 12 years earlier held admissible to impeach testimony regarding gun use).

The Petitioner adopts the dissent's reasoning and contends that it is permissible for a defendant to lie on the stand regarding facts especially probative to his theory of defense, so long as the lie occurs during cross-examination. This is not the

law. Although the dissent correctly notes the State may not ask impermissible questions during cross-examination to elicit otherwise inadmissible evidence not testified to on direct, *DeFreitas v. State,* 701 So.2d 593 (Fla. 4th DCA 1997), the fatal flaw in the dissent's reasoning is that the question in the present case was not "impermissible." Thus the cases cited to by the dissent are unavailing.

This Court has long held that "cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief." *Geralds v. State,* 674 So.2d 96, 99 (Fla.1996); *Coxwell v. State,* 361 So.2d 148, 151 (Fla.1978) (same). Here, the issue of Defendant's gun use and whether his use of the gun was accidental, were matters clearly raised during his case in chief. The State was permitted to ask the question regarding gun use, because it directly related to clarify facts raised on direct, and to contradict Defendant's statements regarding his familiarity with the gun, and his claim the gun fired accidentally in causing his wife's death. Thus, applying well established precedent from this Court, *Geralds v. State,* 674 So.2d at 99, the follow-up questioning during cross was clearly *not* impermissible. Charles W. Ehrhardt, Florida Evidence § 608.1 at 385 (1997 ed.) ("Regardless of the subject matter of the witness' testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness' testimony.") A

finding to the contrary would be tantamount to condoning perjury and adverse to the truth-seeking function of trial.

CONCLUSION

For the foregoing reasons, the opinion of the District Court should be approved and the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **MANUEL ALVAREZ**, Attorney for Petitioner, 1320 N.W. 14th Street, Miami, Florida 33125, on this day of December, 2001.

MICHAEL J. NEIMAND
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

_____

MICHAEL J. NEIMAND
Assistant Attorney General