IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

SKYLAR FRANCIS,

Appellant,

v. CASE NO. 5D18-3587

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ISSUE II: The trial court did not err in failing to sua sponte continue the sentencing hearing where counsel never asked for more time but instead presented argument and documentation in support of a downward departure sentence. The court found such a sentence inappropriate under the circumstances whether the reasons for departure were established or not. Further, any such sentence would have been illegal.

ISSUE III: This is not one of those "rare cases" demonstrating ineffective assistance of counsel on the face of the record. The Defendant's allegations should be addressed in a postconviction proceeding, where an evidentiary hearing can be held to consider the merits of his claims and to allow counsel to explain his strategy.

ISSUE IV: The trial court acted within its discretion in refusing to give a special jury instruction that would have only

confused the jury, as the instruction involved a legal issue resolved by the trial court in a pretrial motion to dismiss. Further, the self defense instruction was not fundamentally erroneous, where the mistake in this instruction involved an uncontested, extraneous matter that did not deny the Defendant a fair trial.

ISSUE V: The Defendant's claim that the trial court abandoned its neutral role was not specifically or timely raised below and accordingly not preserved for appeal. Viewed in context, the trial court's comments were not so prejudicial as to require a new trial.

ISSUE VI: The Defendant's claim of cumulative error has no merit, where there is no merit to his individual claims of error. The Defendant received a fair trial.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO CONTINUE.

As his first point on appeal, the Defendant contends that the trial court erred in denying his request for a continuance. The decision as to whether to grant a continuance rests within the discretion of the trial court, and the lower court's ruling must be sustained "unless no reasonable person would take the view adopted by the trial court." Scott v. State, 717 So. 2d 908, 911 (Fla.), cert. denied, 525 U.S. 972 (1998). Here, the record reflects that the trial court acted well within its discretion in denying the Defendant's request.

This Court has held that a denial of a motion to continue will be affirmed absent a palpable abuse of discretion to the disadvantage of the accused. Trocola v. State, 867 So. 2d 1229, 1230-31 (Fla. 5th DCA 2004). Relevant considerations include the time available for preparation, the likelihood of prejudice, the defendant's role in shortening preparation time, the complexity of the case, the availability of discovery, the adequacy of counsel actually provided, and the skill and experience of chosen counsel and counsel's experience with the defendant or the alleged crime. Id. at 1231.

Here, the record reflects that on September 26, 2018, defense counsel requested a "final" continuance. Because a "final"

continuance had already been granted, the case was very old (973 days), and the legal issues had already been litigated, including a stand-your-ground hearing and a motion to suppress hearing, the court denied this request and found that the case was ripe for trial. (R. 872-73, 878, 882).

Defense counsel explained that he was asking for a continuance because the Defendant was feeling the pressure of the upcoming trial, and counsel needed to explore the fact that there was probably a conflict between the Defendant and counsel at that point. (R. 877). The court explained that the Defendant was not entitled to counsel of his choice, and counsel had demonstrated his ability to thread the needle of a difficult client on previous occasions and would need to do so again here. (R. 877-78).

Recognizing that the Defendant was a problem client, the court noted that the sooner the case got resolved the better; counsel agreed and noted that he did not mind going forward – the conflict was not on his end. (R. 879-80). However, defense counsel wanted the court to know that the Defendant was probably going to voice his opinions about his performance. (R. 880). Trial was set for the trial docket beginning October 15. (R. 882).

On October 4, 2018, new defense counsel, a private attorney, asked for another continuance, stating that he came into the case about two weeks earlier, on September 26 – the day the case was set for trial on October 15. (R. 889-90). Counsel acknowledged that

the case was 981 days old and claimed he would like to try it as soon as possible, but wanted to be prepared. (R. 890).

The State objected, noting that every time the Defendant got close to trial he ended up with a new attorney; this had happened three times already, before the current new attorney – the Defendant had a public defender, then a private attorney, then a public defender again, and now another new private attorney, all coming in once the case was set for trial. (R. 891). The State represented that it was ready to proceed on the third week of the trial docket, October 29. (R. 891-92).

The court stated that this date gave the defense some extra time to prepare, noting that counsel had surely been aware that this 2016 case was scheduled for a date certain trial, so he knew what he was in for when he took the case. (R. 892-93). Counsel had been an attorney since 1977, and the case was not complicated. (R. 915-16). Counsel himself stated that the case was "winnable from the get-go" and that if he had been hired earlier he would have demanded a speedy trial immediately. (R. 916, 925).

The court explained the scheduling process and assured counsel that he did not have to be there on October 15, but instead trial would take place on October 29. (R. 894-99). Counsel asked if the court needed to sign an order granting a continuance, but the court responded that it was not a continuance, just a delay from which week of the three week trial period would be used. (R. 896).

Based on this record, the trial court acted well within its discretion in denying the motion to continue. The court considered the arguments made in support of yet another continuance of this nearly three year old case and rejected those arguments. In doing so, the court did consider the factors discussed above, noting the time that had been spent already litigating the relevant issues, the time still remaining for any needed preparation, the resulting absence of any prejudice to the defense, the experience of both attorneys who had requested last minute delays, the nature of the case, and the Defendant's role in creating the short turnaround time for these particular attorneys – including his complaints about the public defender and his history of replacing attorneys whenever the case was set for trial.

While the Defendant faults the court for improperly considering "client control" in making its decision, the role of the defendant in creating a situation where an attorney has a shortened time to prepare (by, for example, repeatedly securing new counsel on the eve of trial) is expressly recognized as an appropriate factor to be considered. Trocola, 867 So. 2d at 1231. This only makes sense, as failing to consider the defendant's own actions makes the court vulnerable to manipulation. Here, given the heightened anxiety the Defendant experienced as trial approached, this problem was likely to continue indefinitely.

The cases relied on by the Defendant are distinguishable. Specifically, the newly hired attorney in the instant case was

replacing an attorney fired by the Defendant; he had a full month to prepare for trial; and he never indicated any specific items he still needed to investigate. This situation was quite different from that in Boffo v. State, 272 So. 3d 876, 278-79 (Fla. 5th DCA 2019), where the new attorney was required to proceed to a community control hearing having only just met the defendant, and where the attorney received the case because the original attorney could not attend due to military service.

This case is also different from Madison v. State, 132 So. 3d 237, 243 (Fla. 1st DCA 2013), where the defendant had multiple lead attorneys but they had done little preparation and there was no indication that the defendant was not acting in good faith in replacing existing counsel, as he was genuinely concerned about counsel's shortcomings.

Here, in contrast, the succession of attorneys seemed to be the very manipulation condemned by the court in Madison, where the court expressly stated that "an accused may not manipulate the system and obstruct the progress towards trial by repeatedly seeking continuances to replace counsel" but found that was not the case there. Id.

Further, the Madison court also recognized that if, indeed, the case had been over three years old, "we would have greater concern for the timely administration of justice." Id. Here, everyone agreed that the case was nearly three years old when it finally went to trial. As the trial court noted, this case had

been pending long enough, and it was time for it to be resolved, for both the victims involved and for the Defendant himself. (R. 924).

Discretion is abused only when no reasonable person would agree with the trial court's decision, or when the court's decision is arbitrary, fanciful, or unreasonable. See, e.g., LaValley v. State, 30 So. 3d 513, 515 (Fla. 5th DCA 2009), rev. denied, 36 So. 3d 84 (Fla. 2010); Triplett v. State, 947 So. 2d 702, 704 (Fla. 5th DCA 2007). Given this record, the Defendant cannot meet this standard, and he has failed to show an abuse of discretion. His first point on appeal should be rejected by this Court.

ISSUE II

THE TRIAL COURT DID NOT ERR IN FAILING TO SUA SPONTE ASK FOR FURTHER MENTAL HEALTH EVALUATIONS OF THE DEFENDANT BEFORE SENTENCING HIM.

The Defendant next contends that the trial court erred in failing to continue the sentencing to obtain more information regarding the Defendant's mental health. This claim was never raised below and has no merit.

The record reflects that the defense had 11 witnesses available at the sentencing hearing. (R. 954). Five of them actually testified, telling the judge that the Defendant was a kind, loving, helpful, smart person who had never been violent before and who did not deserve a lengthy jail sentence. (R. 955-966). He also presented several letters. (R. 977-78). The Defendant spoke on his own behalf, explaining his regret for this situation and his plans for the future. (R. 979-83).

Defense counsel argued that the Defendant should receive a downward departure sentence because he was young and had some mental issues, as reflected in the PSI, and because this was an isolated incident where he acted impulsively and immaturely, and there was no indication he would be violent again. (R. 971-74). Counsel argued that the court should follow the recommendation of the PSI that the Defendant be evaluated and get counseling and spend his time in a mental health facility, as explained in the

attachment to his motion for downward departure. (R. 984-85, 331-34, 371).[1]

Counsel further argued that the Defendant was only 22 years old, and he acted impulsively when the officers broke in, driven by his misguided mental state. (R. 985).

The prosecutor pointed out that the medical records and attachments were not entered into evidence at the hearing. (R. 987). She also noted that there was a mandatory minimum sentence of five years for the aggravated battery on a law enforcement officer, which required a sentence above the lowest guidelines sentence of 51 months; accordingly, the trial court was precluded from entering a downward departure sentence even if there were grounds to do so, as the mandatory sentence was higher than his scoresheet. (R. 991-92). The State requested a sentence of 15 years. (R. 993).

After considering this information and argument, the trial court concluded that *regardless of whether there was evidence to support a downward departure sentence*, the court did not find such a sentence to be appropriate in any way, given the circumstances of these crimes. (R. 996-1000).

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[1]The attachment appears to be redacted in the record on appeal, but the trial court had access to it. (R. 342-63, 372-92, 984-85). Dr. Ming's report is included elsewhere in the record on appeal; he concluded that the Defendant had no major mental illness that he could discern. (R. 179-82).

The Defendant received a sentence of 15 years imprisonment followed by 15 years probation. (R. 1001). As a special condition of probation, the trial court required the Defendant to have a mental health evaluation and follow any recommended treatment; the court justified this condition by noting that the Defendant's mental health "has been raised over and over, and the behavior does raise the question in and of itself to a small degree." (R. 1001-02).

Notably, at no point did the defense request a continuance of the sentencing, which took place on December 17, over six weeks after trial, nor did the defense request additional pre-sentence evaluation (R. 973, 984-85). The Defendant's mental health issues had been discussed throughout the case, from the competency examination (R. 163-64, 167-68) to the attachments in support of the downward departure sentence (R. 984-85). The Defendant testified at trial and spoke to the court at sentencing, evidencing no readily apparent mental illness that supported a downward departure.

In any event, the trial court was legally precluded from entering a downward departure sentence, where the mandatory minimum sentence was greater than the guidelines score. See State v. Kremer, 114 So. 3d 420, 421 (Fla. 5th DCA 2013) (reversing downward departure sentence because mandatory minimum sentencing enhancements are nondiscretionary and trial courts cannot refuse to apply them).

Under these circumstances, the trial court was not required to sua sponte continue the sentencing and force the defense to further investigate the Defendant's mental health, where the defense never sought such a continuance and it would have been pointless anyway. The Defendant's second point on appeal should be rejected.

ISSUE III

THE DEFENDANT HAS NOT SHOWN THAT THIS IS ONE OF THE RARE CASES DEMONSTRATING THAT COUNSEL WAS INEFFECTIVE ON THE FACE OF THE RECORD.

The Defendant next contends that trial counsel was ineffective on the face of the record, raising various alleged failures in jury instructions, sentencing arguments, and even his treatment of the judge. An appellate court cannot grant relief on a claim of ineffective assistance of counsel on direct appeal unless the record "clearly demonstrates" such ineffectiveness. Colon v. State, 907 So. 2d 1267, 1269 (Fla. 5th DCA 2005). With rare exception, the proper method of raising such an issue is by way of a motion for postconviction relief in the trial court; this procedure allows full factual development of the issues through an evidentiary hearing, if necessary. McMullen v. State, 876 So. 2d 589, 590 (Fla. 5th DCA 2004). This is not one of those rare exceptions.

The record in this case shows that any attorney, no matter how skilled or persuasive, faced an uphill battle to secure a favorable jury verdict or a favorable sentence. As discussed in the Initial Brief (p. 7-11), the witnesses in this case were experienced law enforcement officers who responded to a 911 call, only to be attacked by the Defendant when they entered the back yard after explaining why they were there. The Defendant repeatedly hit one of the officers on the head with a metal baton, and he struck the

other officer with the baton as well, requiring both officers to be treated at the hospital. The Defendant testified that he was acting in self defense and did not intend to harm the officers, but merely reacted to the perceived attack.

The record shows, then, that the case boiled down to a credibility determination between the officers and the Defendant, whose story was questionable at best. The trial court certainly did not believe him, as reflected by its comments at sentencing (R. 996-1000), and the court was not going to issue a downward departure sentence in the face of the facts established at trial, nor could it do so, given the mandatory sentence required by his conviction. (See Issue II).

The multiple alleged failings by defense counsel are impossible to evaluate on this record, with no knowledge of counsel's strategical thinking, the reasoning behind his choices, the potential input from his client, or the expressions or tone used by counsel and the trial judge during these proceedings. For example, counsel is alleged to have been ineffective for failing to request a jury instruction on the use of non-deadly force. Perhaps counsel was so uninformed that he did not consider requesting such an instruction. Or perhaps he believed that asking the jury to find that hitting a person repeatedly in the head with a metal baton was "non-deadly force" would harm his credibility with the jury -- especially since the Defendant's story, if believed, would justify the use of deadly force.

The wide-ranging claims asserted on appeal are much better evaluated in the appropriate forum for addressing such fact-specific issues – in a motion for postconviction relief detailing the alleged deficiencies and allowing for a full evidentiary hearing. This is the procedure that should be followed here.

Judge Winokur of the First District Court of Appeal has discussed at length the ever-growing claims of ineffective assistance of counsel that are now being routinely raised on direct appeal. See Latson v. State, 193 So. 3d 1070, 1071–75 (Fla. 1st DCA 2016) (Winokur, J., concurring). As this opinion points out, such claims directly conflict with the Florida statute governing appeals in criminal cases, which expressly provides for review of preserved or fundamental error, but makes no provision for review of claims of ineffective assistance of counsel. Id. at 1072 (discussing section 924.051(3), Florida Statutes).

This statute only makes sense, as there is already a separate postconviction procedure available to litigate ineffective assistance claims in a venue actually designed to evaluate the fact-specific nature of these claims. Further, as Judge Winokur pointed out, a trial attorney who is accused of acting so unprofessionally that they are not even functioning as the counsel guaranteed by the Six Amendment "ought to be afforded an opportunity to explain their actions, which cannot happen in an appellate proceeding." Id. at 1073.

Additionally, requiring the use of this separate avenue for relief on such claims better applies "the most basic principles relating to review of criminal convictions: direct appeals are intended to address errors of the trial court, whereas collateral proceedings are intended to address deficiencies attributable to other parties in the criminal justice process, such as defense counsel, prosecutors, or police. Claims that could have been raised on direct appeal generally may not be raised in a postconviction motion, and as stated above, collateral claims generally may not be raised on direct appeal." Id. (footnotes and citation omitted).

Given all these considerations, then, as well as the nature of the claims of ineffectiveness raised here, the State submits that this argument should be rejected, of course without prejudice to the Defendant raising these issues in a properly filed 3.850 motion.

ISSUE IV

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN INSTRUCTING THE JURY, AND NO FUNDAMENTAL ERROR OCCURRED.

A trial court has wide discretion in instructing the jury, and its decisions regarding this matter are reviewed with a presumption of correctness on appeal. Buchanan v. State, 927 So. 2d 209, 212 (Fla. 5th DCA 2006). Here, the Defendant first argues that the court erred in failing to give his requested special instruction explaining the details of the emergency exception, which allows the police to enter private premises. (R. 298). The trial court acted within its discretion in declining to give this instruction.

As this Court has explained:

> A trial judge is not constrained to give only those instructions contained in the Florida Standard Jury Instructions. While it is preferable that a standard jury instruction is given if it adequately explains the law, ... and giving a non-standard instruction that misleads the jury is reversible error, ... the trial court's decision to give a particular instruction will not be reversed unless the error complained of resulted in a miscarriage of justice, or where the instruction or failure to give a requested instruction was reasonably calculated to confuse or mislead the jury. Thus, absent prejudicial error, the trial court's decision will not be disturbed on appeal.

Chesnoff v. State, 840 So. 2d 423, 425-426 (Fla. 5th DCA 2003) (citations and quotations omitted).

Here, as the trial court explained, the special instruction had nothing to do with the issues the jury was required to resolve, but instead dealt with the legal Fourth Amendment issue that was resolved through a pretrial hearing on the Defendant's motion to

dismiss. (T. 1156-59). The jury was not tasked with discerning the nuances of the emergency exception, a legal issue properly determined by the trial court, and any instruction on this issue would have only served to confuse the jury.

The State did, of course, have to prove that the officers were acting in the lawful performance of their legal duties, and the jury was so instructed. (T. 1360-61, 1363). The record reflects that the parties disagreed on this matter, but they disagreed on the facts regarding the officers' intrusion on the property, not on the law regarding their actions. Specifically, the State contended that the officers entered the yard to check on the safety of the occupants and investigate the 911 call, while the Defendant contended that the officers barged onto the property because they did not like the Defendant and his girlfriend telling them to go away.

The Defendant also contends that the trial court fundamentally erred in the instruction on justifiable use of deadly force, instructing the jury that such force is appropriate where the individual is defending himself against a burglary with an aggravated battery or aggravated assault, when the instruction should have read burglary with a battery or assault. This claim was not properly preserved below.

The Florida Supreme Court has stated repeatedly that jury instructions are subject to the contemporaneous objection rule. See, e.g., Archer v. State, 673 So. 2d 17, 20 (Fla.), cert. denied,

519 U.S. 876 (1996). No objection was raised here, and this claim was not properly preserved for appeal.

Instructions are reviewable in the absence of an objection only if the error "is pertinent or material to what the jury must consider in order to convict." Cardenas v. State, 867 So. 2d 384, 390-91 (Fla. 2004) (quoting Reed v. State, 837 So. 2d 366, 370 (Fla. 2002)). Even error in an instruction on an element of a crime is fundamental only when it relates to a contested element of the charged offense. Compare Reed, 837 So. 2d at 369 (incorrect definition of malice, an essential element of offense, disputed at trial, was fundamental error) with Battle v. State, 911 So. 2d 85, 88-89 (Fla. 2005)(where error relates even to an element of the crime, but that element is not in dispute, the error is not fundamental and an objection must be lodged to preserve the issue for appeal), cert. denied, 546 U.S. 1111 (2006).

Where, as here, the challenged jury instruction involves an affirmative defense, fundamental error only occurs when the instruction is "so flawed as to deprive defendants claiming the defense ... of a fair trial," which occurs "only in rare cases where a jurisdictional error appears or where the interests of justice present a *compelling demand* for its application." Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008) (quotations omitted) (emphasis in original). Where, as here, self-defense was not the only strategy pursued and the instruction had little effect on the

chance of success of that strategy, the error was not fundamental. Id. at 456.

The instruction in this case was admittedly somewhat confusing if analyzed in detail. Specifically, the jury was initially told (correctly) that the Defendant was justified in using deadly force if he reasonably believed that such force was necessary to prevent death or great bodily harm to himself or another, or to prevent the imminent commission of an aggravated assault or aggravated battery, or to prevent the imminent commission of a "burglary of a dwelling with an assault or battery against himself or another." (T. 1375).

These various forcible felonies were then defined by the court in detail, including a definition of assault and a definition of battery, as well as the aggravated forms of those offenses. (T. 1376-77).

Finally, the definition of burglary was read, and this is where the mistake was made. The crime of burglary was defined as entering a structure with the "intent to commit aggravated assault or aggravated battery in the structure." (T. 1377-78).

While this portion of the instruction was erroneous, it was not fundamentally erroneous. Whether the Defendant believed the officers were going to commit a burglary with an aggravated assault or battery or a regular assault or battery was not a contested matter. Rather, the issue in this case was whether the Defendant reasonably believed that the officers were not acting in accord

with their legal duty to protect citizens and investigate the 911 call, but instead were there to harm him or his girlfriend.

The prosecutor argued in closing that the officers did not go into the yard "with the intent to assault or batter or shoot or hit or do any of those things to" the Defendant. (T. 1252, 1260). In rebutting the claim of self defense, the prosecutor relied on the instruction providing that a person cannot use force to resist a law enforcement officer acting in good faith, as well as the unbelievable nature of the Defendant's story. (T. 1348, 1351, 1354, 1356-57).

Defense counsel argued that the police officers came through the fence with either their guns out or their tasers out (which look like guns), so the Defendant tried to defend himself because he thought he was going to die. (T. 1292, 1296, 1299-1302, 1306-07). The Defendant had the right to stand his ground, in his own home, to stop an unlawful break-in by the police. (T. 1313-19). This theory was reflected in the Defendant's testimony, as he claimed that the officers tore down the fence and came charging onto the property with guns drawn; he did not know they were police officers and thought they were there to harm him and his girlfriend, so he reacted in fear. (T. 997-1015).

In short, then, whether the officers broke into the property to commit a regular assault or battery versus an aggravated assault or battery was not a contested issue in any way. Under the Defendant's version of events, the officers were clearly committing

an aggravated assault or battery, as they had their guns (deadly weapons) drawn and pointed at the Defendant and his girlfriend. There is no reasonable probability that the jury believed this story but found the Defendant guilty because this was a burglary with a regular assault or battery rather than an aggravated assault or battery, and accordingly any error was at worst harmless and certainly not fundamental.

Indeed, this jury asked several questions, none of which involved whether the perceived burglary involved an aggravated or regular assault or battery. (R. 292, 300-03).

Finally, the State notes that self defense was not the only defense used here, as the Defendant also argued that he had no intent to harm the officers but simply reacted out of fear, and that he caused no real harm to the officers, as the baton was a cheap item from the flea market that broke into pieces immediately.

Given these circumstances, the minor error in the jury instruction did not deprive the Defendant of a fair trial. His fourth point on appeal should be rejected by this Court.

ISSUE V

THE TRIAL JUDGE'S ACTION DID NOT VITIATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

As his fifth point on appeal, the Defendant contends that the trial judge abandoned her neutral role during the course of the trial and sentencing.

Claims that a trial judge improperly interjected herself into the proceedings are subject to the contemporaneous objection rule – that is, the claim must be presented to the trial court and cannot be raised for the first time on appeal. Moore v. State, 701 So. 2d 545, 549 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998). This only makes sense, as any error could be quickly remedied if raised below, and the tone and body language used by both the judge and the parties is certainly relevant in evaluating such a claim but cannot be ascertained on the basis of a cold record -- especially where the parties never saw fit to raise the issue at the time the alleged impropriety occurred.

Here, the Defendant alleged in his amended motion for a new trial that the trial judge was "visibly hostile" toward defense counsel and the Defendant, claiming that the judge scowled, bullied, banged her gavel, was not courteous, and was threatening to the Defendant and counsel. (R. 367-69). Notably, the Defendant does not raise these specific allegations of bias on appeal, and he did not mention this ground at all at the hearing on this motion

(R. 934-37). He also did not object when the conduct was actually occurring and could have been timely remedied and documented.

Accordingly, the State submits that the specific grounds raised on appeal were not properly preserved below and cannot be raised now, for the first time, on appeal.

The Defendant contends that the trial judge's actions were so egregious as to constitute fundamental error. The Florida Supreme Court has defined fundamental error as error that reaches down into the validity of the trial itself to such an extent that a guilty verdict could not have been obtained without the assistance of the error. Scoggins v. State, 726 So. 2d 762, 767 (Fla. 1999). The Defendant comes nowhere close to meeting that standard here.

The Defendant raises three alleged improprieties at sentencing and trial. Specifically, the Defendant complains that the court advised the prosecutor regarding the scoresheet so as to achieve a longer presumptive sentence. While the court did in fact find an error on the scoresheet and ask the prosecutor to fix it (R. 991-96), this was not an action that involved advocacy or bias on the part of the court – it was an action that prevented a legal error. The court was not required to stand silent and allow this error to happen, and its correction of the error was in no way improper.

The Defendant also complains that the court based its sentence on an uncharged crime. While such a finding would be reversible error, the record does not support this claim. Reading the court's full comments in context, the court did not actually make its

decision based on a finding that the Defendant committed an uncharged crime. Instead, the record reflects that the court was explaining its rationale for rejecting the Defendant's request for a downward departure sentence.

In doing so, the court expressed in detail its rejection of the Defendant's claim that he was innocently minding his own business when the officers suddenly broke into his yard and tried to attack him:

> There is a —— with regard to downward departure, it is a two—step process. One, whether legally it is appropriate or legally justified by the evidence and —— but the second step of that analysis is whether or not it's appropriate. So, regardless of whether evidence supports it, which I find that it does not, I do not find it's appropriate in any way. These folks are charged with being the ones that come charging into the house when someone is going through their darkest hour. "Help," they're screaming. "Help, help, help."
>
> And these folks in these uniforms that you see around here are fearlessly charging in when they have no idea what they're charging into. And sadly, Deputy Hriciso and Deputy Skinner charged into an ambush.
>
> And that was not just charging in, that was after they told you they needed you to come out, they asked you to come out, they told you to come out, they commanded you to come out, they told you that if you didn't come out they were going in. Still without a response.
>
> And this was not just all boom, boom, boom, boom, boom. This took a period of time, as we heard this play out. So you had plenty of time to make a rational decision, sir.
>
> And the decision that you made was to whip out, snap out —— and don't shake your head at me, because I'm finding the facts now, sir. And you can wipe that grin right off your face because —— or save it for the folks in the Department of Corrections.

> So what I find here is that you have absolutely violated the very premise upon which the fabric of our society sleeps at night, and that is you have attacked the people that are there to protect you. They're to ensure your safety.
>
> And had you been doing something that was one—hundred percent law abiding, like keeping your bees, you certainly —— I couldn't imagine that such a gracious person would have had a problem with the police coming on in and having a look around or doing whatever it was they felt was necessary under the circumstances, because you wouldn't have been doing anything wrong.
>
> But attacking them with a baton that is a weapon actually carried by some law enforcement folks is a horse of a different color.

(R. 999-1000).

The State submits that these comments explaining the judge's decision, viewed in context, were not improper, let alone so improper as to constitute fundamental error.

Regarding the trial itself, the Defendant complains that the judge was rude to the Defendant, telling him to wipe the grin or smirk off his face. Undersigned counsel has searched the trial transcript and found a single incident where the judge instructed the Defendant, outside the presence of the jury, to stop smirking and answer the questions asked of him. (T. 987-90). This took place after the Defendant, out of the blue, testified that he had sex with his girlfriend the morning of the incident, as they typically did every morning, when testifying in front of the jury. (T. 986).

The trial court has the ultimate responsibility to control the conduct of the trial participants. See, e.g., Gomez v. State, 751

So. 2d 630, 632 (Fla. 3d DCA 1999) ("The trial court retains the ultimate responsibility for the proper conduct of trial counsel and trial proceedings in her courtroom."). That is all the court was doing here.

The judge also made a comment, quoted above, regarding the Defendant's grin as he was being sentenced. (R. 999). Again, there was no jury present and accordingly no prejudice to the Defendant from this comment. Further, the State notes that not all judicial comments or questions are improper, and they must be considered in the context in which they were made – including whether those comments were induced by the defense. Evans v. State, 627 So. 2d 96, 97 (Fla. 3d DCA 1993).

The State agrees that the conduct of the trial judge here was far from ideal. Indeed, as the Defendant points out, her conduct was the subject of an inquiry with the JNC, which culminated in her agreeing to a public reprimand based in part on her intemperate tone in the trial here. See Inquiry Concerning a Judge, Re: Robin C. Lemonidis, 2019 WL 5996619 (Fla. Nov. 14, 2019). Not only was the judge rude to defense counsel, but she was also "openly annoyed" with witnesses and others involved in the proceedings. Id. at *1.

However, the discipline of a judge (or attorney) for misconduct is a different matter, and a different standard, than the evaluation of the merits of an appeal from the trial where the

misconduct occurred. As the Florida Supreme Court explained in a case involving prosecutorial misconduct:

> When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation. Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. . . . **The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter;** it 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) (citations omitted) (emphasis added). The State submits that the judge's misconduct here was not so prejudicial as to require a new trial.

In addition to the specific circumstances discussed above, the State notes that the jury was explicitly told that the reliability of the evidence was a matter for its determination, no one else's, that its verdict should not be influenced by its feelings toward either party or the lawyers, and that any actions by the trial judge indicating a preference for either side should be disregarded. (T. 1387-88).

As this Court has explained, "not every act or comment with potential to be interpreted as demonstrating less than total neutrality on the part of the trial judge, will be deemed

fundamental error." Johnson v. State, 114 So. 3d 1012, 1014 (Fla. 5th DCA 2012) (reversing conviction where court extensively questioned State's key witness, commented on witness's answers, and suggested answers that witness then adopted).

Given the nature of the court's comments here, as well as the context of those comments, the Defendant has failed to show error, let alone fundamental error. The trial court's comments and actions did not deprive the Defendant of a fair trial, and his fifth point on appeal should be rejected by this Court.

ISSUE VI

THE DEFENDANT RECEIVED A FAIR TRIAL.

As his final on appeal, the Defendant raises a claim of cumulative error. Because the Defendant has not shown individual error, he cannot show cumulative error. Rose v. State, 774 So. 2d 629, 635 n.10 (Fla. 2000) ("claims of cumulative error are properly denied where the Court has considered each individual claim and found the claims to be without merit."). To the extent the Defendant identifies any actual error on appeal, it was at worst harmless, as discussed above. The Defendant received a fair trial, even if imperfect, and his convictions and sentence should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully requests this honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished to Nancy Ryan, counsel for Appellant, 444 Seabreeze Blvd., Ste. 210, Daytona Beach, Florida 32118, by e-service to appellate.efile@pd7.org and ryan.nancy@pd7.org, this 20th day of November, 2019.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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