SUPREME COURT OF FLORIDA

CASE NO.: SC06-662

SHANA BARNES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT CASE NO. 1D04-5450

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner Shana Barnes ("defendant") seeks review of a decision of the District Court of Appeal, First District, which affirmed her conviction and sentence for second-degree murder with a firearm in the shooting death of her husband. In this brief, defendant will cite the nine-volume record on appeal by designation "R" followed by the volume number. The trial transcript is located in Volumes IV-IX. Defendant will cite the appendix accompanying this brief by designation "App." with the appropriate tab number.

Factual Background

On the evening of July 15, 2000, Shana Barnes, then age 36, and her husband of fifteen years, Gregory Barnes, visited a tattoo parlor after work and then dined at Applebee's Restaurant on Atlantic Boulevard in Jacksonville. (R-IV 196; R-V 228-29). In her written statement given to detectives, defendant stated that her husband drove her home about 9:30 p.m. and told her he was going to "his friend Frank's" to watch a boxing match on television. (R-V 228-29). When her husband had not returned home by 2:00 a.m., she called him on his cell phone twice but received no reply. (R-V 229). Mr. Barnes arrived home about 2:30 a.m., parked their Infiniti automobile in the garage and went into a second bedroom to

undress. (R-V 229). Defendant noticed that her husband was "wobbling"[1] and asked him why he had not called to tell her he would be late. (R-V 229). Mr. Barnes told his wife he would talk about it in the morning and went through the master bedroom and into the bathroom. (R-V 229). Defendant pressed her husband for an answer but he told her "he was grown and he did not have to call." (R-V 229).

According to defendant's statement, Mr. Barnes then pushed her violently onto the bed in the master bedroom and began choking her. (R-V 229). In the ensuing struggle, she bit his hand and possibly his arm and drew blood. (R-V 229-30). Defendant grabbed a fanny pack from the headboard which contained a gun, but Mr. Barnes snatched it from her. (R-V 230). She then dialed 911 from the bedside telephone but her husband took the telephone and hung it up. (R-V 229). He then pushed defendant face down onto to the floor and left the room. (R-V 230).

Defendant decided at that point to leave the house. She grabbed her purse and the gun from the fanny pack which she knew was loaded.[2] (R-V 230). She

[1] Defendant told the 911 dispatcher after the shooting that her husband "came home very drunk." (R-IV 82). The autopsy revealed a .16% blood alcohol level. (R-V 380).

[2] According to the crime scene technician, the weapon used to shoot Mr. Barnes was a .38 caliber revolver, not the .40 caliber revolver kept in the fanny pack. (R-

told the detectives in her statement that she took the gun because she was probably going to drive downtown at 2:30 a.m. and "because Greg had never become physically violent at that level with me and I did not know what he might do next." (R-V 230). She then walked down the hall and retrieved her keys and cell phone from the kitchen. (R-V 230). Mr. Barnes was standing at the door leading to the garage which he had opened, and he also had opened the garage door itself. (R-V 230). Defendant then returned to the master bedroom to get her shoes and, as she walked past her husband into the garage, he was cursing at her. (R-V 230). Defendant told Detective Dwayne Darnell that her husband called her a "bitch." (R-V 218). Defendant described the ensuing events as follows:

> I got in the car which was parked in the garage. The front windows were down. I started backing out of the garage and he was saying something, I'm not sure what. As I was backing out I stopped to hear what he was saying. I locked the doors and attempted to put the windows up. However, he came to the driver's side window. He slapped me through the open window on my cheek. I reached for the gun which was sitting on the passenger seat. I picked it up and fired it out the driver's window. I heard him hit the front of the car on the windshield and I saw blood. He then slumped down.
>
> I continued to pull out of the garage so I could see what happened. I got out of the car and saw Greg lying on the ground with blood. I screamed and went to the car and got my cell phone. I had put the gun back on the

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IV 120-22). According to defendant's testimony from the first trial which the State read to the jury, both weapons were kept in the master bedroom. (R-VI 438).

> seat. I called 911 and stayed on the phone with them until the police arrived.
>
> My objective to having the gun in the car was not to kill Greg, I only wanted to scare him so I could leave and protect myself.

(R-V 230-31).[3]

Course of Proceedings in the Lower Tribunals

The State charged defendant with second-degree murder and discharging a firearm during the commission of the crime. (R-I 8). Defendant was tried before a jury on April 22 through April 24, 2002, at which time she testified that she shot her husband in self-defense. (R-VI 452-53). Nevertheless, the jury returned a verdict of guilty on both charges. (R-I 60). Defendant received a twenty-seven year sentence with a twenty-five year minimum mandatory term for the firearms charge as required by section 775.087(2)(A)3., Florida Statutes. (R-I 63-64). The First District, however, reversed defendant's conviction and sentence and remanded for a new trial "because the jury instructions on the issue of self-defense were confusing, misleading, and erroneous." Barnes v. State, 868 So. 2d 606, 607 (Fla. 1st DCA 2002) ("Barnes I") (App. at Tab 2).

[3] Consistent with defendant's statement, a neighbor testified that she was awakened in the early morning hours of July 16, 2000, when she heard a gunshot followed in twenty or thirty seconds by a woman's scream which she described as "blood curdling, like a terror scream." (R-VI 528-29).

Only a few days before the retrial began on October 4, 2004, the prosecutor advised defense counsel that the State planned to read defendant's testimony from the first trial to the jury. (R-II 385). Although defendant conceded that her testimony from the first trial was admissible, she argued by motion in limine that portions of her prior testimony were inadmissible and should be excluded. (R-II 205-15). After conducting a hearing on the first day of trial (R-II 385-400; R-III 401-85), the trial court granted defendant's motion in limine, in part, requiring the State to redact several objectionable portions from the transcript of defendant's prior testimony which it planned to publish to the jury. (R-II 205).

During that same hearing, the State announced its intention to offer the transcript of defendant's prior testimony into evidence as an exhibit available to the jury during deliberations. (R-II 389-90). Defense counsel objected to permitting the jury to take the transcript into the jury room because "[w]hat you're doing is putting [a]n unfair emphasis on this one aspect of the testimony." (R-III 392). The prosecutor argued that a transcript of the defendant's prior trial testimony is no different from a transcript of a statement given by the defendant to a detective at the police station. (R-II 391). The trial judge agreed with the State and ruled preliminarily that he would allow the transcript into evidence as an exhibit. (R-II 393).

Before the State read defendant's prior testimony to the jury, defense counsel renewed his objection to admitting the transcript into evidence as an exhibit available to the jury during deliberations because "it's the only trial testimony that the jury will have in front of them and they therefore give it undue weight and too much attention compared to all the other evidence in the case. Especially when they have heard it read by question and answer here in the courtroom." (R-VI 426). The prosecutor argued that "it is important for the jury to be able to have that and compare it [transcript of prior testimony] to her written statements to the police." (R-VI 427). The trial court confirmed its preliminary ruling and overruled defendant's objection. (R-VI 429).

The State read defendant's testimony from the first trial as planned. (R-VI 432-506) (App. at Tab 3). One assistant state attorney read the questions while another assistant played the role of Ms. Barnes by reading the answers.[4] (R-VI 432). Later in the trial, the State offered the 75-page transcript of testimony into evidence. (R-VIII 641). Defense counsel again objected on the grounds previously stated. (R-VIII 642). The trial court overruled defendant's objection and admitted the transcript into evidence as an exhibit available to the jury during deliberations based on the following rationale:

[4] The trial court entered an order in limine to prevent counsel from making any direct references to the first trial. (R-II 214). Counsel referred to defendant's testimony from the first trial as her "statement on April 24, 2002" or her "testimony from 2002." (R-IX 879, 889, 939, 952).

> THE COURT: On the issue of state's quintuplet A for identification, while we are on that subject, I did in the previous ruling and I will again consider this to be not testimony in the trial but a sworn statement from Ms. Barnes containing admissions. It was made of course under oath and with counsel present in a situation where she voluntarily gave the testimony after being apprised of her rights and with all the procedural and substantive safeguards requisite for such a statement to be admissible. And I allowed it in on that basis.
>
> I think the state could have just offered it as an exhibit and gotten it admitted that way. But they certainly have the right to offer an admissible document into evidence and then publish it to the jury which is what they did.
>
> It was not Ms. Barnes sitting here and testifying live to the jury. It was just the reading or the publishing of this document.
>
> So I do think it is a different situation from the state wanting to transcribe the testimony of their lead detective and send it back to the jury room with the jury.
>
> So I will overrule again the objection to its admission.

(R-VIII 644-45). The jury received the transcript with the other exhibits when it retired to deliberate. (R-IX 994).

In addition to reading defendant's prior testimony, the State played the tape recording of defendant's second 911 call and read her written statement to the jury. (R-IV 77; R-V 228-31). The State also presented evidence purportedly contradicting defendant's claim of self-defense, including evidence that she was

not seriously injured during the alleged struggle with her husband (R-IV 89, 169-170, 193); the medical examiner did not find bite marks on Mr. Barnes' body or any other injuries except for the gunshot wound (R-V 384); defendant outweighed her husband by at least 18 pounds (R-V 246, 357); and there was no blood found in the car. (R-V 389).

The State also presented the testimony of Mr. Barnes's co-worker, Vera Christopher, who testified that she watched the boxing match at Donna Dowdell's house with Mr. Barnes, Donna and a neighbor and then accompanied Mr. Barnes to the Bombay Bicycle Club for drinking and dancing. (R-IV 70-72). Christopher testified that Mr. Barnes had "a couple of beers" and was not intoxicated when he took her home at midnight. (R-IV 72-73). She could not account for Mr. Barnes's whereabouts after midnight. (R-IV 75). The State did not present any evidence that defendant knew or even suspected that her husband had been with Ms. Christopher on the night in question.

Defendant did not testify during the second trial. However, she presented numerous witnesses from Modus where she was employed who testified that she enjoys an excellent reputation in the community for truthfulness and peacefulness. (R-VI 546, 586-87, 628, 677, 685). Additionally, one of the investigating officers, James Williams, testified that he found evidence of a struggle in the master bedroom and blood on the door to the garage which the State did not attempt to

match. (R-V 294; R-VI 551-52). The medical examiner testified during the defense case that she has encountered strangulation victims with little, if any, visible evidence of an injury. (R-VII 606). Nevertheless, she identified a possible neck injury on a photograph of defendant taken after her arrest. (R-VII 606). Detective Darnell also noted during his testimony that defendant had a laceration on her upper lip and a scratch on her neck. (R-IV 193).

During closing and rebuttal arguments, the State made repeated references to defendant's testimony from the first trial which had been read to the jury and admitted into evidence in transcript form. (R-IX 879-80, 889-90, 939, 952, 967). For example, the prosecutor pointed out that in her written statement, defendant reported that the gun was on the seat of her car while in her prior testimony, she said the gun was in her purse. (R-IX 879-80). In rebuttal, the prosecutor emphasized that this discrepancy was a "critical distinction" (R-IX 952) and urged the jury to "[l]ook at the quotes in the transcript." (R-IX 961).

The jury returned a verdict finding defendant guilty of second-degree murder and discharging a firearm during the commission of the crime. (R-II 254). After denying defendant's motion for new trial and renewed motion for judgment of acquittal (R-Supp. 9, 12), the trial court sentenced defendant to twenty-seven years in prison with a twenty-five year minimum mandatory term. (R-II 260-61).

The First District affirmed the conviction and sentence in Barnes v. State, Case No. 1D04-5450 (Fla. 1st DCA Mar. 3, 2006) (Tab 1), reported at 922 So. 2d 380 (Fla. 1st DCA 2006) ("Barnes II"). The First District addressed three of the five issues raised by defendant and held: (1) the trial court did not err by denying defendant's motion for judgment of acquittal; (2) the trial court did not abuse its discretion by allowing the jury to take the transcript of defendant's prior testimony into the jury room during deliberations; (3) the trial court did not confuse or mislead the jury with its instruction on duty to retreat and justifiable use of deadly force. On the first point, the district court found from the record "that the State presented the jury with adequate evidence supporting its theory that appellant shot and killed her husband in a fit of anger over his behavior on the night in question." Barnes II, 922 So. 2d at 381 (slip op. at 2). Regarding the transcript issue, the court explained:

> Appellant next argues that the trial judge erred by allowing the jury to take an exhibit containing portions of Appellant's prior testimony into the jury room. Appellant argues that this constituted error because the jury might have placed greater emphasis on Appellant's prior testimony than it did on other witness testimony. See Young v. State, 645 So. 2d 965 (Fla. 1994). We review the admission or exclusion of evidence for an abuse of discretion. See McBride v. State, 913 So. 2d 696 (Fla. 1st DCA 2005). The trial judge properly admitted the statements in question as an exhibit of numerous admissions made by the Appellant. See Delacruz v. State, 734 So. 2d 1116, 1122 (Fla. 1st DCA 1999) (finding that defendant's prior statements, whether

> exculpatory or not, were admissible against defendant as admissions under section 90.803(18), Florida Statutes (citing Charles W. Ehrhardt, Florida Evidence § 803.18, at 733-34 (1999 ed.)). The fact that the State published the exhibit to the jury does not turn the exhibit into "testimony." Accordingly, the trial judge acted within his discretion to allow the jury to take the exhibit into the jury room. See Fla. R. Crim. P. 3.400(a)(4) (permitting the judge to allow "all things received into evidence other than depositions" into the jury room).

Id. at 382 (slip op. at 3).

Defendant thereafter sought discretionary review in this court, alleging jurisdictional conflict on all three issues addressed by the First District. By order dated January 22, 2007, this court accepted "jurisdiction of this case as to the First District Court of Appeal's opinion with respect to permitting the jury to take an exhibit into the jury room." Barnes v. State, No. SC06-662 (Fla. Jan. 22, 2007).

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE JURY IN DEFENDANT'S SECOND TRIAL TO TAKE A TRANSCRIPT OF DEFENDANT'S TESTIMONY FROM THE FIRST TRIAL INTO THE JURY ROOM DURING DELIBERATIONS

II. WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF SECOND-DEGREE MURDER WITH A FIREARM

SUMMARY OF ARGUMENT

I.

This court should quash the district court's decision based on the settled rule followed by Florida courts which prohibits the jury from taking testimonial transcripts into the jury room during deliberations. This rule prevents the jury from unduly emphasizing the transcript over the witness's oral testimony and other evidence presented during trial.

The court should reject the State's argument that the transcript of defendant's prior testimony was admissible as an exhibit because it contains defendant's admissions much like a statement or confession given by defendant to the police. The State's argument lacks merit because the State did not treat defendant's prior testimony as a statement or confession. Instead, the State read defendant's prior testimony to the jury in question and answer form as though defendant were actually testifying. As such, the trial court should have treated the transcript of defendant's prior testimony in the same manner as a deposition or transcript of live testimony, neither of which is permitted into the jury room during deliberations.

The district court incorrectly relied on Florida Rule of Criminal Procedure 3.400(a)(4), which provides: "The court may permit the jury, upon retiring for deliberation, to take to the jury room: . . . (4) all things received in evidence other

than depositions." First, the trial court should not have received the transcript in evidence. Second, this court in Young v. State, 645 So. 2d 965 (Fla. 1994), interpreted Rule 3.400(a)(4) to prohibit juror access to materials other than "depositions" (video presentations of live testimony). Third, because the State read defendant's prior testimony to the jury in question and answer form, it should be treated as a "deposition" under Rule 3.400(a)(4).

The trial court's error in permitting the jury to take the transcript of defendant's prior testimony into the jury room was not harmless because the State made the inconsistencies between defendant's written statement and her prior testimony read to the jury one of the focal points of its case. The State repeatedly emphasized these inconsistencies during closing argument and even urged the jury to "[l]ook at the quotes in the transcript." (R-IX 961).

II.

The trial court should have granted defendant's motion for judgment of acquittal on the charge of second-degree murder with a firearm. Although defendant admitted shooting her husband, the State's circumstantial evidence did not establish beyond a reasonable doubt that defendant acted with a depraved mind, i.e., with ill will, hatred, spite or an evil intent, nor did the state prove beyond a reasonable doubt that defendant did not act in self-defense. Although the State proved that defendant's husband was out drinking and dancing with another

woman on the night in question, the State presented absolutely no evidence, circumstantial or otherwise, that defendant knew of her husband's whereabouts. Therefore, the district court erred by determining "that the State presented the jury with adequate evidence supporting its theory that appellant shot and killed her husband in a fit of anger over his behavior on the night in question." Barnes II, 922 So. 2d at 381 (slip op. at 2).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE JURY IN DEFENDANT'S SECOND TRIAL TO TAKE A TRANSCRIPT OF DEFENDANT'S TESTIMONY FROM THE FIRST TRIAL INTO THE JURY ROOM DURING DELIBERATIONS.

A. Standard of Review

The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. See Fitzpatrick v. State, 900 So. 2d 495, 514-15 (Fla. 2005).

B. General Prohibition Against Juror Access to Transcripts

Under Florida law, the jury is not permitted to take transcripts of depositions or transcripts of live testimony presented during trial into the jury room during deliberations. See Young v. State, 645 So. 2d 965, 967 (Fla. 1994); Janson v. State, 730 So. 2d 734, 734-35 (Fla. 5th DCA 1999), rev. denied, 767 So. 2d 457 (Fla. 2000); St. Azile v. King Motor Ctr., Inc., 407 So. 2d 1096, 1098 (Fla. 4th DCA 1982); Gills v. Angelis, 312 So. 2d 536, 537 (Fla. 2d DCA 1975), cert. denied, 330 So. 2d 17 (Fla. 1976); Schoeppl v. Okolowitz, 133 So. 2d 124, 126-27 (Fla. 3d DCA 1961). This rule prevents the jury from placing undue emphasis on the transcript over the witness's oral testimony and other evidence presented during trial. See Young, 645 So. 2d at 966-67; Janson, 730 So. 2d at 734.

Schoeppl is the first reported Florida decision on this subject. In that case, the trial court in a personal injury action admitted two deposition transcripts into evidence after plaintiff read the deposition testimony to the jury. Over defendant's

objection, the trial court allowed the jury to take the deposition transcripts to the jury room during deliberations. In reversing a favorable verdict and judgment for plaintiff, the Schoeppl court quoted at length from an 1858 Illinois case, Rawson v. Curtiss, 19 Ill. 456, 1858 WL 5981 (1858):

> "It is certainly not the policy of the law, to give a superiority to depositions over oral proofs. With the oral proofs, given by witnesses on the stand, the jury must be content, and make up their minds upon it, some of which, important to be remembered, may be—such is the infirmity of the human memory—forgotten. The adversary, having no other than written testimony, contained in depositions, which the jury, taking them with them, can read, discuss, dissect and, if disposed, torture the words from their true meaning, and which are constantly before them, during their deliberations, to operate on them, has a most manifest advantage over him whose proofs are oral, which no rule of law or practice should accord to him. The deposition should be regarded as the living witness speaking from the stand, and as he cannot be taken into the jury room, but only what he has said, so neither should the deposition be so taken, but only the words and facts contained in it, and given out from it, as from the living witness. The parties are then upon equal grounds, the one having no advantage over the other.
>
> * * *
>
> We think, purity of jury trials—their efficiency, their power to give satisfaction whilst doing justice, will be best promoted by keeping them from temptation, from trespassing on forbidden ground for forbidden food, by withholding entirely from them all depositions, parts of which have been rejected by the court, and even those against which no objection exists, and thus prevent the party, whose case is sustained by depositions, from having an improper advantage over him whose proofs are oral only. This is equality, and equality is equity and justice."

Schoeppl, 133 So. 2d at 126 (quoting Rawson, 19 Ill. at 480, 483, 1858 WL 5981, at * 21, 25).[5]

Although Schoeppl and Rawson involved depositions, their reasoning and the rule prohibiting juror access to deposition transcripts applies with equal force to transcripts of witnesses who testify live or by videotape. See Young, 645 So. 2d at 967 ("If depositions read into evidence in lieu of live testimony cannot be taken to the jury room, there is all the more reason to preclude video presentations of live testimony from being taken to the jury room."); Janson, 730 So. 2d at 734-35 (applying Young's rationale to hold that trial court erred by permitting the jury to review a transcript of testimony from two witnesses who testified live during trial).

C. This Case

The State has not offered a valid reason why the transcript of defendant's prior testimony which it read to the jury should be treated differently from the deposition transcripts in St. Azile, Gills and Schoeppl, the witness transcript in Janson or the videotaped testimony in Young. The State argued in the trial court that because defendant's prior testimony was read to the jury as admissions against her interests, the transcript was no different from a transcribed statement or confession made by defendant to the police which is admissible in evidence as an

[5] The error in Schoeppl was particularly egregious because the transcripts included stricken portions of the deposition testimony not read to the jury.

exhibit and available to the jury during deliberations. (R-VI 425-25). Defendant disagrees, however, because the admissibility of the prior testimony and the admissibility of the transcript are separate issues. See St. Azile, 407 So. 2d at 1098 ("Appellees argue that appellant made no objection to introducing the deposition. However, it was not the introduction but the manner in which it was introduced and used to which the appellant objected.").[6]

The State read the transcript of defendant's prior testimony in exactly the same manner as a deposition with one prosecutor reading the questions and another prosecutor reading the answers as though defendant were actually testifying. (R-VI 432). In fact, immediately before the State read the transcript, the trial judge gave a jury instruction similar to an instruction he might give before a party reads a deposition:

> [W]e are now going to place in evidence sworn testimony of Shana Yvette Barnes, the defendant in this case, which in this instance is Miss London Hairston, who is also an assistant State Attorney who is going to act the role of Miss Barnes when she gave this testimony and read her part. And Miss Zima will read the questions and Miss Hairston will read the answers.

(R-VI 432). Under these circumstances, the transcript of defendant's prior testimony was more like a deposition transcript or a transcript of live testimony

[6] Citing State v. Billie, 881 So. 2d 637 (Fla. 3d DCA 2004), defendant conceded below that the State could read her testimony from the first trial to the jury. (R-II 205).

than a statement or confession made to the police.[7] The trial court should have barred the jury's access to the transcript to prevent the jury from placing greater emphasis on the written questions and answers than the oral reading of defendant's prior testimony and other evidence presented during trial. See Young, 645 So. 2d at 966-67; Janson, 730 So. 2d at 734.

The present case is distinguishable from those cases in which the jury requests a transcript of testimony or a witness's testimony read back during deliberations. In such cases, the trial court has broad discretion to grant the jury's request. See Fla. R. Crim. P. 3.410; Francis v. State, 808 So. 2d 110, 130 (Fla. 2001), cert. denied, 537 U.S. 1090 (2002); Cole v. State, 701 So. 2d 845, 850 (Fla. 1997) Garcia v. State, 644 So. 2d 59, 62 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990), cert. denied, 501 U.S.

[7] The State's assumption that a transcript of defendant's statement given to the police is admissible in evidence for jury examination during deliberations is not always correct. For example, a transcript of a tape recorded statement played to the jury is not admissible in evidence for the jury's use during deliberations. See Grimes v. State, 244 So. 2d 130, 135 (Fla. 1971); Waddy v. State, 355 So. 2d 477, 478 (Fla. 1st DCA 1978); Duggan v. State, 189 So. 2d 890, 891-92 (Fla. 1st DCA 1966). Even if a court reporter goes to the police station and reports the defendant's statement for later transcription, the transcript is still not admissible unless the defendant signs it or acknowledges the statement as his own. See Marshall v. State, 339 So. 2d 723, 724 (Fla. 1st DCA 1976), cert. dismissed, 354 So. 2d 982 (Fla. 1977); Williams v. State, 185 So. 2d 718, 719 (Fla. 3d DCA 1966) ("However, an oral statement transcribed by a third party which is not read to or adopted by the Defendant is inadmissible in evidence.").

1259 (1991).[8] In that situation, however, the jury, not the trial court, makes the decision about what testimony bears emphasis in reaching its verdict. On the other hand, when the trial judge gives the jury a transcript of a witness's testimony as an exhibit formally admitted by the trial judge into evidence and bearing an official stamp affixed by the clerk, the transcript carries the imprimatur of the court and, not surprisingly, receives more credence from the jury than untranscribed testimony presented during trial.

D. District Court's Decision

In direct conflict with Young, Janson, St. Azile, Gills and Schoeppl, the district court determined that "[t]he trial judge properly admitted the statements in question as an exhibit of numerous admissions made by the Appellant." Barnes II, 922 So. 2d at 382 (slip op. at 3). Although defendant's testimony from the first trial may have been admissible in the retrial, the district court cites no authority for the proposition that a transcript of her testimony is admissible as an exhibit for the jury to examine during deliberations.

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[8] Like Florida courts, federal courts enjoy broad discretion in granting a jury's request to review transcripts of trial testimony during deliberations. See United States v. Edwards, 968 F.2d 1148, 1152 (11th Cir. 1992), cert. denied, 506 U.S. 1064 (1993); United States v. Morrow, 537 F.2d 120, 148 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977). The federal courts, however, commonly refuse such requests because furnishing the jury with a transcript of only one portion of the trial creates a danger that the jurors will give that portion undue weight. See United States v. Schmitt, 748 F.2d 249, 256 (5th Cir. 1984), cert. denied, 471 U.S. 1104 (1985).

The district court further reasoned: "The fact that the State published the exhibit to the jury does not turn the exhibit into 'testimony.'" Id. This statement, however, places the proverbial cart before the horse. The testimony did not become an exhibit until after the State read it to the jury and offered the transcript into evidence two days later. (R-VI 432; R-VIII 641-42). Thus, in line with the authorities previously cited, the district court should have said: "The fact that the State read defendant's prior testimony to the jury does not turn the testimony into an 'exhibit.'"

Finally, the district court cited Florida Rule of Criminal Procedure 3.400(a)(4) as authority for its conclusion that "the trial judge acted within his discretion to allow the jury to take the exhibit into the jury room." Barnes II, 922 So. 2d at 382 (slip op. at 3). Florida Rule of Criminal Procedure 3.400(a) provides:

> The court may permit the jury, upon retiring for deliberation, to take to the jury room:
>
> (1) a copy of the charges against the defendant;
>
> (2) forms of verdict approved by the court, after being first submitted to counsel;
>
> (3) in noncapital cases, any instructions given, but if any instruction is taken all the instructions shall be taken;
>
> (4) all things received in evidence other than depositions.

(emphasis supplied). Based on the language in Rule 3.400(a)(4), the district court apparently concluded that "depositions" are the only "things received in evidence" excluded from jury deliberations. The court's reasoning is incorrect, however, for several reasons.

First, although Rule 3.400(a)(4) allows the jury to take "all things received in evidence other than depositions" back to the jury room, the trial court should never have received the transcript of defendant's prior testimony in evidence. Reading her testimony to the jury was sufficient.

Second, notwithstanding the language in Rule 3.400(a)(4), Young suggests that depositions are not the only evidence precluded from jury examination during deliberations. In Young, this court held that videotaped testimony introduced into evidence under section 90.803(23), Florida Statutes, is not allowed into the jury room during deliberations. See Young, 645 So. 2d at 967. In so holding, the court reasoned that "[i]f depositions read into evidence in lieu of live testimony cannot be taken to the jury room, there is all the more reason to preclude video presentations of live testimony from being taken to the jury room." Id. at 967. This rationale should apply at bar. If witness depositions read into evidence in lieu of live testimony cannot be taken to the jury room, the court should likewise exclude transcripts of the accused's prior testimony from the jury room.

Third, for reasons previously expressed, the transcript of defendant's prior testimony should be treated like a "deposition" and therefore should fall under the proscription in Rule 3.400(a)(4), particularly since the State read the testimony to the jury in the same format as a deposition.

E. Decisions from Other Jurisdictions

Several cases from other jurisdictions support defendant's position that the trial court abused its discretion and committed reversible error by admitting the transcript of her prior testimony into evidence as an exhibit for examination by the jury during deliberations. See Fuller v. United States, 873 A.2d 1108 (D.C. 2005); Littlejohn v. State, 85 P.3d 287 (Okla. Crim. App.), cert. denied, 543 U.S. 947 (2004); State v. Carter, 888 P.2d 629 (Utah), cert. denied, 516 U.S. 858 (1995); State v. Solomon, 96 Utah 500, 87 P.2d 807 (1939). In Fuller, defendant's first trial ended in a mistrial after the jury deadlocked on some of the charges. On retrial, the government read defendant's testimony from the first trial. The defendant did not testify at the retrial. As here, the trial judge provided the transcript from the first trial to the jury over defendant's objection. On appeal, the court determined that the trial judge erred by submitting the transcript to the jury.[9] In so holding, the court in Fuller noted the particular concerns which arise when the transcript offered into evidence documents the testimony of the accused:

[9] The Fuller court found the error harmless.

> The risk that the jury might give undue weight to some testimony because it is available in transcript form over jurors' recollection of other, untranscribed trial testimony is heightened where the transcript is of the testimony of the defendant, because a defendant's admissions normally carry particular force with a jury. Moreover, there is a Fifth Amendment concern, for even if a defendant's testimony from a prior trial has been properly admitted as evidence, a transcript of that testimony might receive greater scrutiny-and invite impermissible inferences-where the defendant has exercised his constitutional right not to take the stand at a second trial.

Fuller, 873 A.2d at 1117. The court concluded that "although no blanket rule prohibits submitting to the jury for its deliberation the transcript of a defendant's testimony that has been admitted as evidence, the attendant risks require that it not be done reflexively and as a matter of course. A trial judge should first consider whether the jurors have a particular need for the transcript, and if so, give a special instruction cautioning against unduly emphasizing the transcript over other evidence." Id. at 1117-18.

In Solomon, the State impeached a witness on cross-examination by using a transcript of his testimony from the first trial. Over defendants' objection, the trial judge made the entire transcript from the first trial available to the jury during deliberations with the pertinent pages used by the State during cross-examination of the witness flagged for easier reference. The Utah Supreme Court reversed defendants' convictions for the following reasons:

> That the testimony given at a former hearing of the cause by a witness may be used to impeach him or to test his credibility is elemental. It may even be used as evidence in chief in any subsequent trial of the same cause, in the event the witness is deceased, or beyond the jurisdiction of the court. . . . But such testimony, even though taken by a reporter, transcribed, and certified, is not documentary evidence to be received in writing and given to the jury.

Solomon, 87 P.2d at 810-811.

In Carter, defendant was convicted of first-degree murder and sentenced to death. The Utah Supreme Court affirmed the conviction but reversed the sentence and remanded for a new sentencing hearing. Utah has a retrial statute for capital cases which provides: "'In cases of remand for new sentencing proceedings, all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing proceedings shall be admissible in the new sentencing proceedings.'" Carter, 888 So. 2d at 641 (quoting Utah Code Ann. § 76-3-207(4) (1990)). Pursuant to this statute, the State prepared a "cleaned up" version of the testimony presented at the first trial for use in the retrial. During the retrial, the State read from the transcript and entered it into evidence. The jurors took the exhibits, including the transcript from the first trial, into the jury room during deliberations. The jury again sentenced the defendant to death.

On appeal, the defendant argued, among other things, that the statute which permits the State to use a transcript from the first sentencing proceeding during a retrial was unconstitutional because it violates a capital defendant's right to

confront adverse witnesses. In response, the Utah Supreme Court stated that the transcript was admissible under the applicable statute but established certain procedural safeguards to protect defendant's constitutional rights:

> First, we construe section 76-3-207(4) as permitting the admission of prior testimony in oral form only. . . . Second, we hold that the written transcript should not be admitted into evidence as an exhibit, nor should it be taken into the jury room during deliberation. . . . The condition is simply that the defendant make a timely objection to the introduction of the transcript under section 76-3-207(4).

Carter, 888 P.2d at 642 (emphasis supplied). Accord Littlejohn, 85 P.3d at 297.

The Carter court reached its conclusion even though Utah, like Florida, has a rule which states: "'Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, except depositions . . . .'" Id. at 642 (quoting Utah R. Crim. P. 17(k)) (emphasis the court's). The court reasoned that "[w]hile not directly on point, rule 17(k) indicates that exhibits which are testimonial in nature should not be given to the jury during its deliberations." Id. The same result should obtain in this case.

F. Prejudicial Error Analysis

The State did not argue harmless error on this issue in the court below, undoubtedly because the error committed by the trial court in permitting the jury to take the transcript of defendant's prior testimony into the jury room was highly prejudicial. Defendant will address the harmless error issue nonetheless.

"The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). In other words, "[if] the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." Id. at 1139.

In this case, it cannot be said beyond a reasonable doubt that the jury's improper access to the transcript did not contribute to the guilty verdict. To the contrary, the record shows that the inconsistencies between defendant's written statement which she gave to the police after her arrest and her testimony from the first trial were critical to the State's case. In support of the State's request to allow the jury to take the transcript into the jury room during deliberations, the prosecutor argued that "it is important for the jury to be able to have that and compare it [transcript of prior testimony] to her written statements to the police." (R-VI 427). In closing argument, the State highlighted the apparent inconsistencies between defendant's written statement and her testimony from the first trial. For example, the prosecutor emphasized what she called the "critical distinction" between defendant's written statement in which she reported that the gun was on the seat of her car and her prior testimony in which she said the gun was in her

purse. (R-IX 879-80, 952-53). At one point during her closing argument, the prosecutor actually quoted from the transcript to substantiate her argument that defendant's prior testimony "defies common sense." (R-IX 889-90). During rebuttal, the prosecutor emphasized a discrepancy between defendant's written statement and her later testimony about whether Mr. Barnes had removed the gun from the fanny pack in the bedroom. To resolve this discrepancy, the prosecutor urged the jury to "[l]ook at the quotes in the transcript." (R-IX 961).

In short, in light of the tenuous evidence of guilt (discussed in the next section) and the State's closing argument, which repeatedly emphasized defendant's prior testimony, it cannot be said beyond a reasonable doubt that the presence of the transcript in the jury room did not contribute to the guilty verdict. See Young, 645 So. 2d at 967 ("We share the view of the district court of appeal that allowing a jury to have access to videotaped witness statements during deliberations has much the same prejudicial effect as submitting depositions to the jury during deliberations.").

II. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF SECOND-DEGREE MURDER WITH A FIREARM.[10]

A. Standard of Review

In reviewing a motion for judgment of acquittal, the de novo standard of review applies. See Troy v. State, No. SC04-332, 2006 WL 2987627, at *8 (Fla. Oct. 19, 2006). As explained by this court in Troy, "[g]enerally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence." Id. "There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." Id.

In cases based on circumstantial evidence, the court should grant a motion for judgment of acquittal "if the state fails to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt." Reynolds v. State, 934 So. 2d 1128, 1146 (Fla. 2006). However, "[t]he state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." Darling v. State, 808 So. 2d 145, 156 (Fla. 2002) (quoting State v. Law, 559 So. 2d 187, 189 (Fla. 1989)). "Once the State meets

[10] Once the court accepts jurisdiction to resolve a decisional conflict, it has the discretion to consider other issues properly briefed and argued below. See Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982).

this threshold burden, it becomes the jury's duty to determine 'whether the evidence fails to exclude all reasonable hypotheses of innocence . . ., and where there is substantial, competent evidence to support the jury verdict, [the Court] will not reverse.'" Reynolds, 934 So. 2d at 1146 (quoting Law, 559 So. 2d at 188).

B. Proof Required

Second-degree murder is the "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual . . . ." § 782.04(2), Fla. Stat. (2000). The phrase "evincing a depraved mind regardless of human life" means "ill will, hatred, spite, an evil intent." Huntley v. State, 66 So. 2d 504, 507 (Fla. 1953).

Although defendant admitted shooting her husband, the State still was required to prove beyond a reasonable doubt that she acted with "ill will, hatred, spite or an evil intent." Sigler v. State, 805 So. 2d 32, 34 D2880 (Fla. 4th DCA 2001), rev. denied, 823 So. 2d 126 (Fla. 2002); Fla. Std. Jury Instr. (Crim.) 7.4. The State also was required to prove beyond a reasonable doubt that defendant did not act in self-defense. See Rasley v. State, 878 So. 2d 473, 476 (Fla. 1st DCA 2004). "A person may use deadly force in self-defense if he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm." Id. "A person may not, however, use deadly force without using every available

means to avoid danger, including retreat." Id. "One has a limited duty to retreat in one's own home to the extent reasonably possible, but there is no duty to flee the residence." Id.

C. Sufficiency of the Evidence

In rejecting defendant's challenge to the sufficiency of the evidence, the district court below determined:

> A review of the record demonstrates that the State presented the jury with adequate evidence supporting its theory that appellant shot and killed her husband in a fit of anger over his behavior on the night in question. Despite appellant's claim that she acted in self-defense, the issue of whether a defendant acted in self-defense is a question of fact for the jury. . . . As the State presented sufficient evidence that appellant did not act in self-defense, but rather killed her husband in a fit of anger, we must affirm the jury's decision.

Barnes II, 922 So. 2d at 381-82 (slip op. at 2-3).

Reviewing the evidence, the State called Vera Christopher as its first witness, ostensibly to refute defendant's statement that Mr. Barnes was drunk when he came home at 2:30 a.m. (even though the medical examiner later testified that Mr. Barnes was intoxicated with a .16% blood alcohol reading). (R-IV 70-73; R-V 380). Christopher's testimony, however, also established that Mr. Barnes lied to his wife by telling her that he was going to "Frank's" house to watch the boxing match when, in fact, he was with another woman drinking and dancing at a nightspot until midnight. (R-IV 70-73). Although such infidelity might make a

spouse sufficiently enraged to meet the second-degree murder standard of "ill will, hatred, spite or an evil intent," the State presented absolutely no evidence that defendant knew her husband's actual whereabouts on the night in question. Defendant assumed her husband went to Frank's house to watch the boxing match. Defendant was no doubt unhappy when her husband came home late without calling, but there was no evidence from which a jury could infer that these events created "ill will, hatred, spite or an evil intent." To the contrary, the evidence showed that defendant remained relatively calm and rational despite being thrown around and choked by her husband. In short, the State did not present sufficient evidence to prove beyond a reasonable doubt that defendant did not act in self-defense, nor did the State present sufficient evidence to permit an inference that defendant "shot and killed her husband in a fit of anger over his behavior on the night in question." Id. at 381 (slip op. at 2).

CONCLUSION

For all the foregoing reasons, the court should quash the decision of the district court with directions to the trial court to vacate defendant's conviction and sentence and discharge defendant or, alternatively, grant defendant a new trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bill McCollum, Esquire, Attorney General, and Thomas D. Winokur, Esquire, Assistant Attorney General, Office of Attorney General, The Capitol PL-01, 400 South Monroe Street, Tallahassee, Florida 32399, attorneys for respondent, by U.S. Mail on this 16th day of March, 2007.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman proportionally spaced font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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