IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-472

GABRIEL BRIAN NOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

DON M. ROGERS
Assistant Attorney General
Florida Bar No. 0656445
1515 North Flager Drive
Ninth Floor
West Palm Beach, FL. 33401
Telephone: (561)837-5016
(561)837-5108 fax

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATUTES

PRELIMINARY STATEMENT

Petitioner, Gabriel Nock, was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Respondent, State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In this brief, the parties shall be referred to as they appear before this Honorable Court except that the respondent may also be referred as the State or prosecution.

In this brief "Vol" will be used to denote the volume of the record on appeal followed by the actual page number within that volume.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections, clarifications and or modifications contained below and in the body of this brief.

Just before the trial commenced, the defense filed two pretrial motions regarding the video recorded statement that Nock gave to Detective Rivera. The first was a motion in limine to prohibit mention of certain portions of the statement where Nock makes reference to prior arrests, prior crimes, bad acts and drug use. (Vol. 3, pgs. 422-425)

The second motion, also titled a motion in limine, was accompanied by a memorandum of law. (Vol. 3, pgs. 430-435) In this motion the defense acknowledged and argued:

> **It has come to counsel's attention that the State, at trial, intends to somehow "summarize" the Defendant's statement (through the lead detective in the case) and to only introduce selected portions of the actual recording, if any at all. This should not be permitted for the following reasons: (Vol. 3, pg. 427)**

The motion sought to require the State to introduce the video recorded statement at trial and not just present the testimony of Detective Rivera. The motion was briefly discussed before the start of voir dire and the trial judge noted: "Would you agree,

though, that would be cured if you, on cross examination, introduced it?" (Vol. 10 pg. 552) A few pages later the trial judge stated:

> **I think you understand that, but if he has the detective testify about it, the Doctrine of Completeness enables you, it kind of trumps the hearsay rule, you have the ability, either through cross examination or your case in chief. That's why I see this differently than you do. I think a party in a civil case or in a criminal case has the option, the manner and means how they wish to present their case. I think the detective is competent in this instance, ... he has the right to testify to his interaction with the defendant, the defendant's statement is non-hearsay, or an exception to hearsay in State Court, and he can testify as to that. You can cross examine him with the video or you can move the video in. So, there's no due process issue, there's no fundamental fairness issue, it's just the manner and means of the way the trial is conducted, the Court has discretion, the moving party has discretion, that's how I see it. (Vol. 10, pgs. 557-558)**

After another brief hearing the trial judge denied the defense motion in limine stating: "the court finds the State should not be compelled to enter the videotaped interrogation into evidence." (Vol. 14, pg. 1007)

The State outlined their case during opening statement as follows:

> **Detective Rivera will say [Nock] told me I went to that beach, I targeted a gay man because he's an easier target, that's exactly what he did. His words say what his plan was, his actions show what his plan was. He's gonna say he already had his wallet and credit cards before he had to kill him, choke him. And his actions show what his intentions were, not only by choking but**

> **what he does afterwards with the credit cards, the evidence will show that. (Vol. 15, pg. 1050)**

The record reflects that the defense prepared a redacted copy of Nock's video recorded statement to Detective Rivera. It was available to both the prosecution and the defense at trial. Just before Detective Rivera testified at trial, the defense referenced their redacted video and said: "... all the things we asked to be excluded are excluded. We have that ready to be presented and our position is that it should be presented by the State at this time." (Vol. 18, pgs. 1388-1389) It was never presented to the jury by either party.

Just before the State closed their case the trial judge instructed the jury:

> **Let me emphasize to you, and this is really, really important, the fact that Mr. Nock, as will be established by the State [is] convicted of prior felonies in no way goes to his innocense or guilt, what it go[es] to is your evaluation of his credibility and his credibility alone, you're not to speculate as to prior convictions or otherwise, it only goes to one thing weighing credibility. ... Okay, in other words, you're to decide your case whether the State has proved the case beyond and to the exclusion of all reasonable doubt in this case, not other events, okay? (Vol. 20, pgs. 1626-27)**

The prosecutor then advised the jury as follows: "That's it's a fact Mr. Nock has nine prior convictions of felonies or crimes involving dishonesty." (vol 20, pg. 1627) Judgments were not admitted. Nock did not testify at trial.

SUMMARY OF THE ARGUMENT

In Nock v. State, 211 So. 3d 321 (Fla. 4th DCA 2017), the Fourth District certified that a portion of their opinion was in conflict with Foster v. State, 182 So. 3d 3 (Fla. 2nd DCA 2015). The State asserts that Foster is wrongly decided and is contrary to cases from this court. It appears that the Second District in Foster examined issues that were different from the issues reviewed by the Fourth District in Nock. The Fourth District Court of Appeal noted that Foster was contrary to decisions of this court in Huggins v. State, 889 So. 2d 743 (Fla. 2004) and Kaczmar v. State, 104 So. 3d 990 (Fla. 2012).

In this brief the State argues that the Fourth District Court of Appeal correctly decided that the statutory rule of completeness, as found in §90.108 Fla. Stat., did not apply as the State never introduced the video taped Mirandized statement Nock gave to a police detective. The State acknowledges there is a general doctrine called the rule of completeness. This doctrine allows a defendant, during cross examination, to ask questions regarding portions of the defendant's statement not offered during the direct testimony. This is exactly what happened in this case. Nock's attorney was permitted broad cross examination of the detective during an 80 page cross examination. During the cross examination Nock brought out many parts of his statement to the

detective that were exculpatory--in this case portions of his statement during which Nock expressed that the death of the victim was an accident. Under cases from this court and §90.806 Fla. Stat., this permitted the State to impeach Nock with the number of his past felony conviction.

Even if there was error, the error is harmless. The brief mention of Nock's 9 felony convictions played no role whatsoever in the verdict returned. Nock did not testify at trial. His words to the detective and his actions after the death of the victim dramatically impacted any credibility he had before the jury.

ARGUMENT

THE FOURTH DISTRICT CORRECTLY HELD THAT THE RULE OF COMPLETENESS FOUND IN §90.108(1) FLA. STAT. DID NOT APPLY AS THE STATE NEVER INTRODUCED THE VIDEO RECORDED STATEMENT APPELLANT MADE TO POLICE; AND, 2) NOCK COULD BE IMPEACHED WITH THE NUMBER OF HIS PRIOR FELONY CONVICTIONS WHEN HE ELICITED FROM THE POLICE WITNESS DURING CROSS EXAMINATION EXCULPATORY STATEMENTS NOCK MADE TO POLICE DURING HIS STATEMENT

This case is before this court based on the Fourth District Court of Appeal certifying conflict with Foster v. State, 182 So. 3d 3 (Fla. 2nd DCA 2015). As argued later in this brief, the State asserts that Foster is wrongly decided and is contrary to cases from this court. Additionally, it appears that the court in Foster examined issues that were different from the issues reviewed by the Fourth District in Nock v. State, 211 So. 3d 321 (Fla. 4th DCA 2017).

In the initial brief appellant argues that the Fourth District Court of Appeal erred in ruling that the rule of completeness, as found in § 90.108(1) Fla. Stat.[1], was not applicable to the facts

---

[1] **90.108. Introduction of related writings or recorded statements**

(1) When a writing or recorded statement or part thereof is

of the present case. Appellant also suggests the Fourth District Court of Appeal erred in finding that pursuant to §90.806(1) Fla. Stat. the State could impeach Nock with the number of his prior felony convictions after Nock brought out exculpatory portions of his police statement during an extensive cross examination of the State's police witness. The State disagrees and contends the ruling of the Fourth District Court of Appeal was correct and followed established precedent from this Court and other District Courts of Appeal.

Petitioner, Brian Nock, (Nock) was taken to the Broward Sheriff's Office where he gave a Mirandized statement to Detective Rivera. During this video recorded statement he described his involvement in the death of the victim. The defense had redacted inadmissible portions of this video recording and it was available to be placed in evidence and played to the jury. (Vol. 18, pgs. 1388-1389) However, it was not offered into evidence at trial by either party. Detective Rivera testified as a State witness. During this direct testimony Rivera was asked questions regarding what Nock said to him during the statement. Defense counsel made

---

introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

several objections during this direct testimony and requested the State be required to present the entire redacted video recording of Nock's police statement citing "best evidence" and citing section 108 and stating the "rule of completeness." (Vol. 18, pgs. 1387-88, 1399, 1412, 1431, 1434) The prosecutor responded that the defense was free to introduce the video in their portion of the case. (Vol. 18, pg. 1400) Defense counsel's trial objections parroted his pretrial arguments contending that the trial judge should require the State to introduce the video recorded statement into evidence. This was apparently done as part of a defense strategy to place the exculpatory comments Nock made during the police statement before the jury without exposing him to impeachment with his prior felony convictions. (see Vol. 10, pgs 644, 650) The trial judge rejected appellant's arguments and did not compel the State to present the actual video recorded statement to the jury. During the extensive cross examination of Detective Rivera, Nock's exculpatory statements were presented. (Vol. 18, pgs. 1439-1519) These exculpatory statements formed the basis of Nock's defense of accidental death. Nock did not admit the redacted video statement into evidence.

Rule of Completeness from §90.108(1) Fla. Stat. Not Applicable

Appellant's first argument asserts that the State should have

been required to introduce into evidence and then play the recorded video statement in lieu of Detective Rivera's direct testimony. Appellant cites to the "rule of completeness." The Fourth District correctly held that the rule of completeness found in section 90.108(1) Fla. Stat. was not applicable under the facts of this case. The District Court wrote:

> **We have held that the rule of completeness does not apply when the written or recorded statement is not introduced into evidence. Cann v. State, 958 So. 2d 545, 549 (Fla. 4th DCA 2007); see also Hoffman v. State, 708 So. 2d 962, 966 (Fla. 5th DCA 1998). "The state simply asked the deputy to tell the court and jury what appellant said. The rule of completeness is inapplicable when no portion of the taped statement is actually played for the jury." Hoffman, 708 So. 2d at 966.**
>
> **Here, the State did not introduce the defendant's recorded statement. It merely questioned the detective on direct examination about his conversation with the defendant. The defendant was free to do the same and did so on cross-examination. But in doing so, the trial court properly ruled the rule of completeness inapplicable.**
>
> **Nock, 211 So. 3d at 324.**

The State asserts that the Fourth District Court of Appeal was correct. The statutory rule of completeness, as found in §90.108(1) Fla. Stat., is only applicable when a writing or recording is introduced into evidence. See Hoffman v. State, 708 So. 2d 962 (Fla. 5th DCA 1998); Cann v. State, 958 So. 2d 545, 546 (Fla. 4th DCA 2007); Larzelere v. State, 676 So. 2d 394 (Fla. 1996)

The State does acknowledge the cases petitioner cites that seem to extend the broad evidentiary concept of the rule of completeness[2] to situations involving oral statements. See Christopher v. State, 583 So. 2d 642 (Fla. 1991)("When the state offers in evidence a part of a confession or admission against interest, the defendant is entitled to bring out during cross-examination the entire confession or admission."); Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 2nd DCA 1989)("Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury

---

[2]Although the cases use the phrase "rule of completeness" it is apparent the cases are not applying section 90.108, but actually referencing other concepts such as the doctrine of curative admissibility which "rests upon the necessity of removing prejudice in the interest of fairness.... and [i]ntroduction of otherwise inadmissible evidence under the shield of this doctrine is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." See Guerrero v. State, 532 So. 2d 75 (Fla. 3d DCA 1988). This court has stated: "The phrase 'opening the door' has been utilized interchangeably with the rule of completeness. The rule of completeness, however, is a separate evidentiary concept that falls with the general principle of door-opening." Ramirez v. State, 739 So. 2d 568, 579 (Fla. 1999). See Reese v. State, 694 So. 2d 678, 683 (Fla. 1997)("Although that rule is defined at section 90.108, Florida Statutes (1995), to include only written or recorded statements, it is true that we have allowed the policy to apply to testimony as well.")

to accurately perceive the whole context of what has transpired between the two."); Sweet v. State, 693 So. 2d 644, 645 (Fla. 4th DCA 1997). However, the cases do not support appellant's position in this case--they support the State's position. The cases hold that when the State presents a portion of the defendant's oral statements to police during direct testimony, a defendant is allowed to bring out the rest of the relevant oral statements, including exculpatory portions, during cross examination of the state witness. This is exactly what happened at bar. It is the State's position that any variant of the legal doctrine known as the "rule of completeness" was fulfilled in this case as Nock had full and unfettered cross examination of Detective Rivera regarding his statement to police. The cross examination here covered approximately 80 pages of transcript. (Vol. 18, pgs. 1440-1520)

Appellant cites no case that requires the State, during their direct examination of a State witness, to ask the witness any particular question or that requires the State to play the audio or video recording of the defendant's statement to police.

Throughout the initial brief Petitioner repeatedly argues the State was intentionally misleading the jury during their direct examination of Detective Rivera. Petitioner argues there is an absolute obligation on the part of the prosecutor to present all portions of the defendant's police statement to the jury, even

where the prosecutor has a good faith belief that much of what Nock told the police were lies. The State strongly challenges this portion of the initial brief.

At the time of Nock's arrest and his subsequent statement, (six days after the victim's death) the State had already compiled significant evidence against Nock. They had surveillance video recordings of Nock using the victim's credit cards at several retail stores shortly after the victim's death. Some of the recordings show Nock using the victim's credit cards even before the victim's body was discovered. From the video police made still photographs of Nock. Police knew the victim had been with a young man named Gabriel just before his death. A landscaper who saw Nock with the victim on the victim's back porch just before the death, worked with police on a composite sketch. (Vol 5, pgs. 35-40; Vol. 20, pgs. 1628-1634) The victim's friends told police the victim and the young man left the beach in the victim's car around 2 p.m. At his arrest, Nock was in possession of the victim's car and other belongings and showed police where the car was parked in a nearby garage.

The State would point out that during the first hour of Nock's statement to Detective Rivera, Nock continually lied. Nock stated he did not know the victim and had purchased the victim's belongings, which he possessed when arrested, for $300 from a

person named Trevor on the beach in Ft. Lauderdale. (Vol. 18, pgs. 1393-95) Detective Rivera knew Nock was lying to him and misleading him. Nock overlooks the fact that he was charged with first degree premeditated murder and the evidence, including Nock's statement, directly supported that charge. Nock was on the run for 6 days before he was arrested. This six day period gave Nock lots of time to come up with an explanation for the victim's death. Nock's suggestion that the victim's death was an accident was not consistent with the evidence. Nock admitted he was targeting gay men. (Vol. 18, pg. 1410, Vol. 20, pg. 1626) Nock was seen returning to the victim's home with the victim at 2 p.m. and shortly thereafter the victim was dead. At 5:45 p.m. the same day, before the victim was discovered dead on his kitchen floor, Nock was driving the victim's car and using the victim's credit cards[3]. (Vol. 17, pgs. 1335-1345) Before leaving the victim's house, Nock doused the victim's body and surrounding kitchen floor with Clorox to destroy any evidence left there. (Vol. 18, pg. 1420) Nock initially denied ever meeting the victim. Nock initially told police he had purchased the victim's belongings from a person named

---

[3]**The victim's body was discovered shortly after 7:55 p.m. on March 10, 2009. (Vol. 16, pgs. 1138-1142) Videos and photos show appellant driving the victim's car and using the victim's credit cards at a 7-11 store at 5:47 p.m., at a Publix at 5:54 p.m. and at a Target store at 7:25 p.m. (Vol. 17, pgs. 1335-1345)**

Trevor on the beach. (Vol 18, pgs. 1393-94) Even though Nock eventually claimed accidental death during the police statement, Nock never called 911 or sought help for the victim. What Nock did was destroy evidence and flee in the victim's car with the victim's belongings. Nock stole the victim's credit cards and wallet even before the victim's death. (Vol. 18, pg. 1491) The State did not mislead the jury. The prosecutor was merely doing what all prosecutors should do--present the evidence and inferences from that evidence in the light most favorable to the State's theory of the case.

From opening statements the jury clearly understood that the defense was accident. The prosecutor first mentioned this during opening statement: "And I guess it's a big accident. Detective Rivera will say he didn't intend to hurt him he just, he just wanted to choke him." (Vol. 15, pg. 1047) The defense attorney during opening statement stated: "Gabriel Nock is not guilty of murdering Larry Ellison. He did not intentionally cause Mr. Ellison's death and Mr. Ellison's death was not the result of any felony criminal behavior on Gabriel Nock's part. Larry Ellison's death was an accident." (Vol. 15, pg. 1051)

During Detective Rivera's direct testimony the chronology and substance of what Nock told Detective Rivera was presented. Rivera testified Nock told him about the victim's interest in wrestling,

how the victim would tap out while engaged in the first sex act upstairs, and how Nock described using head locks on the victim. (Vol. 18, pgs. 1415-1418) Rivera testified that Nock stated: "he just stopped breathing, he wasn't supposed to die..." (Vol. 18, pg. 1416) Petitioner's argument that the State was presenting intentionally misleading testimony is not accurate. It has as its foundation the implied assertion that the statements Nock made to Detective Rivera were true. This obviously was not the case.

During the extensive cross examination of Detective Rivera, Nock brought out every possible exculpatory statement Nock made during his police statement. (Vol. 18, pgs. 1439-1518) The trial judge imposed no limitation on this defense cross examination. Nock goes into great detail about his cross examination of Detective Rivera in the statement of the facts. (see initial brief, statement of the facts at pages 17-25) Based on this extensive cross examination, the Fourth District Court of Appeal correctly determined that the State could then properly impeach Nock with the number of his prior felony convictions pursuant to §90.806(1) Fla. Stat. (2014)[4] because Nock had elicited his own exculpatory,

---

[4]**The statute is as follows:**

> **When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had**

hearsay statements through another witness at trial.

In ruling that based on the facts of this case the statute allowed for impeachment with the number of prior felony convictions the Fourth District Court of Appeal cited to Kelly v. State, 857 So. 2d 949, 949 (Fla. 4th DCA 2003) (holding that the court properly allowed the state to admit the defendant's convictions as impeachment evidence once the defendant elicited exculpatory statements through the interrogating officer); Huggins v. State, 889 So. 2d 743, 756 (Fla. 2004) (providing that a defendant who succeeds in getting his exculpatory statements into evidence risks having those statements impeached through felony convictions); and Kaczmar v. State, 104 So. 3d 990, 1000-01 (Fla. 2012)(this court cites to Kelly and Huggins and agrees with the trial judge allowing state to introduce redacted version of defendant's recorded police statement with exculpatory portions removed and agreeing with warning of prosecutor to defense counsel that asking questions during cross regarding the redacted exculpatory portion of statement would allow for impeachment with prior felonies)

The State asserts that the ruling of the Fourth District was

> **testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with the declarant's hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.**

in full conformity with these cases and other cases not cited in the opinion. See e.g. Mathis v. State, 135 So. 3d 484 (Fla. 2nd DCA 2014); Gonzalez v. State, 948 So. 2d 877, 878 (Fla. 4th DCA 2007)(A non-testifying defendant who brings out his or her own exculpatory statements through another witness, "runs the risk of having those statements impeached by felony convictions."); Werley v. State, 814 So. 2d 1159, 1162-63 (Fla. 1st DCA 2002) (holding that prior convictions were properly admitted for impeachment purposes where the "trial court instructed the jury that the prior convictions should be considered only for the purpose of assessing the defendant's credibility of statements he made that were related by witnesses, and are not to be considered as proof of guilt for the charged offense"); Moore v. State, 943 So. 3d 296 (Fla. 1st DCA 2006); Fisher v. State, 924 So. 2d 914 (Fla. 5th DCA 2006).

The leading case regarding the issue is this court's opinion in Huggins v. State, 889 So. 2d 743, 756 (Fla. 2004). In Huggins at 755-756, this court explained as follows:

> **The trial court admitted the fact of Huggins' convictions on the basis of section 90.806(1), Florida Statutes (2002), which provides in part that "[w]hen a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness." The trial court's ruling was made in accordance with First and Fourth District Court of Appeal holdings that section 90.806 permits the introduction of a defendant's felony convictions when the defendant elicits**

> **his or her own exculpatory, hearsay statement through another witness at trial. See Kelly v. State, 857 So. 2d 949 (Fla. 4th DCA 2003); Werley v. State, 814 So. 2d 1159 (Fla. 1st DCA 2002); Llanos v. State, 770 So. 2d 725 (Fla. 4th DCA 2000). Two of those decisions cite the following treatise passage concerning the functionally identical federal evidence provision: "A defendant who chooses not to testify but who succeeds in getting his or her own exculpatory statements into evidence runs the risk of having those statements impeached by felony convictions." Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 806.04(2)(b) (Joseph M. McLaughlin ed., 2d ed.2002). We agree with the First and Fourth Districts on that point of law. Under section 90.806(1), a hearsay declarant is treated as a "witness" and his or her credibility may be attacked in the same manner as any other witness's credibility. In turn, section 90.610(1), Florida Statutes (2002), provides in pertinent part that "[a] party may attack the credibility of any witness ... by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year."**

The State contends that based on the above cases, Foster v. State, 182 So. 3d 3 (Fla. 2nd DCA 2015) was wrongly decided. It does not appear that the Foster court applied, or even was aware, of any of the leading cases outlined earlier in this brief. Contrary to what Nock argues in the initial brief at page 37, there is nothing in Foster that even remotely suggests that what Foster told the officer implied he had burgled the wallet from a car. In stark contrast to the present case, Foster involved the admission of "certified copies of Foster's eleven prior convictions." Id. at 4.

The State also would argue from what is written in the Foster

opinion, the issues presented to the District Court in Foster must have been different than the issues presented to the Fourth District in this case. The Foster court bases its decision on Bozeman v. State, 698 So. 2d 629 (Fla. 4th DCA 1997). Bozeman involves the State eliciting on redirect examination a description of the special management unit where the defendant was housed. The Fourth District concluded the "description of the special management unit was tantamount to the admission of prior bad acts to prove that Bozeman had acted consistently with that pattern of conduct in striking the officer." Id. This obviously is very different from happened in the present case which involves the admission of only the number of prior felonies when a non testifying defendant elicts his prior exculpatory hearsay statements during cross examination of a state witness.

The Second District in Foster does not cite to any case dealing with the subject of impeachment with prior convictions of a defendant who brings out exculpatory statements during the cross examination of a state witness. Foster does not involve a detailed Mirandized police statement[5] and an extensive cross examination of

---

[5]In Foster the arresting officer located a stolen wallet in Foster's pocket during a consent search. Foster told the officer he had found the wallet. On cross examination the officer testified that "Foster had told him he found the wallet inside a garbage can and that he was going to turn it in to police as found property." Foster apparently only involves the

the police witness. Foster simply involves clarifying one sentence Foster made during his brief discussion with police. Most telling is the fact that Foster does not even cite to Mathis v. State, 135 So. 3d 484 (Fla. 2nd DCA 2014), a case from the Second District involving the same issue as presented in this case. Mathis cites to the leading cases on this topic and was issued 18 months prior to Foster by the same court. Clearly had the same issue been presented in Foster the Second District Court of Appeal would have cited to their most recent decision on the topic.

In any event any error must be harmless as there is no reasonable probability, that the jury being orally told that Nock had 9 prior felony convictions, had any impact on the verdict returned. State v. Diguilio, 491 So. 2d 1129 (Fla. 1986). "[I]t is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations." State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).

Just before the State rested, the trial judge instructed the jury: "the fact that Mr. Nock, as will be established by the State, [is] convicted of prior felonies in no way goes to his innocense or guilt, what it go[es] to is your evaluation of his credibility and his credibility alone, you're not to speculate as to prior "the

---

clarification of one sentence stated to police.

jury: "the fact that Mr. Nock, as will be established by the State [is] convicted of prior felonies in no way goes to innocence or guilt ..., you're not to speculate as to prior convictions or otherwise, it only goes to one thing weighing credibility. ... Okay, in other words, you're to decide your case whether the State has proved the case beyond and to the exclusion of all reasonable doubt in this case, not other events, okay?" The prosecutor then advised the jury as follows: "That's it's a fact Mr. Nock has nine prior convictions of felonies or crimes involving dishonesty." (Vol. 20, pgs. 1626-27) Copies of the judgments of conviction were not admitted. Absent evidence to the contrary, juries are presumed to follow the instructions given them. See Sutton v. State, 718 So. 2d 215, 216 (Fla. 1st DCA 1998).

The State would assert that the fact the prosecutor advised the jury Nock had nine prior convictions had no impact whatsoever on the verdict returned. The nine prior felony convictions constituted a tiny portion of the evidence which provided the jury with a negative picture of appellant's credibility.

During his statement to police Nock told the police he targeted the victim because he was a gay man and therefore as a gay man he was an easy target. Nock admitted he had prostituted himself to the victim for $80--selling sex for money. (Vol. 18, pg. 1414) Nock admitted he had taken the victim's wallet and credit

cards before the alleged second sexual incident and before victim died. (Vol. 20, pgs. 1417, 1491, 1516-17, 1525) When the victim fell limp on the kitchen floor Nock did not call 911--even though the victim was still, "making some type of noise as if he was struggling for air at the time." (Vol. 18, pgs. 1418-19) Before fleeing, Nock poured bleach on and around the victim as he was on the kitchen floor to destroy any evidence. Nock initially placed a cord around the victim's neck to feign a robbery but later removed it. (Vol. 18, pg. 1421) Nock stole the victim's car and other personal items. Nock then used the victim's credit cards at various retail locations in the area. Nock used the victim's credit card to buy a gift card that he used at a strip club shortly after the victim died. (Vol. 18, pg. 1423) For the first hour of his police statement appellant repeatedly lied to the detective. Obviously, from all this, and other evidence presented at trial, it is clear appellant had no credibility before the jury. Any error must be viewed as harmless.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,
PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/ Celia A. Terenzio
_____

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

/s/ Don M. Rogers
_____
DON M. ROGERS
Assistant Attorney General
Florida Bar No. 0656445
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL. 33401
(561) 837-5016
(561) 837-5099 fax
Counsel for Respondent
CrimAppwpb@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished to: Ian Seldin, Assistant Public Defender, 421 Third St, 6th floor, West Palm Beach, FL. 33401 at appeals@pd15.state.fl.us and a PDF copy has been filed with the Supreme Court of Florida on December 1, 2017.

/s/ Don M. Rogers

OF COUNSEL

Certificate of Font Size

This brief is typed in Courier New 12 font.

/s/ Don M. Rogers

Don M. Rogers