IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MICHAEL DAVID DUNN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO: 1D14-4924
LT. : 2012-CF-011572-AMA

REPLY BRIEF OF APPELLANT

TERRY P. ROBERTS, ESQ.
FLORIDA BAR NO. 0526479
LAW OFFICE OF TERRY P. ROBERTS
SPECIAL ASSISTANT PUBLIC DEFENDER
P.O. BOX 12366
TALLAHASSEE, FL 32308
(850) 590-8168
FAIRDAYINCOURT@AOL.COM
WWW.FAIRDAYINCOURT.COM

TABLE OF CONTENTS

TABLE OF CITATIONS

A. Florida Statutes

B. Florida Cases

PRELIMINARY STATEMENT

Appellant, Michael David Dunn, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the STATE OF FLORIDA, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of 44 volumes, which will be referenced as V, the number of the volume, a dash, and the appropriate page number. The supplemental volume is cited as VSupp1.

IB will refer to the Initial Brief, and AB will refer to the Answer Brief.

ARGUMENT IN REPLY

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL ON SELF-DEFENSE

The lower court erred in denying the motions for judgment of acquittal in both trials. There was insufficient evidence rebutting self-defense. In the Initial Brief, Appellant showed unrebutted evidence that Decedent David was in a rage while Appellant sat passively and did not react. Appellant showed that, while holding an object in his hand that Appellant took to be a weapon, the record was unrebutted concerning the fact that Decedent Davis threatened to kill Appellant and either opened or attempted to open his door before Appellant resorted to deadly force. Thus, the State failed to rebut the claim of self-defense.

In the Initial Brief, Appellant cited and analyzed Diaz v. State, 387 So.2d 978 (Fla. 3d DCA 1980), the case where a restaurant patron killed a fellow patron whom Diaz claimed advanced on him, threatened to kill him, and reached into his pocket in what Diaz took as an attempt to arm himself with a firearm. Diaz was intoxicated, claimed that he did not mean to actually fire his own gun, and attempted to hide the gun before the police arrived. (IB-82-90). Nevertheless, the Third District reversed for failure to rebut Diaz's claim of self-defense because the claim that the decedent advanced on Diaz

while threatening death was unrebutted. The State attempted to distinguish Diaz on the basis that eyewitnesses "contradicted Appellant's testimony" through testimony by the occupants of the Durango that they did not hear Decedent Davis threaten to kill Appellant. (AB-15-16). In Diaz, no one heard the decedent threaten Diaz, either, despite the fact that there were indeed eyewitnesses. Specifically, a "patron testified he heard a shot and saw the victim fall but did not see the defendant draw the lethal weapon, a 45-calibre pistol. A waiter, working tables, only heard the report of the pistol." Diaz, 387 So.2d at 979. In Diaz, as in this case, the defendant made unrebutted claims that the decedent threatened to kill him and started to advance, though the eyewitnesses did not hear the threat. In Diaz, it is hard to understand why no one else heard the threat, as the confrontation took place in a restaurant within eyesight of at least the patron and the waiter. In the instant case, however, it is easy to understand why Victims Thompson and Brunson did not hear the death threat. They both testified that their music was turned up so loud a volume that they could not hear all of what Decedent Davis was shouting at Appellant. (V18-1640, 1642; V19-1670, 1675, 1720, 1744; V37-1223, 1280, 1340). They both agreed, though, that Appellant's request to turn down the music enraged Decedent Davis. (V19-1674, 1721, 1739; V37-1276, 1338). They both agreed that Appellant was polite about his request, and that he did not react in anger when Decedent Davis began cursing at him. (V19-1672, 1675,

1743, 1747; V37-1275, 1342). Victim Brunson admitted that the more Appellant failed to react to Decedent Davis's shouting, the angrier Decedent Davis got. (V19-1747). Victim Brunson had seen Decedent Davis react angrily to people in the past. (V19-1748). They both agreed that Decedent Davis was cursing at Appellant in a fury. (V18-1638-40, 1674; V19-1675, 1719; V37-1222, 1276-77, 1311). Victim Thompson did not hear Decedent Davis threaten Appellant, but he **could not deny that a threat was made** because the music was so loud. Victim Thompson opined that the situation escalated because of Decedent Davis's behavior. (V19-1684). We also know from the State's witnesses that Decedent Davis said something outrageous that prompted Appellant to ask whether Decedent Davis meant him. Victim Brunson heard Decedent Davis answer, "Yeah, I'm talking to you." (V19-1725). Thus, Appellant's claim that Decedent Davis threatened to kill him was unrebutted and, unlike in Diaz, it was actually corroborated by the witness testimony of the parts of the conversation that they **did** hear.

Likewise, it was unrebutted that Decedent Davis was trying to get to Appellant in order to attack him. Victim Brunson saw Decedent Davis put his hand on the door handle, trying to exit the Durango, but claimed that he did not think that Decedent Davis actually opened the car door because he thought that child locks on the doors prevented him from doing so[1]. (V19-

[1] To be frank, while the undersigned counsel understands that review is for competent, substantial evidence, Victim Brunson's

1721, 1742-43, 1745, 1764; V37-1312, 1344). Victim Thompson did not turn around to look at what Decedent Davis was doing, and he only assumed that Decedent Davis did not exit the vehicle. (V19-1667-68; V37-1280). Thus, nothing rebutted Appellant's claim that Decedent Davis was at least trying to open his door while threatening to kill him. He was armed with a knife. (V22-2359-66). Thus, Diaz is not distinguished. Both cases involved unrebutted evidence of aggression by the decedent that placed the defendants in fear of imminent serious bodily injury or death.

Likewise, the State's attempt to distinguish State v. Rivera, 719 So.2d 335 (Fla. 5th DCA 1998) at AB-16-17 fails.

---

testimony that Decedent Davis was prevented from exiting the vehicle by the child locks stretches this test to the limit. The only accident reconstruction expert testified that Decedent Davis was definitely partly inside and partly outside the vehicle and that the door was open. (V42-2221-24). Victim Thompson (who, unlike Victim Brunson, had spent a lot of time in the Durango) testified that Victim Stornes habitually kept child locks on the windows, but not the doors. (V19-1632, 1667). The State's law enforcement witnesses later agreed that the child locks on the Durango were disengaged on the vehicle after the vehicle was towed, and asserted that they would have noted if anyone had changed the child lock settings. (V20-2080, 2086; V22-2202; V26- 2688; V38-1499; V39-1743). Victim Brunson did not initially tell police that Decedent Davis had tried to exit the Durango during the argument because, in his view, "They didn't ask." (V19-1742). Respectfully, it is hard to believe Victim Brunson as the sole bit of eyewitness testimony rebutting Appellant's claim that Decedent Davis **succeeded** in getting the car door open. That the barest bit of substantial evidence is in the record that Decedent Davis **failed** to open the car door, however, does not change the fact that everyone—Victim Brunson most of all—agrees that Decedent Davis was **trying** to exit the vehicle in a rage, cursing at Appellant and that the evidence was unrebutted that Decedent Davis was threatening to kill him.

The State attempts to distinguish that case based on the argument that the State's eyewitnesses disputed Appellant's account of the encounter in that Appellant claimed to have seen a firearm, whereas Victim Brunson testified that the item held by Decedent Davis was actually a cellular telephone[2]. The State takes the view that if Appellant was mistaken about the nature of the object in Decedent Davis's hand, his testimony was "rebutted" and judgment of acquittal was prohibited. This is incorrect. Again, as stated in the Initial Brief, in self-defense cases, the

> [danger] [emergency] facing the defendant **need not have been actual**; however, to justify the commission of the (crime charged) (lesser included offenses), **the appearance of the [danger]** [emergency] must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the [danger] [emergency] could be avoided only by committing the (crime charged) (lesser included offenses). **Based upon appearances, the defendant must have actually believed that the [danger] [emergency] was real**.

In re: Std. Jury Instructions in Crim. Cases—Report No. 2013-07, 143 So.3d 893, 896 (Fla. 2014)(emphasis supplied). The unrebutted testimony that Decedent Davis was holding something that Appellant took to be a firearm coupled with the unrebutted testimony that Decedent Davis was threatening to kill Appellant and trying to get out of the vehicle satisfies this test, and

[2] Again, we have only Victim Brunson's word that the item being brandished was the cell phone, not the knife in Decedent Davis's pocket.

the State failed to offer any evidence to disprove it. Again,

> where the evidence "'leaves room for two or more inferences of fact, at least one of which is consistent with the defendant's hypothesis of innocence, [it] is not legally sufficient to make a case for the jury.'" Fowler, 921 So.2d at 712 (quoting Fowler v. State, 492 So.2d 1344, 1348 (Fla. 1st DCA 1986)).

Stieh v. State, 67 So.3d 275, 279 (Fla. 2d DCA 2011).

The sole substantive case cited by the State in support of its argument that the evidence was sufficient to rebut the *prima facie* claim of self-defense was Chaffin v. State, 121 So.3d 608 (Fla. 4th DCA 2013). That case is entirely distinguishable. In that case, Chaffin's father was angry at him, told him to move out of his home, and continued yelling at Chaffin from outside of the house while Chaffin went inside to pack his things. Chaffin, 121 So.3d at 610-11. The

> the evidence created a fact issue as to whether a reasonable person in Chaffin's shoes would have believed danger was imminent — during his videotaped confession Chaffin admitted that his father never stated he was going to shoot or kill him, and his father did not ever reach for his gun.

Chaffin, 121 So.3d at 612. Despite this, Chaffin claimed that he feared for his life, and he shot his father through the bedroom window while the father stood outside in the yard. Id. Chaffin's story of his father's rage did not comport with the physical evidence, and Chaffin buried his father's body in the yard in order to conceal it. Id. In the instant case, however, the tale

of Decedent Davis's rage was **not** rebutted; it was confirmed by his two friends in great detail. Second, unlike in Chaffin, there is an unrebutted claim of a death threat and a confirmed attempt by Decedent Davis to exit the vehicle. Third, Appellant did not destroy any evidence. Thus, Chaffin is not at all on point. Instead, this case is like Diaz in every material respect. Nothing in the State's case disproved that Decedent Davis was enraged by Appellant's polite request that Victim Thompson turn the music down and that, while in that rage, he held an item that Appellant reasonably took to be a firearm, that he threatened to kill Appellant, and that was at least attempting to exit the Durango. Under such circumstances, the State did not rebut Appellant's *prima facie* claim of self-defense. This Court should reverse.

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL FOR COUNTS TWO, THREE, AND FOUR BASED ON LACK OF INTENT

Appellant maintains that self-defense should bar convictions on Counts II-IV, as Appellant reasonably believed that he was defending himself against Decedent Davis, whom he thought to be armed with a firearm. That said, however, Appellant concedes that, assuming *arguendo* that self-defense does not apply, the evidence was sufficient to support convictions for attempted second degree murder. Shellman v. State, 620 So.2d 1010, 1012 (Fla. 4th DCA 1993)(finding evidence that appellant fired weapon "repeatedly" into vehicle, is sufficient for attempted second-degree murder conviction for the two passengers he did not intend to kill and who were in fact not killed). The charged offense—attempted first degree murder—would be reversed under the same authority, but the jury acquitted Appellant of attempted first degree murder on the counts in question, finding him guilty of the lesser included offense that does not require victim-specific intent. Appellant wonders whether a 90-year sentence for firing in the vicinity of bystanders is what the legislature contemplated when authorizing the crime of attempted second degree murder, but Appellant concedes that this issue must be abandoned.

III. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR THE INSTRUCTION ON PRESUMPTION OF FEAR

The trial court erred in denying Appellant's request for the standard instruction that Appellant was presumed to be in fear if Decedent Davis was in the process of forcefully entering Appellant's Jetta or in the process of attempting to remove Appellant from the Jetta. The parties appear to agree on the applicable law, and the State does not refute Appellant's argument that failure to give the jury instruction on presumption of fear would not be harmless in light of the partially hung jury and the partial acquittals. The question is whether the facts in the record justified the instruction.

After filing two very long briefs, the parties have both failed to find a case exactly like the one at bar where a criminal defendant requests an instruction that the victim was in the process of unlawfully and forcefully entering his vehicle or was attempting to remove another against that person's will from an occupied vehicle when that person, not in possession of a firearm, is exiting his own vehicle and threatening to kill the defendant, who is also in a vehicle. Thus, this is, perhaps, a case of first impression. Again, the instruction was required if Appellant's case suggested the possibility that Decedent Davis was attempting to enter the Jetta or remove Appellant from the Jetta.

> Pope v. State, 458 So.2d 327, 329 (Fla. 1st DCA 1984)("**The evidence need not be 'convincing to the trial court,' before the instruction can be submitted to the jury,...as it suffices that the defense is 'suggested' by the testimony.**"); Parrish v. State, 113 So.2d 860, 863 (Fla. 1st DCA 1959)(**no matter how improbable defendant's testimony was, if not demonstrably false, the trial court errs in refusing to give a self-defense instruction**).

Chavers v. State, 901 So.2d 409, 410-411 (Fla. 1st DCA 2005)(emphasis supplied). Taking as true that Decedent Davis either exited or was attempting to exit the Durango while stating his intention to kill Appellant, who was seated in his own car, the answer seems obvious that Decedent Davis was in the process of either entering Appellant's Jetta or removing Appellant from the Jetta. That is the only way that Decedent Davis, who had a knife but had no firearm, could have made good on his threat.

Admittedly, Decedent Davis was fired upon before he made it to Appellant's car door. He was in the earliest stage of attempting to enter the Jetta or remove Appellant from the Jetta. That does not defeat Appellant's claim, however. One is deemed to have attempted burglary if one makes any "overt act directed toward its commission," and that "overt act" need only need only manifest the specific criminal intent." Jones v. State, 608 So.2d 797, 798 (Fla. 1992). Likewise, the attempt statute states that one "attempts" a crime if a person "does any

act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof....” § 777.04, Fla. Stat. (2016). Also,

> **If there is the slightest evidence of an overt act by the victim which may reasonably be regarded as placing the defendant in imminent danger, all doubts as to the admission of self-defense evidence must be resolved in favor of the accused.**" 781 So.2d at 457; see also Nelson v. State, 739 So.2d 1177, 1178 (Fla. 4th DCA 1999).

Wilson v. State, 971 So.2d 963, 965 (Fla. 4th DCA 2008)(citation omitted; emphasis supplied). Appellant’s claim was that Decedent Davis actually began exiting the vehicle. It is unrebutted, however, that Decedent Davis was attempting to get out of the vehicle while in a rage and threatening to kill Appellant. The exiting or attempt to exit constitutes the overt act necessary to find that Decedent was in the process of either entering the Jetta or removing Appellant from it. **There would have been no other way for Decedent Davis to make good on his threat.** Because there is at least the “slightest evidence” that this is true, Counts II-V must be reversed and remanded for new trial.

IV. WHETHER THE TRIAL COURT ERRED IN ALLOWING DR. SIMONS TO TESTIFY IN MATTERS OF ACCIDENT RECONSTRUCTION

The trial court erred in allowing Dr. Simons, the medical examiner who performed the autopsy in this case, to testify as to whether Decedent Davis was inside or outside of the vehicle when he was shot, a matter of accident reconstruction that was far outside of her medical area of expertise.

Preservation

The State argues that objection to the accident reconstruction portion of Dr. Simons' testimony was not properly preserved. The State is incorrect as a matter of both law and fact. In regard to the law, the State relies on decades-old precedent that stated that a motion *in limine* that was denied prior to trial must be renewed during the trial in order to preserve the issue. (AB-35-36). This old rule was replaced in 2003 with § 90.104(1)(b), Fla. Stat. (2003), which provides that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." In re Amendments to the Fla. Evidence Code-Section 90.104, 914 So.2d 940 (Fla. 2005). That would be sufficient to preserve the claim, but the State is also wrong on its facts in arguing that the issue was not re-raised at trial. Appellant vigorously objected to the accident

reconstruction portion of Dr. Simons' testimony. (V9-1571-73). Her use of dowels was specifically discussed. (V9-1576-77; V40-1951). Her inexperience with dowels was a key part of the argument, and the judge specifically discussed admitting that portion of the testimony in the order denying the motion *in limine*. (V7-1303-08; V9-1582). All of these citations were supplied in the Initial Brief. The issue was exceedingly well-preserved.

Merits

The trial judge abused his discretion in allowing Dr. Simons to offer accident reconstruction testimony in addition to her admissible medical testimony. Her testimony about the location and position of Decedent Davis's body at the time of the shooting should have been excluded. Jones v. State, 748 So.2d 1012, 1025 (Fla. 1999) and Mattek v. White, 695 So.2d 942 (Fla. 4th DCA 1997) are determinative of this issue. The State essentially argues that it is enough that Dr. Simons saw people place dowels in the past and read a few book or articles so that she could testify in this specific case. Prior to this case, she never placed dowels in a vehicle. (V40-1977). She had observed others place dowels during her one-year fellowship in forensic pathology. (V40-1977). She was not certified in accident reconstruction. (V40-1979). She had no special certification in ballistics. (V40-1979). In conjunction with this case, she read

sections of three books regarding bullets passing through vehicles, bullets ricocheting, reaction times of persons seeing a gun pointed at them and attempting to dodge bullets, and the appearance of bullets after they have passed through windows. (V40-1980). At the end of her *voir dire*, the State noted, "I'm not tendering her as an expert in crime scene reconstruction." (V40-1981). It is impossible to describe such a person as an "expert" on accident reconstruction. The judge, however, allowed Dr. Simons to testify that Decedent Davis was sitting, that his car door was closed, and that he was on the seat when shot. Those are not medical questions, and the State, in its Answer Brief, appears to give up on the pretense that they were not accident reconstruction opinions. Dr. Simons was, after all, allowed to position a dummy on a table and pretend that it was Decedent Davis and the back seat of the Durango. For the reasons stated in the Initial Brief, this Court should reverse all counts and remand for new trial with instructions to exclude Dr. Simons' opinions on accident reconstruction.

Dr. Simons opined that Decedent Davis was "seated in the right rear passenger seat, and I believe that at the time the bullets hit his body, he was leaning over toward the left and in

motion." (V41-2066). It is incomprehensible that an autopsy physician was permitted to offer accident reconstruction and physics testimony. Dr. Simons's humility in adding that her opinions were meant "in a common-sense way—this was in no way meant to be a reconstruction" is fatal to the State's position. (V41-2059). Expert testimony as to "common sense" matters is prohibited, and Dr. Simons's "common sense" opinions were rebutted by the accident reconstruction expert, who opined "with 100 percent certainty that the car door was open to some extent and that it was improper to do accident reconstruction by looking at the wounds. (V42-2210-11, 2217-19).

The State does not appear to contend that the evidence, if wrongfully admitted, was harmless. Rather, it was the only expert evidence rebutting Appellant's accident reconstruction expert in his opinion that the door was open and that Decedent Davis was partially outside the vehicle, diving back in at the time of the shots, and it unfairly corroborated Victim Brunson's dubious claim that Decedent Davis was prevented from opening the door by the child locks, something disputed by all other State witnesses. Count I should be reversed and remanded for new trial.

V. WHETHER THE TRIAL COURT ERRED IN EXCLUDING EXPERT ON ACUTE STRESS

The lower court erred in excluding all testimony from Appellant's acute stress expert, Dr. Abuso, in the first trial. The State, in its Answer Brief, persists in the argument that the "trial court properly excluded Dr. Abuso's testimony because his opinion about why Appellant felt the need to flee the scene did not establish the fact in issue of whether Appellant acted in self-defense." (AB-41). This was despite the fact that the State opposed Appellant's motion *in limine* to exclude the sequence of events after Appellant left the gas station on the ground of relevance. (V25-2758-59). The judge denied that motion *in limine*, permitting the testimony. It is well settled that when "a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." Bogart v. State, 114 So.3d 316, 318 (Fla. 4th DCA 2013)(citing Straight v. State, 397 So.2d 903, 908 (Fla. 1981). What is good for the goose is good for the gander. If the evidence, portrayed as consciousness of guilt, was relevant to guilt, then evidence rebutting that theory was also relevant.

Appellant testified that he knew he should have called law enforcement on the night of the shooting, adding:

> It sounds crazy and I couldn't tell you what I was thinking when all of this happened. I could just tell you that I didn't do it, and if you told me that if this happened to you you wouldn't call the police I wouldn't believe you, but that's what happened.

(V26-2987). The State cross-examined Appellant extensively about his failure to contact law enforcement in the hours after the shooting. (V26-2987-3006). Appellant explained that he was not in a rational state of mind. (V27-3025). The exclusion of Dr. Abuso's testimony deprived Appellant of a scientific explanation to the jury for his irrational choice to leave the scene, spend the night at a hotel, and drive home before turning himself in, leaving him only with the statement that his decision to leave "sounds crazy." During closing argument, the State told the jury that Appellant fled the scene, and that conduct "shows what his intent was at the time" of the shooting. (V28-3311). The State argued that Appellant left the scene "because he knew what he had done was wrong." (V28-3311-12). The State argued that returning to the hotel and consuming food and drink was not the action "of somebody who shot in self-defense." (V28-3312). Thus, it is hard to understand how the State persists in claiming that the evidence explaining this conduct was not relevant to any

material fact. The State appears to admit that Dr. Abuso's 30 years of practice in his field qualified him as an expert in acute stress reactions. (V26-2796). Dr. Abuso offered a scientific explanation for Appellant's "crazy" decision to leave the scene that would have rebutted the State's argument regarding consciousness of guilt. Thus, it was error to exclude the witness.

The State's citation to Harrison v. State, 33 So.3d 727 (Fla. 1st DCA 2010) is welcomed, as the decision involved reversing for exclusion of a witness. As the case is not similar to the instant case in any way, however, application of the case to the instant facts is limited. To the extent that Harrison stands for the proposition that expert witnesses with relevant testimony must be allowed to testify, the case supports reversal.

The State put forth two other arguments that it was proper to exclude Dr. Abuso's testimony, arguing that his testimony would simply have "bolstered Appellant's credibility because it provided that his actions were in conjunction with his version of events" and, also, that Dr. Abuso's testimony did not constitute "expert" testimony because it was not outside of the common understanding of the jury. Both arguments lack merit. First, Dr. Abuso would not have served merely to bolster

Appellant's testimony. Dr. Abuso was going to testify that Appellant was suffering from an acute stress reaction after the shooting, and he would have explained the science behind that conclusion. (V26-2787-89, 2799, 2801). He had no intention of testifying as to whether Appellant's feeling of being threatened was justified or not, and he was not going to testify as to whether Appellant had the right to use self-defense in this case. (V26-2782, 2799). Second, it is hard to see how acute stress response science is not outside of the common understanding of the jury. Dr. Abuso offered specific scientific evidence concerning

> an adrenaline dump that last[s] about 10 to 15 seconds. Following that the lactic acid is converted to lactose which is sugar. That lasts another 45 seconds or so, so that's the initial–the initial defensive response. The aftermath of that normally lasts about 72 hours. During that time a person cannot be expected to act in a balanced and rational way in all things.

(V26-2787). He reiterated that "acute stress response to a traumatic threat...begins with the 10 or 15 seconds immediately when the person feels threatened, culminates after about 72 hours when the cortisone levels bring the body pretty much back to baseline. (V26-2796). Dr. Abuso testified that what Appellant "did was very consistent with 50 years of research on acute stress response. (V26-2801). That is expert testimony. No lay

witness could be allowed to offer such scientific evidence, and such evidence did not merely bolster Appellant's testimony. In fact, without Dr. Abuso to explain the science behind his acute stress response, Appellant could only tell the jury that his decision to leave the scene sounded crazy even to him and that he did not understand why he had done that.

The State also argues that the exclusion was not relevant to Appellant's decision to leave the gas station because Dr. Abuso only testified that Appellant followed Fiancée Rouer's requests, and those requests were only made once they were in the hotel. (AB-43-44). First, even if that were factually true, the testimony would have been relevant to explain why Appellant drove home the following morning. Second, however, Dr. Abuso never testified that Appellant's acute stress reaction was only in response to Fiancée Rouer's requests. Rather, as the State noted, Appellant testified that he initially fled because he feared that the Durango might return, and he continued to hide out in the hotel, peering out the windows, worried that the occupants of the Durango would find him and seek revenge. As Dr. Abuso testified in his proffer:

> During [the 72 hours after an acute stress event,] a person cannot be expected to act in a balanced and rational way in all things. That is why officers after a shooting are taken off road detail[. S]o in terms of why did he make irrational decisions, yes,

he did.

(V26-2787). Dr. Abuso testified that Appellant's decision to leave the scene "was very consistent with 50 years of research on acute stress response. (V26-2801). The State built much of its case on Appellant's decision to leave the scene, order a pizza, and stay the night in a hotel. Dr. Abuso put forth the only scientific basis for this irrational decision. For this reason, the exclusion cannot be deemed harmless.

VI. WHETHER THE TRIAL COURT ERRED IN REMOVING JUROR 4

During the second trial, the trial court erred in removing Juror 4 from the jury and substituting an alternate. In the Initial Brief, Appellant examined the three-prong De La Rosa test for proving juror misconduct that involves bias, a concealment of that bias, and a showing that the State asked questions that would have shown the bias absent a juror's concealment. Appellant's answer to the argument at IB-150-160 is that Juror 4's removal was justified because Juror 4 made the comment about Attorney Corey despite the fact that he "swore he could be fair and impartial prior to being empaneled as a juror. (V.39, 1606)." The State apparently refers to V10-39 and V39-1606. With respect, V10-39 is a reference to the wrong trial that clarifies only that jurors signed a questionnaire. V39-1606 is a citation to Juror 4's admission that he had sworn to be a fair and impartial juror during *voir dire*. All jurors were asked by the judge if they could be fair and impartial generally. (V10-111). As explained fully in the Initial Brief, however, a juror's negative reaction to a prosecutor's comment during *voir dire* is not evidence of "bias," especially in light of Juror 4's answers to questions showing his lack of bias. He had even voted for Attorney Corey in the past. (V39-1649). Regardless, however, even assuming that the comment could be considered "bias," the

State's citations utterly fail to show that Juror 4 concealed the information during questioning or that failure to disclose the information was not attributable to the State's lack of diligence in asking about juror's reactions to their performance during *voir dire*. The State fails to cite a single question to the juror about his feelings toward the State's attorneys. The State's citation to the vague promise to be fair and impartial falls far short of satisfying the De La Rosa test. The judge violated the De La Rosa test.

The error is especially troubling in light of the fact that the judge *sua sponte* brought up case law that, in his erroneous view, justified removal of the juror. It is also troubling in light of the fact that the judge lay down a blanket rule that he would allow jurors to serve even if they had formed strong opinions about Appellant's guilt from watching the news of the first trial as long as they promised that they could be impartial. (V31-130-31, 134-35-37; V39-1778-79). Yet, somehow Juror 4's promise that he could be fair and impartial was not enough. This Court should find that the judge erred.

The State's argues that any error would be harmless. In the Initial Brief, however, Appellant cited this Court's decision in Washington v. State, 955 So.2d 1165 (Fla. 1st DCA 1997) for that proposition that improper removal of a juror for misconduct is a

structural error that **cannot** be harmless. (AB-159-60). The State responds that the error can and should be found harmless, citing Orosz v. State, 389 So.2d 1199 (Fla. 1st DCA 1980) for the proposition that "this Court found it was harmless error to remove a juror who was sleeping through trial." (AB-52). Washington cites and distinguishes Orosz, however. In Washington, this Court wrote:

> In some instances an error in removing a juror can be treated as harmless, if the juror is replaced by a duly selected alternate. For example, this court concluded in Orosz v. State, 389 So.2d 1199 (Fla. 1st DCA 1980), that any error in removing a sleeping juror was harmless, because the juror was replaced with an alternate selected during voir dire. However, this reasoning cannot be applied here. It would make little sense to conclude that it is error to reconfigure the jury panel based on nothing more than the perceived impressions a juror holds about the case, but that the error does no harm because the parties had previously selected the alternate juror. In this situation, the reconfiguration of the jury panel is the very error that must be corrected.

Washington v. State, 955 So.2d at 1172-1173. First, if this Court were to decide this issue based on whether the facts are more similar to Washington or Orosz, this Court would have to conclude that the judge's incorrect finding of juror misconduct based on the perceived notions about Attorney Corey is more similar to the "perceived impressions a juror" held in Washington. Juror 4 was not asleep, after all. Beyond that, however, Washington was far too generous to Orosz. The better

view is that the portion of Orosz discussing harmless error was mere dicta that was superseded by the holding in Washington. That is because Orosz did not resolve the case on the question of harmless error. Instead, the Orosz court found that the sleeping juror was **properly** dismissed and that there was **no objection** to the removal. Orosz, 389 So.2d at 1200. Thus, there was no "error" for a proper harmless error holding. The comment was a textbook example of *obiter dictum*. Both the Second and Fourth districts recognize that this Court follows the Washington rule that erroneous removal of a juror midway through trial is structural error that cannot be deemed harmless even if the juror is replaced by an alternate. See Nicholas v. State, 47 So.3d 297, 320 (Fla. 2d DCA 2010) and McNeil v. State, 158 So.3d 626, 628 (Fla. 5th DCA 2014). Orosz has never been relied upon by this Court to conclude that an error in removing a juror was harmless. The structural error portion of Washington was part of the holding. Absent a decision to recede from Washington *en banc*, this Court must find that any error in removing Juror 4 was structural and cannot be harmless. This Court should reverse.

VII. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE

The trial court erred in denying Appellant's motion to change the venue of the second trial. As with Issue VI, we are faced with disagreement on the meaning of the phrase "fair and impartial." The judge in the second trial found that jurors could be considered "fair and impartial" even if they had previously formed strong opinions about Appellant's guilt based on media coverage. (V31-130-31, 134-35-37). The judge then found that a juror could not be "fair and impartial" because he was offended by State Attorney Corey's lack of professionalism during *voir dire* even though the juror promised that he could be "fair and impartial." Now this Court must decide if Appellant was afforded his right to a "fair and impartial" jury under the Florida Constitution and § 910.03(3), Fla. Stat. (2012) after the slew of media attention and courthouse protests poisoned Duval County's jury pool by the time of the second trial.

The State admits that there was extensive publicity regarding the case, but argues that Appellant failed to demonstrate any difficulty in selecting a jury. (AB-53-56). In the Initial Brief, at IB-161-69, Appellant explained the facts behind the motion to change venue and the standard involved, showing that the inhabitants of Duval County generally **and the jurors specifically** were so infected by knowledge of the case and

accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. Prospective Juror 32, who was eventually selected as a juror, promised that he could be fair and impartial, but he had used the first trial as an example in a class discussion, he had watched the first trial on national television, and his opinion of guilt was a proverbial "six out of 10." (V32-207-15). Prospective Juror 52, who was eventually selected for the jury, knew about the prior case, knew that Appellant had been found guilty on certain charges, thought that the jury was unable to agree on sentencing, and received local news updates and watched television news about the trial. (V4-244). Prospective Jurors 52, 58, and 71—all of whom were selected for the jury—had all watched the first trial in the news. (V4-244, 255, 301-05). Only 11 of 140 prospective jurors had not heard of the case. (V35-891-92). Prospective Jurors discussed the first trial and their exposure to media reports at length. (V31-50, 57-58, 93, 127-28, 140, 142-49, 151, 164-70, 174-79, 185-86, 188, 197-200; V32-204-05, 215-18, 221-40, 246, 248-49, 257, 295, 297-99, 306-18, 321-327, 331, 333-37, 340-59, 361-67; V33-426-30, 432-54, 460-72; V34-660-69). Protests were held within earshot of the prospective jurors during *voir dire*. (V31-13; V32-650-52). Most

telling, however, was that the trial judge himself announced that he would allow jurors who had strong opinions about the case to serve if they promised to set those opinions aside because "**regardless of what they say, 90 percent of these**" jurors would hold an opinion about the case, and a *voir dire* excluding such jurors would be "pointless." (V31-130-35)(emphasis supplied). In light of these facts and the additional facts about the media saturation in the Initial Brief, this Court cannot possibly hold that the trial court did not deny Appellant a right to a "fair and impartial" jury. If a change of venue was not required this case, then when would it ever be required? Count I—the subject of the second trial—should be reversed and remanded with instructions to grant a motion for a change of venue.

VIII. WHETHER THE TRIAL COURT FUNDAMENTALLY ERRED WHEN THE STATE URGED THE JURY TO SEND A MESSAGE TO THE COMMUNITY WITH ITS VERDICT

Fundamental error occurred when the prosecution urged the jury, in the first trial, to send a message to the community by delivering a verdict of guilt. The parties appear to agree on the legal standard. Most cases raising this issue revolve around the particular wording of the prosecutor's comment to the jury, with the State attempting to distinguish the prosecutor's words from prior cases involving reversals and defendants attempting to point out the similarities. The standard is that the prosecutor may not use any combination of words to exhort a jury to send a message to the community by delivering a guilty verdict. The words here were: "Your verdict in this case will not bring Jordan Davis back to life. Your verdicts won't change the past but they will forever define it in our town." (V29-3426). The State asks that this Court take those words to mean that the "verdict will define whether the town looks back on this case and says that Appellant was guilty, or not guilty." (AB-59). This Court should reject that argument.

The words were an obvious plea to the jury to show Jacksonville's idea of justice to the world, particularly in the context of recent Florida verdicts—cases like the Marissa

Alexander[3] case and the George Zimmerman[4] case—that were seen by many as prime examples of unfair treatment of African-American defendants and victims by Florida's (or even America's) court system. The prosecutor sought to make the jury treat Michael Dunn and Jordan Davis just as media accounts would have us treat them: as symbols of greater issues involving racial injustice, white privilege, or pro and anti-gun sentiments. The jury was exhorted to do what it was forbidden to do: to treat the two people involved in the case as symbols instead of individuals, and to remain conscious that the verdict in the case would be accorded a broader meaning by many outside the courtroom. The immense pressure on the jurors is hard to imagine, and the prosecutor's closing argument amounted to a solid reminder that the world outside was waiting to hear their verdict and that the verdict would forever be yet another symbol: a symbol of Jacksonville justice. This undoubtedly crossed the line that forbids prosecutors from asking jurors to send a message with their verdict. This Court should reverse all but Count I under this issue.

[3] https://en.wikipedia.org/wiki/Marissa_Alexander_case
[4] https://en.wikipedia.org/wiki/George_Zimmerman

IX. WHETHER THE TRIAL COURT ERRED IN ANSWERING JURY QUESTION

The trial court erred in incorrectly answering a jury question regarding self-defense that vitiated Appellant's first trial. The State seems to agree, at AB-63-64, that if Appellant's claim of self-defense against Decedent Davis was valid as to all of the shots fired (including the shots as the Durango drove away), that claim of self-defense would apply to counts II, III, IV, and V even though Appellant was defending against Decedent Davis, not the victims named in those counts. That is all Appellant is arguing. The instruction given—and the answer to the question read by the judge—instructed the jury in the completely opposite fashion, however. The only reasonable reading of the judge's comment is that Appellant had to be defending himself from the threat of seriously bodily injury or death from Victims Stornes, Brunson, and Thompson in order to be acquitted on a self-defense theory on those counts. The State argues that this answer to the jury's question did not rob Appellant of his only defense because there was no valid self-defense argument to begin with. (AB-64). Respectfully, that should have been a matter for the jury to determine. Self-defense **was** Appellant's sole defense to those counts, and the jury could have found that, though the danger of Decedent Davis was not "actual," it was reasonable for Appellant to believe

that Decedent Davis was armed and, if uninjured, he would be firing back at Appellant at any moment. Telling the jury that Appellant had to be defending himself against the three innocent bystanders, however, gutted the defense because those three had done absolutely nothing to threaten Appellant, and Appellant was not trying to shoot them. The only way Appellant had a valid defense was if shooting in self-defense against Decedent Davis constituted valid self-defense under Counts II, III, IV, and V. The parties seem to agree that that is a correct statement of law, but the trial judge told the jury the exact opposite. This Court should reverse Counts II-V and remand for new trial.

CONCLUSION

Based on the foregoing discussions, Appellant respectfully requests this Honorable Court reverse the convictions and sentences for the reasons supplied under each issue statement.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

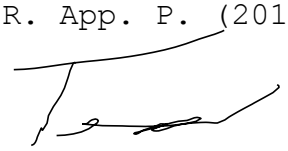
I certify that a copy hereof has been furnished to Matthew Pavese, Esq., Office of the Attorney General (Criminal Appeals), State of Florida, by email at criminalappealsintake@myfloridalegal.com on March 14, 2016.

Respectfully submitted and served,

TERRY P. ROBERTS
LAW OFFICE OF TERRY P. ROBERTS
SPECIAL ASSISTANT PUBLIC DEFENDER
FBN: 0526479
P.O. BOX 12366
TALLAHASSEE, FL 32308
Ph: 850-590-8168
www.fairdayincourt.com
fairdayincourt@aol.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210, Fla. R. App. P. (2016).



Terry P. Roberts, Esq.
Attorney for Appellant