IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MICHAEL DAVID DUNN

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 1D14-4924
LT# 16-2012-CF-011572

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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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.

STATEMENT OF THE CASE AND FACTS

In the instant criminal appeal, Appellant challenges his convictions and sentence for first degree murder, attempted second degree murder, and shooting into an occupied vehicle. In light of the appellate standard of review with respect to factual determinations, the following statement of facts will be made in a light most favorable to the Appellee. The statement is not intended as a stipulation to any fact, particularly those facts disputed below. To the extent that Appellant refers to the uninjured persons named as victims in the Information as victims, this brief does so only so as to easily differentiate a person named in the Information as the victim from other witnesses or persons discussed.

Facts From Both Trials

The appellate record contains two trials due to a hung jury on Count I, first degree murder, and second trial wherein Appellant was convicted and sentenced on that count. The facts from both trials are summarized here with any discrepancies noted.

In August 2012, Aliya Harris ("Girlfriend Harris") met Jordan Davis ("Decedent Davis") at their high school when she transferred to the school for her senior year. (V17-1316, 22). Girlfriend Harris started dating Decedent Davis at the end of September 2012. (V17-1322). Decedent Davis and Leland Brunson ("Victim Brunson") were best friends. (V19-1710; V37-1302). In the summer or at the start of the 2012 school year, Decedent Davis and Victim Brunson met Tevin Thompson ("Victim Thompson"). (V18-1625-26; V19-1678, 1741; V37-1245-46). Decedent Davis and

Victim Brunson were in high school during the 2012-2013 school year. (V18-1627; V19-1709-10; V37-1210, 1302). Victim Stornes was 19 years old in 2012, a year or two older than the other three youths. (V19-1786). Victim Stornes was not friends with either Victim Brunson or Decedent Davis; rather, they were friends of his friend, Victim Thompson. (V19-1787; V37-1211, 1258; V37-1303, 1362). Victim Stornes only socialized with Decedent Davis twice prior to November 23, 2012. (V19-1832). The four young men did not normally socialize together as a group. (V27-1252).

Michael Dunn ("Appellant") was a 45-year old male. (V42-2405). Appellant and Rhonda Rouer ("Fiancée Rouer") were involved in a romantic relationship since 2008. (V22-2293-94). In November 2012, they lived together in Satellite Beach, Brevard County, Florida. (V22-2294-95; V39-1799). They were engaged to be married. (V39-1798).

On November 22, 2012, Appellant and Fiancée Rouer spent the night at a hotel in Jacksonville, Florida because Appellant's son's wedding was scheduled for the following day. (V22-2295). They brought their puppy, Charlie, with them. (V22-2296).

November 23, 2012 was "Black Friday," the day of intense shopping that follows Thanksgiving. (V17-1316, 1323). On that day, Appellant and Fiancée Rouer began getting ready for Appellant's son's wedding at around 2:30 p.m. (V22-2298). The wedding occurred around 4 p.m. (V40—1807). Appellant drove his Black Jetta to the wedding. (V40-1807-08). At the wedding reception, Appellant consumed three or four alcoholic drinks

composed of rum and Coca-Cola, but the open bar did not make the drinks very strong. (V22-2300-34; V40-1809-10). Appellant was in a good mood at the wedding. (V22-2333). Fiancée Rouer estimated, based on her observation of him in the past and at the wedding, that Appellant was not impaired in the slightest based on the small amount of alcohol that he drank. (V22-2335).

On the same day, Decedent Davis and Victim Brunson called Victim Thompson and Victim Stornes to see if they would drive them to the mall. (V19-1788; V37-1212; V37-1253, 1363). Of the four young men, only Victim Stornes owned a vehicle. (V19-1741; V37-1259; V37-1304). Victim Stornes and Victim Thompson drove in Victim Stornes's red Dodge Durango to pick up Victim Brunson and Decedent Davis. (V17-1627-28; V19-1712-13, 1789; V37-1213, 1365). The quartet drove to Victim Thompson's house to change into better clothes because they planned to search for girls to meet and pick up in Town Center, the mall. (V18-1629; V19-1712; V37-1213-14; V37-1253, 1305). Victim Brunson described the activity as "girl shopping." (V19-1713). Victim Stornes, the driver, had a felony on his record, he was on probation, and his friends knew that he had a 7 p.m. curfew as part of his probation. (V19-1680-81, 1810). All four young men carried cellular telephones. (V37-1254).

Girlfriend Harris worked a part-time job in a clothing store at Town Center. (V17-1317; V18-1630; V37-1305). Girlfriend Harris arrived at work at around 5 p.m. (V17-1317). While she was working, Decedent Davis visited her store. (V17-1318; V18-1630; V19-1790; V37-1215, 1365). He was accompanied by Victim

Thompson, Victim Brunson, and Victim Stornes. (V17-1319; V18-1630; V19-1790). They visited for a few minutes, and Decedent Davis appeared to be in good spirits. (V17-1319-20; V18-1635). It got dark around 5:30 p.m., and Girlfriend Harris noted that it was dark outside when Decedent Davis and his friends left the store. (V17-1323; V37-1306, 1366). The quartet remained at the mall for an hour or two. (V19-1714). The friends left the mall at around 7:30 p.m. knowing that Victim Stornes was out after his probation-imposed curfew. (V19-1681; V37-1215; V37-1255, 1366).

The quartet then re-entered Victim Stornes's red Durango and drove toward the Avenues Mall in search of more girls. (V18-1631; V19-1791; V37-1253-55, 1306, 1329). Decedent Davis had a Smith and Wesson knife in his pocket. (V19-1754). Victim Stornes was driving, Victim Thompson was in the front passenger seat, Decedent Davis was in the rear passenger-side seat, and Victim Brunson was in the rear driver-side seat. (V18-1631; V19-1715, 1791-92; V37-1306). Victim Stornes turned on loud rap music during the drive. (V37-1397). He lowered Decedent Davis's window during the drive. (V19-1794; V37-1398). At some point during the evening, Victim Brunson heard Decedent Davis say, "I'm tired of people telling me what to do." (V19-1746; V37-1339). Victim Stornes drove to the Gate Petroleum gas station to buy gum and cigarettes. (V18-1632-33; V19-1715, 1792; V37-1216, 1307).

Victim Stornes, the driver, entered the gas station store while the other three remained in the vehicle. (V18-1634; V19-1716, 1793). Victim Stornes left his car on with loud rap music

playing at sufficient volume to make the windows shake. (V18-1634; V19-1716, 1739-40, 1793; V37-1218, 1308, 1335-36, 1368, 1399). The rear passenger seat occupied by Decedent Davis had the window halfway down. (V37-1256).

Steven Smith ("Witness Smith") was a general contractor performing home renovation in Jacksonville. (V17-1327-30; V35-965). At approximately 7:30 p.m., he drove his company truck to the Gate Petroleum gas station to buy a fountain drink. (V17-1331, 1447; V35-965). The weather was clear and cool. (V17-1332). The gas station exterior had good lighting. (V17-1332). When he pulled in, he observed Victim Stornes's red Dodge Durango. (V17-1331; V35-969). There was an open parking spot next to the Durango, but Witness Smith drove his truck to a different spot because he "heard loud music [coming from the Durango] and didn't want to deal with it." (V17-1333; V35-970). The Durango's passenger-side windows were down, and Witness Smith observed four males in the vehicle. (V17-1333). The windows could only be controlled from the driver's seat door. (V19-1789).

Shawn Atkins ("Witness Atkins") was a 25-time felon. (V17-1405-06; V36-1171). On November 23, 2012, he was homeless and living in his car with his girlfriend. (V17-1406-07; V36-1173). He parked at the Gate Petroleum gas station because his girlfriend needed to use the restroom. (V17-1409-10; V36-1176).

Victim Stornes used the restroom inside the gas station before purchasing the gum and cigarettes. (V19-1795; V37-1369).

At around 7 p.m., Appellant and Fiancée Rouer left Appellant's son's wedding reception early because Fiancée Rouer needed to check on her puppy. (V22-2301, 2324-25; V40-1810). The puppy was not housetrained, and he was in a crate. (V22-2324; V40-1811). They rode in Appellant's black Jetta. (V22-2302; V40-1811). They stopped at the Gate gas station because Fiancée Rouer wanted to buy a bottle of wine and a bag of chips because they had not eaten much at the reception, having left early. (V22-2303, 2325; V40-1812). Appellant parked to the right of the red Durango. (V18-1418, 1635; V19-1717-18; V22-2304; V37-1219; V40-1813). The Jetta was so close that Victim Thompson later testified that he, being a large person, would not have been able to exit the Durango, though there was room for someone the size of Decedent Davis to exit the vehicle. (V18-1636, 1668; V22-2304; V37-1271).

When Appellant heard loud music coming from the Durango, he said, "I hate that thug music." (V22-2306; V40-1815). Appellant was not, however, in any sort of rage. (V22-2329). He did not bang the steering wheel or punch the dashboard or make any visible display of anger. (V22-2329). Fiancée Rouer exited the Jetta and walked into the gas station store. (V18-1636; V19-1718; V22-2306-07; V37-1219, 1309; V40-1815).

Witness Smith exited the vehicle and entered the gas station to buy his drink, but he could still hear the Durango's music from inside the store. (V17-1335). Witness Smith joked with the store clerk, saying, "I wish they'd turn it up. It's my favorite song...." (V17-1336; V35-971). The clerk laughed. (V17-1336).

Decedent Davis had his window halfway down; the other windows in the Durango were closed. (V18-1634; V19-1719). Appellant, with his window up, mouthed some words to the occupants of the Durango. (V19-1739; V37-1273). The Durango sat higher than the Jetta, so the Durango occupants were looking down at Appellant. (V19-1758; V37-1270). Victims Thompson and Brunson later testified that Appellant then lowered his window and spoke generally to the occupants of the Durango, asking "Can you turn the music down[?] I can't hear myself think." (V18-1638, 1672; V19-1718, 1738-39; V37-1273-75, 1310). Victim Brunson testified that Appellant was asking a question, not making a demand. (V19-1739). Victim Brunson later testified that Appellant's request was a demand for common courtesy, and he asked his question in a normal tone of voice. (V19-1739; V37-1221). Appellant did not point his finger, yell, curse, or say anything derogatory. (V19-1675, 1738; V37-1274-75, 1310). Appellant's window was closer to Victim Thompson's window, not Decedent Davis, who was sitting in the back seat. (V19-1738). The Durango's windows had such a dark tint that Appellant would only have been able to see Decedent Davis, whose window was down. (V19-1672). Victim Thompson turned the music down. (V18-1638; V37-1310). Appellant put his window back up. (V37-1275).

Victim Thompson later testified that the request to turn down the music enraged Decedent Davis. (V19-1674, 1739; V37-1276, 1338). Decedent Davis began to curse at Appellant. (V19-1675). Victim Thompson later testified that Decedent Davis told him, "Fuck that nigger. Turn the music back up." (V18-1638, 1674;

V19-1719; V37-1222, 1276). Victim Thompson complied, turning the music back up. (V18-1639; V37-1223). The music was loud enough that the windows and doors were vibrating. (V19-1669). Decedent Davis continued cursing loudly at Appellant. (V37-1277). At the first trial, Victim Thompson testified that he reached over to the driver's side window controls and raised Decedent Davis's window until it was only open about three inches so that Decedent Davis "could stop talking" to Appellant. (V18-1641-42; V37-1225, 1314). None of the physical evidence supported that, however, Decedent Davis continued to curse at Appellant, and the claim that the window was almost closed was not repeated at the second trial. (V41-2172-73). Victim Thompson and Victim Brunson both heard Decedent Davis say to Appellant, "Fuck you." (V18-1640; V19-1719; V37-1311).

At that point, Victim Thompson could not hear some of what was said because the music was so loud. (V18-1640, 1642; V19-1670, 1675; V37-1223, 1280, 1340). Victim Thompson did not notice Appellant point or curse at him or say anything derogatory to him or anybody else in the Durango. (V19-1672). Victim Thompson did not hear Decedent Davis threaten Appellant. (V37-12). Victim Brunson agreed that, like Victim Thompson, he could not hear all of what was being said because the music was so loud. (V19-1720). Victims Thompson and Brunson later denied that they had any weapons in the car. (V18-1640-41; V19-1723). Victim Thompson did not turn around to look at what Decedent Davis was doing, but he assumed that Decedent Davis did not exit the vehicle.

(V19-1667-68; V37-1280). Victim Brunson noted that Decedent Davis appeared angry. (V19-1721).

Walking out of the gas station store, Witness Smith observed Appellant's black Volkswagen Jetta parked next to the Durango, and he could see Appellant seated in the driver's seat. (V17-1337-38). Appellant's Jetta was parked to the right of the Durango. The loud music had been turned off. (V17-1338). As Witness Smith walked to his truck, he passed the Durango and Jetta and could see through the Durango's open passenger-side window. (V17-1341-42). He could also see through Appellant's passenger window as the passenger seat was unoccupied. (V17-1342). Victim Thompson later opined that the situation was escalating because of Decedent Davis's behavior. (V19-1684). Victim Brunson saw Decedent Davis put his hand on the door handle, trying to exit the Durango, though he claimed that Decedent Davis was unable to exit due to the child locks. (V19-1721, 1742-43, 1745, 1764; V37-1312, 1344). Decedent Davis was gesticulating with his right hand during the argument, resting his left hand on the back seat. (V19-1721, 1755-56). Victim Brunson denied that Decedent Davis placed his hands outside of the vehicle or placed his hands in the shape of a gun. (V19-1722). Decedent Davis did, however, have a cellular telephone in his right hand during the argument, and he was gesturing angrily toward Appellant with that hand. (V19-1723, 1756; V37-1313). Victim Brunson admitted that during the argument, Appellant never cursed at Decedent Davis, never threatened him, and never raised his voice despite the fact that Decedent Davis was

yelling at him. (V19-1743; V37-1342). Victim Brunson admitted that the more Appellant didn't 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). Victim Brunson denied hearing Decedent Davis threaten to hurt Appellant. (V37-1312). Victim Brunson saw Decedent Davis point his finger at Appellant. (V37-1312).

When Victim Stornes arrived back at the Durango, he opened the car door and proceeded to dance to the music in front of the car. (V18-1643, 1796; V37-1226, 1369). At some point, Victim Stornes re-entered the driver's seat. (V18-1643). Victim Thompson turned down the music to tell Victim Stornes, "Let's go." (V19-1725-1796, 1837; V37-1280-81). Victim Stornes did not observe anyone threatening Appellant or holding any items. (V19-1798). Victim Stornes, sitting in the driver's seat, did not see Decedent Davis try to exit the vehicle. (V19-1798). He did not see Appellant threatening anyone, either. (V19-1838).

Witness Smith was in a position close to the back of the passenger side of Appellant's Jetta when he claimed that he heard Appellant, who was still seated in the driver's seat of his Jetta with the windows up, shout, "You're not going to talk to me that way." (V17-1339). Witness Smith did not see a weapon or hear any loud threat coming from the Durango. (V17-1341; V35-997-78). He had not seen Decedent Davis exiting the vehicle. (V35-985). Neither Victims Thompson nor Brunson heard Appellant say "You're not going to talk to me that way." Rather, Appellant and Victims Brunson and Thompson agreed that Appellant had asked

Decedent Davis, "Are you talking to me?" Due to the music, Victim Brunson could not hear what Decedent Davis said to Appellant. (V19-1744). He couldn't hear what Appellant was saying from the other vehicle, either. (V19-1745). Appellant asked Decedent Davis, "Excuse me? What did you say?" (V37-1314). Victims Thompson and Brunson heard Appellant angrily ask Decedent Davis, "Are you talking to me?" (V18-1644; V19-1683, 1725; V37-1227, 1314). Victim Brunson heard Decedent Davis answer, "Yeah, I'm talking to you." (V19-1725). Victim Stornes saw Appellant mouthing words through his window, but he could not hear or understand what Appellant was saying. (V19-1797).

Shortly thereafter, Appellant retrieved a silver firearm from his glove compartment. (V17-1341; V18-1457, 1644; V19-1726, 1795; V35-979; V37-1226; V37-1281, 1315; V37-1372). Victim Thompson later testified that Appellant pointed the gun in Decedent Davis's direction and that due to his position and visibility, "if he wasn't aiming [at Decedent Davis,] I would have been the first target." (V19-1686, 1702; V37-1228, 1281). Appellant was not aiming blindly. (V19-1702). Victim Brunson corroborated that Appellant was aiming toward Decedent Davis's window. (V19-1726; V37-1316). Victim Stornes heard the gunshots, but was not watching Appellant during the shooting. (V19-1800). Victim Stornes knew that Appellant had aimed the gun at his car, but he did not see him aim the gun at him personally. (V19-1839). Appellant fired three shots at the Decedent Davis's passenger side rear door. (V17-1342; V18-1645; V19-1726; V37-1283; V37-1373). Victim Brunson tried to pull Decedent Davis

downward, and Decedent Davis, who had still been at the window, simply collapsed backward onto Victim Brunson. (V19-1727, 1757).

Victim Thompson leaned over toward Victim Stornes, remaining there until the Durango was away from the scene. (V18-1646; V37-1229).

Maria Grimes ("Cashier Grimes") and Lillian Chrestensen ("Manager Chrestensen") were working at the Gate Petro station. Cashier Grimes heard "about three gunshots" from outside the store. (V18-1456; V36-1048). Witness Atkins heard "two gunshots" coming from his right side. (V17-1413; V36-1182). Manager Chrestensen was in the back room of the store, but she believed that she heard three shots. (V18-1481, 1069).

Victim Stornes backed the Durango out. (V17-1342-43, 1415; V19-1727, 1799). Witness Smith observed bullet holes in the side of the Durango. (V17-1343).

Witness Smith thought that Appellant fired two, three, or four more shots at the Durango. (V17-1344; V35-980). Manager Chrestensen heard three or four more shots. (V18-1483). Witness Atkins thought that Appellant fired four or more shots. (V17-1416). Victim Brunson did not hear any further shots once they had backed out. (V19-1759).

Witness Atkins stated that Appellant exited his Jetta and dropped into a "police stance" while firing the final shots. (V17-1417; V36-1185). Fiancée Rouer never saw Appellant attempt to exit the vehicle. (V22-2335). Cashier Grimes briefly ducked down after the first shots, but then she stood back up. (V18-1464-66; V36-1048-50, 1070). She watched Appellant fire the

shots. (V18-1465). She stated that Appellant never exited his vehicle, and that his hands were on the windowsill of the driver's side window. (V18-1466; V36-1048-50). The Durango then drove forwards into an adjacent parking lot. (V17-1342-43; V19-1728; V37-1374).

Fiancée Rouer paid for wine and a bag of chips inside the gas station prior to the shots, but after the shooting, she left the items and her change on the counter. (V18-1463, 1485; V22-2308-10; V36-1051, 1056-57; V40-1817-18). She turned and saw Appellant facing out of his driver's side door which was now open. (V22-2309; V40-1819). The Durango was not in her sight. (V40-1820). She exited the gas station store and approached Appellant's Jetta. (V17-1344, 1417; V18-1458; V22-2310; V36-1053, 1071). She asked Appellant what was going on. (V17-1344). In a panicked voice, Appellant instructed her to get in the car. (V17-1344, 1368; V22-2311). The woman had a horrified look on her face. (V17-1419). Appellant repeated, "Get in the car." (V40-1821). Fiancée Rouer got in the passenger seat, and Appellant drove away from the gas station. (V17-1344; V18-1457, 1485-86; V35-981; V36-1053, 1072; V40-1822). Appellant put his gun back in the glove compartment. (V22-2311; V40-1821).

Witness Atkins memorized Appellant's license plate number as he drove away. (V17-1419-22; V36-1187). He proceeded inside to report the license plate number to Manager Chrestensen who called 911. (V17-1420; V18-1486; V36-1074). After that, Witness Atkins left the scene because he was frightened and because he had absconded from probation. (V17-1423).

Victim Stornes drove the Durango to "the plaza," an adjacent parking lot. (V18-1646; V19-1749; V37-1283). He stopped the vehicle to "see if everyone was okay." (V19-1801). Victim Stornes began calling out his friends' names one by one, and they all answered except Decedent Davis. (V18-1648; V19-1729, 1803; V37-1230). Decedent Davis was lying in Victim Brunson's arms. (V18-1648; V19-1803; V37-1230, 1289). Victim Thompson exited the vehicle, and so did Victim Stornes. (V19-1804; V37-1288). Victim Thompson examined the car and saw three bullet holes in the rear passenger door, Decedent Davis's door. (V19-1663; V37-1232). Decedent Davis was gasping for air. (V19-1666, 1730, 1803; V37-1231, 1319, 1377). His head was on Victim Brunson's shoulder or chest, and his feet were on the floor. (V19-1697). They opened Decedent Davis's door. (V19-1666). Victim Thompson denied that Victim Stornes opened up the rear driver's side door or that they took anything out of the car. (V19-1666). Victim Brunson checked Decedent Davis and felt blood on his clothing. (V19-1729). Victim Thompson claimed that he saw Appellant's vehicle drive past. (V19-1655). Neither Victim Stornes nor Victim Brunson saw Appellant's vehicle pass by. (V19-1750, 1802). Victim Brunson asked Victim Thompson to call 911, but he did not. (V19-1750-51).

Alyssa and Christopher LeBlanc, bystanders in the plaza, largely corroborated the account by the Durango's occupants, verifying that Victim Stornes drove to the plaza and that Victim Stornes and Thompson exited to view the bullet holes in the car. (V20-1854-1905; V38-1421-33, 1451, 1455). Christopher LeBlanc

thought that Victim Stornes was stashing something in the back of the car, but he saw nothing come out of the car. (V20-1906-07; V38-1457). Alyssa LeBlanc saw Victim Stornes talking on his cellular telephone. (V38-1431). She saw Victim Stornes open the rear driver door and lean into the vehicle. (V38-1431). She did not see anything removed from the car. (V38-1431-32). Victims Stornes and Thompson were outside of the Durango for about a minute. (V38-1432).

Realizing that Decedent Davis was bleeding, Victim Brunson said, "We need to go back and get help." (V37-1318). Victim Stornes and Victim Thompson reentered the vehicle. Victim Stornes then drove the Durango in reverse back to the gas station. (V17-1351, 1364; V18-1654-55; V19-1802; V20-1867; V35-982; V37-1234, 1378, 1433, 1473). Victims Thompson and Stornes later testified that they returned because there were more people at the gas station than in the plaza, and they were seeking help. (V19-1687, 1843).

Alyssa and Christopher LeBlanc left the area in a vehicle, and Christopher LeBlanc called 911. He and Alyssa reported what they had seen. (V38-1435-39, 1461).

Victim Stornes parked the Durango at the Gate gas station in a spot next to some bushes. (V17-1366). Witness Smith insisted that the Durango was gone for five to 10 minutes. (V35-993).

Unaware that anything was amiss, Samantha Eichas ("Witness Eichas") also stopped at the Gate Petroleum station to get a cup of coffee. (V18-1502; V36-1030). She parked at the gas station, but sat in her car while she was finishing a phone call to her

friend. (V18-1506-07; V36-1032). The red Durango pulled in to a spot next to her. (V18-1507; V36-1034). She noticed bullet holes in the side of the vehicle. (V18-1507; V36-1040). Victim Stornes and Victim Thompson exited the Durango. (V18-1507-08; V19-1655-56, 1805; V37-1234). Witness Eichas asked if everyone was okay, and they said yes. (V18-1508; V36-1035). They stood in front of the Durango, and Witness Eichas also exited her vehicle. (V18-1508). The two young men looked shocked, and someone asked Witness Eichas to call 911. (V18-1509; V19-1689, 1760-61; V36-1042-43). She did. (V18-1509; V36-1041). Victim Thompson also used his cell phone to call 911 at that point. (V19-1688; V37-1236).

Witness Smith did not keep his eyes on the occupants of the Durango. (V17-1366). Instead, he returned inside the store in order to speak to the police as a witness. (V17-1366).

Andrew Williams ("Witness Williams") and his wife were chaperoning two teenagers on a date. (V17-1376-77; V36-1006). Witness Williams was 21 years old. (V17-1393-94). Driving past the gas station, Witness Williams heard the gunshots. (V17-1381; V36-1008). Over the next two minutes, Witness Williams drove to a place where he could make a u-turn and returned to the gas station because "[s]omething inside me told me to go." (V17-1382). He observed the return of the red Durango. (V17-1383-84; V36-1011).

Witness Williams saw the driver of the Durango exit the vehicle looking "very upset." (V17-1385). Someone in the Durango shouted, "[H]e's not moving." (V17-1386; V36-1012). Witness

Williams found Decedent Davis in the vehicle and realized that he had been hit. Victim Brunson was cradling Decedent Davis in the back seat of the vehicle. (V17-1387; V37-1381). Decedent Davis appeared unresponsive, and Witness Williams could not detect a pulse or respiration. (V17-1387-90; V36-1013).

Officers Robert Holmes and Valentine of the Jacksonville Sheriff's Office arrived on the scene. (V17-1398; V18-1509; V18-1528; V36-1014; V36-1089). Officer Holmes saw Victims Stornes and Thompson outside of the Durango. (V18-1542). Officer Holmes approached the vehicle and saw Victim Brunson "sitting on the driver's side rear passenger seat sobbing uncontrollably. He was cradling" Decedent Davis's head and Decedent Davis "was stretched out across the seat." (V18-1543; V36-1092). Decedent Davis was "sitting in the rear passenger seat slumped over to the left." (V18-1544; V36-1101). Officer Holmes checked Decedent Davis for a pulse but did not find one. (V18-1546; V36-1102). He ordered Victim Brunson out of the Durango, and Victim Brunson complied. (V19-1731; V36-1104; V37-1321).

Witness Williams and Officer Holmes moved Decedent Davis out of the vehicle and onto the ground, and Witness Williams performed CPR chest compressions though he had little training. (V17-1386-88, 1394-95; V18-1548; V19-1732, 1807; V36-1105; V37-1237, 1321). Officer Holmes noticed some blood coming from Decedent Davis's back. (V18-1549; V36-1106). Once EMTs arrived, Officer Holmes went to question the witnesses inside the gas station store. (V18-1549; V36-1106).

William Spicer ("Paramedic Spicer"), an engineer and paramedic with the Jacksonville Fire and Rescue Department, arrived on the scene in response to a dispatch. (V17-1569-73; V36-1116). He did not see anyone performing CPR on Decedent Davis. (V17-1587). Decedent Davis had no pulse. (V17-1576). Paramedic Spicer began CPR. (V17-1576; V36-1119). Decedent Davis had one visible bullet wound to his right side. (V17-1577). Decedent Davis was intubated and was not breathing on his own. (V17-1578).

Appellant drove back to his hotel, approximately three miles away from the scene of the shooting. (V21-2200-01; V22-2312; V40-1824). Neither he nor Fiancée Rouer used Fiancée Rouer's cellular telephone to call 911. (V22-2313). They saw police vehicles with their emergency lights on heading toward the gas station. (V40-1824). Appellant looked in his rear view mirror and side mirrors during the drive. (V40-1824-25). Fiancée Rouer was highly emotional and frightened even by the time they arrived at the hotel. (V22-2326). The drive did not take long, and Appellant parked normally with no attempt at concealing the vehicle. (V40-1824-25, 1858). Appellant was shaken and in shock. (V22-2327). Appellant took the dog out of the room to relieve itself. (V22-2315; V40-1826). Fiancée Rouer went to the front desk and obtained the phone number for a pizza delivery restaurant, ordering a pizza because she felt physically ill. (V22-2316, 2338; V40-1821, 1854-55). Appellant left the room to pay for the pizza. (V22-2316, 2338; V40-1821, 1854-55). Fiancée Rouer ate only a few bites, and she did not observe Appellant eat anything. (V40-1828). They both drank a rum and Coke. (V22-

2317; V40-1829). Appellant was trying to take care of Fiancée Rouer, and he appeared concerned for her. (V22-2338). They were tense and afraid. (V22-2343-44). Fiancée Rouer fell asleep. (V22-2317; V40-1829).

At the violent urging of his girlfriend, Witness Atkins, the man who had memorized Appellant's license plate, returned to the scene to give a statement. (V17-1423-26; V36-1194).

The police instructed Victims Brunson, Thompson, and Stornes to wait inside the gas station store with the other witnesses. (V19-1808; V37-1322, 1381; V39-1753-54). While waiting at the scene, Victim Thompson called several people on his cell phone. (V19-1694). He later claimed that he did not recognize some of the numbers and did not know who he had called. (V19-1694). Victim Stornes also made several cell phone calls while at the gas station, and he later claimed that he did not recognize some of the numbers that he had called. (V19-1842).

At 7:54 p.m., Decedent Davis was transported to Shands Hospital as first responders continued attempts to revive him. (V17-1579; V36-1120). Decedent Davis was pronounced dead at 8:15 p.m. (V22-2445).

Sergeant Brian Shore of the Jacksonville Sheriff's Office spoke with witnesses at the gas station and typed in Appellant's license plate identification. (V17-1605). No officer located Appellant's vehicle. (V17-1607; V36-1133). None of the officers ever examined the area in the plaza where the Durango had parked for a brief time after the shooting. (V19-1691).

Officer Holmes transported Victims Brunson, Stornes, and Thompson to the police station to make a statement. (V17-1551; V19-1657, 1733; V37-1322, 1381). Victim Thompson's interview with the police lasted only about 15 minutes. (V19-1696-97; V21-2192-93). During that time, he made a written statement. (V19-1695). Victim Thompson also identified Appellant from a photographic lineup during his statement that used Appellant's picture from the license plate information given at the scene. (V19-1658; V21-2188, 2192; V37-1241; V39-1706-08). Victim Brunson narrowed a photographic lineup down to two suspects one of which was Appellant. (V19-1734; V21-2194; V37-1323). Victim Stornes also narrowed down a photographic lineup to the same two pictures. (V19-1809; V21-2195; V37-1382; V39-1710). 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). He admitted that the police had asked what happened, but he apparently did not view the question as specific enough that he felt the need to be forthcoming about the fact that Appellant tried to exit the vehicle. (V19-1742).

After midnight, the police obtained a warrant for Appellant's arrest. (V21-2197).

The police collected five semiautomatic pistol shell casings from the parking lot. (V20-1994; V38-1510-19). The police found no weapons in the Durango. (V20-2005-07). There were three bullet holes in Decedent Davis's car door. (V20-2013-14). There were six strikes to the rear of the Durango for a total of nine

bullet strikes. (V20-2017-18). One bullet fragment was collected from the vehicle door. (V38-1495). The police noted three bullet holes close together on Decedent Davis's door, three widely spaced bullet holes in Victim Thompson's front passenger door, and three bullet holes in the rear of the vehicle. (V38-1524-25). Only the first three shots into Decedent Davis's door penetrated the vehicle. (V38-1540-41).

Fiancée Rouer awoke at 7 a.m. (V40-1829). Appellant was in the restroom. (V40-1830). The television was on. (V40-1830). Fiancée Rouer saw television news regarding the shooting and the death of Decedent Davis. (V22-2344; V40-1830). Fiancée Rouer became panicked and told Appellant multiple times that they had to get home. (V22-2348; V40-1830, 1857). At 8 a.m., they headed home to Satellite Beach even though they had planned to visit St. Augustine. (V22-2318-19; V40-1830-31). Fiancée Rouer feared that she would be arrested, so she asked Appellant to take her home because she wanted to arrange for her puppy to be taken care of. (V22-2318). Fiancée Rouer later testified that they were not trying to flee; they were trying to get their affairs in order. (V22-2348). They arrived home at around 10:30 a.m. (V22-2320; V40-1831). Upon arriving home, Fiancée Rouer walked the puppy while Appellant unloaded the luggage from the car. (V22-2320; V40-1832).

On the morning of November 24, 2012, Deputy Carmine Siniscal ("Deputy Siniscal") of the Brevard County Sheriff's Office was informed by Sergeant Harrell, a fellow officer on the night shift, that Appellant was in the area and was wanted by the

police in Duval County, which was three hours north by car. (V20-2122-25).

Fiancée Rouer received a phone call on her cellular telephone from the 904 area code, Jacksonville. (V22-2320; V40-1833). She handed the phone to Appellant thinking that it was perhaps his son calling. (V22-2320; V40-1833). Appellant answered the phone and spoke to a Deputy Carmine Siniscal who instructed him that he was on the way and that Appellant should come out and surrender to them. (V20-2128-29; V39-1656). Appellant had gone to his neighbor's apartment three or four units away to discuss the matter and ask for help in surrendering locally. (V22-2321; V39-1680; V40-1833). The neighbor was a law enforcement officer. (V22-2350). Fiancée Rouer went to the neighbor's apartment, too. (V40-1833-34). Appellant surrendered, exiting the neighbor's apartment and following police instructions—including coming out with his shirt off—respectfully and without incident. (V20-2129-35; V22-2351; V39-1661; V40-1859). The police interviewed Fiancée Rouer on the same day. (V21-2199; V23-2321). The police recovered Appellant's firearm from his Jetta glove compartment, which had been left open. (V21-2200; V39-1671, 1714, 1788). The police found four shell casings fired by Appellant lodged in the Jetta's windshield. (V22-2271; V39-1670). One further shell casing was found on the floor of the vehicle. (V23-2404; V39-1670). The State's expert later determined that the shells had been fired by Appellant's gun. (V23-2405-06).

Four days after the shooting, Victim Brunson told the police for the first time that Decedent Davis had tried to exit the

vehicle during his argument with Appellant, claiming that child locks on the rear door prevented him from exiting. (V19-1764; V37-1345).

The State's law enforcement witnesses later testified that the child locks were disengaged on the vehicle after the vehicle was towed, they did not document the position of the child locks prior to towing, and they would have noted if anyone had changed the child lock settings. (V20-2080, 2086; V22-2202; V26-2688; V38-1499; V39-1743).

A cellular telephone and a Cuttin' Horse Smith & Wesson brand pocketknife were collected as items on Decedent Davis's person when he was shot. (V22-2359-66).

On November 27, 2012, police examined the red Durango. (V21-2201-02). At that time, the child locks were in the off position. (V21-2202). The police noted a plastic tripod under the rear passenger seat. (V21-2202).

Indictment and First Trial

On December 13, 2012, the State obtained an indictment by a grand jury for five separate counts. (V1-15). The indictment charged Appellant with one count of first degree premeditated murder of Decedent Davis with a firearm, one count of attempted first degree murder of Victim Thompson with a firearm, one count of attempted first degree murder of Victim Brunson with a firearm, one count of attempted first degree murder of Victim Stornes with a firearm, and one count of shooting into an occupied vehicle. (V1-15-16; V4-628-29).

Appellant also filed a Motion to Prohibit Spectators From Wearing Items that Depict Support for the victims. (V2-229). That motion was granted. (V2-248, 260).

On December 28, 2013, in case 1D13-5721, this Court granted an emergency petition by interested media parties granting greater media access to records in this case.

On February 3, 2014, the trial court granted Appellant's request to sequester the jury. (V3-552; V4-657; V10-26).

During jury selection, protesters shouted specific information about the case at potential jurors. (V11-279-80). The trial judge noted that there was nothing that could be done to address the situation because there was only one way into the building. (V11-280-82). The protesters used loudspeakers. (V11-282). The judge asked prospective jurors to ignore the protesters. (V12-559).

During *voir dire*, the media was present. One prospective juror noted that the media was filming the *voir dire*, she saw media passes on people, and the media pass actually "said Dunn trial media overflow," which was visible to the juror. (V13-664-65). Another prospective juror told the judge that she had had her husband check her email, and the husband told her that a friend had emailed and asked if she had been picked "for that big trial...." (V13-666). Another juror used the phone to ask a landlord not to send roofers while he or she was sequestered, and the landlord asked whether the juror was "going to be on that really big trial and I hung up." (V13-666). Another prospective juror reported that he or she had gone to work after

court and had been asked whether he or she "might be on that big Dunn case and I didn't answer. I just said, yeah, I heard about that and let it end like that." (V13-668). Another prospective juror indicated that he or she had a family member who was sensitive to media coverage, that his family was trying to protect that family member, that he or she "was not comfortable with my name being released or any media coverage and all and I was filmed on the way out of the courthouse yesterday." (V13-673). The prosecutor told the prospective jurors that ignoring media reports about the case and coming in with a mental "clean slate [is] a difficult thing to do...." (V13-800).

It took three days to select a jury, something that the judge had only seen "in a couple of cases...." (V15-1034).

The State brought Appellant to trial on February 6, 2014. In addition to the witness testimony, the jury was shown a video of the shooting taken by the security system at the gas station. (V17-1348-50). On February 7, 2014, the parties stipulated that the body in question was that of Jordan Davis. (V4-733; V20-1940).

During his testimony, Victim Thompson testified that he was routinely in Victim Stornes's Durango and that Victim Stornes habitually kept child locks on the windows, but not the doors. (V19-1632, 1667).

After Victim Thompson and Victim Brunson testified, it came to the court's attention that Victim Stornes, who was also set to be called as a witness, had viewed part of the trial on the internet. (V19-1773). Specifically, he admitted to watching from

opening statements up to the testimony of Witness Smith. (V19-1774). The State Attorney acknowledged that she failed to tell Victim Stornes not to look for the case on the internet. (V19-1777-78). The trial court opined that the witness did not actually violate the rule of sequestration because he had not discussed the case with other witnesses. (V19-1778-80).

Dr. Stacey Simons was called by the State. She was a forensic pathologist. (V22-2439). She worked from 2011 to 2014 as a medical examiner for Duval County. (V22-2440). She was declared an expert in the area of forensic, clinical and anatomical pathology without objection. (V22-2442). She performed that autopsy of Decedent Davis. (V22-2447). He was 5'11", and he weighed less than 145 pounds. (V22-2447-48). No drugs or alcohol were found in his system. (V22-2449). She determined that the cause of death was multiple gunshot wounds. (V22-2449). She displayed Decedent Davis's black tank-top shirt, second shirt, and a jacket which had a bullet hole in the right side. (V23-2459, 63). There was also evidence of a gunshot to Decedent Davis's thigh near the crotch. (V23-2461-64). There were three bullet wounds in total. (V23-2465). The bullet that entered Decedent Davis's chest perforated his liver and diaphragm, right lung, heart, and aorta and fractured his ribs. (V23-2473-74). That bullet entered lower on the right side of the chest and rose upward diagonally through the chest toward the left shoulder. (V23-2495). A second and third bullet entered the left thigh and the area near the left leg and "what we think of as traditionally the back" causing serious wounds that would not

have been fatal on their own. (V23-2484, 2490, 2497, 2499). One of the lower wounds went the opposite direction from the chest wound, going left to right with no significant upward or downward path. (V23-2521-22).

During Dr. Simons's testimony, she used dowels and demonstrative aids. (V23-2500). She opined that the lower wounds would either have had to come from underneath Appellant if he were sitting up straight or, if they came from the side, Appellant had to be in the vehicle and leaning or collapsing at the time of the lower body injuries. (V23-2501-02, 2504-05).

On cross-examination, Dr. Simons stated that her testimony was based on the evidence, not hypotheticals or assumptions. (V23-2508). Asked to assume that Decedent Davis was standing behind the Durango door at the time of the shooting, she testified, "I would have to see the height of the Durango and the height of the shots from the ground before I could tell you that. (V23-2508). She stated that she assumed Decedent Davis was seated inside the Durango because that is what law enforcement told her. (V23-2509). She opined that the bullet in the leg was "too deformed to have only gone through thigh as opposed to having hit a hard object first such as going through the door. (V23-2513). She never considered the variables in the height of the vehicles. (V23-2514). It was possible that Decedent Davis could stand after being shot in the chest. (V23-2523).

At the close of the State's evidence, Appellant moved for a judgment of acquittal. (V24-2530). Appellant argued that there was only circumstantial evidence of premeditation. (V24-2530).

Also, Appellant argued that the evidence was insufficient to rebut a claim of self-defense on all claims including shooting into an occupied vehicle. (V24-2531). The State argued—and the judge accepted—that self-defense was an affirmative defense that could not result in a judgment of acquittal. (V24-2535).

Appellant called as character witnesses several neighbors of his parents, who were part of an aviation community that Appellant visited with and flew with virtually every weekend. The character witnesses uniformly testified to Appellant's reputation for peacefulness in the community. (V25-2567-70; V25-2578-79, 2587, 2590).

Appellant called Michelle Reeves, who worked at a dry cleaners in the plaza across from the Gate gas station. (V25-2616). She was outside at the time of the shooting, and she testified that she saw the Durango drive in a back alley in the plaza while it was in the plaza, thought she did not see it make any stops. (V25-2618-24).

Appellant called his son and ex-wife and the ex-wife's daughter to testify that Appellant was in a good mood at the wedding and was not visibly intoxicated. (V25-2644, 2649-50, 2657, 2660, 2664, 2677-82).

Appellant called Don Moes, a friend and co-worker of Appellant's during a two-year stint of contract work for the U.S. Navy. (V25-2698-99, 2703-04). He testified that Appellant had a reputation for peacefulness among his fellow employees and that he was a "calming influence in that group." (V25-2701).

Appellant noted that he intended to call Dr. John Abuso, an expert on acute stress reaction, in regard to the issue of why the stress of the shooting could have caused Appellant to leave the area. (V25-2708). The State had deposed the expert, but State Attorney Corey expressed ignorance as to whether the Frye or Daubert standard applied in Florida courts, and she then objected to Appellant's witness testifying because she had no idea what he was going to say and felt he had only limited knowledge of the facts and could only offer personal opinions. (V25-2708-11). The trial judge told State Attorney Corey that she could meet with Dr. Abuso that evening or take a supplemental deposition, and the expert could be called the following day. (V25-2711).

Appellant stated that the expert was a Ph.D, a clinical psychologist, with 30 years experience in treating law enforcement workers. (V25-2756). Attorney Corey again stated that she did not know whether Daubert or Frye applied in Florida, but she declined to further depose Dr. Abuso, asking instead that the defense proffer the witness testimony. (V26-2770).

Appellant proffered Dr. Abuso's testimony. (V26-2773). Dr. Abuso testified that he was a licensed marriage and family therapist with a Masters degree in Divinity and a Doctorate of Ministry in Counseling Psychology. (V26-2773). His license was issued by the Florida Department of Health. (V26-2802). He was originally trained as a prison chaplain. (V26-2773). He obtained his Masters in 1987 and his Doctorate in 1990. (V26-2773). He

had between 50 and 100 hours training in acute stress responses. (V26-2773-74). He worked in prison settings from the 1980s onward. (V26-2774). He had trained hundreds of officers and civilians on "stress, work and family, [and] helping officers to deal with stress." (V26-2776). He read extensively on "fight or flight type scenarios." (V26-2776). He counseled officers in New York, particularly in the aftermath of shootings or other on-the-job violent trauma. (V26-2777-78). He provides counseling for all Sheriff's deputies, police officers, and fire rescue in Palm Beach County, Florida. (V26-2777). He trained Palm Beach County Sheriff's officers in approximately 36 8-hour training courses over three years. (V26-2777). He was a mental health consultant for the Florida Department of Juvenile Justice. (V26-2781). He was a member of the Association for the Treatment of Sexual Abusers and the American Association for Marriage and Family Therapy. (V26-2784). Dr. Abuso had not interviewed Appellant personally, but he had viewed Appellant's videotaped interview with police and listened to Appellant's jailhouse telephone calls. (V26-2771, 2779, 2793). He also interviewed Fiancée Rouer. (V26-2771, 2779). He read the police reports in the case. (V26-2771, 2779). He listened to the 911 calls. (V26-2771, 2779). He testified that the science of studying the physical issues related to emotional stress began in 1939 and was fully developed by the 1970s. (V26-2780). He stated that he was not going to testify as to whether Appellant had the right to use self-defense in this case. (V26-2782). Appellant tendered Dr. Abuso as an expert witness. (V26-2786).

State Attorney Corey asked what expert testimony Dr. Abuso could offer in regard to Appellant's mental state after the shooting and prior to his arrest. (V26-2787). Dr. Abuso answered:

> When someone is faced with a traumatic threat there is 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. 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). He continued:

> What [Appellant] did was protect a very, very upset fiancée who was very erratic, who even in my meeting with her was very upset, and the passivity that he showed in doing whatever she wanted done was---is very typical of someone after an incident like this. If she was worried about the dog, if she was worried about getting arrested[,] everything I've seen in him indicates that he was in a very passive place attempting to comfort her and nothing else mattered.

(V26-2789). On re-direct, he opined

> The...thing that I see consistently post shootings with officers, with civilians, the thing that I see consistently is a sense of very strong passivity. Even very strong people, even officers tend to become very passive after a shooting and that will last 72 hours. That could last longer than that. It has a profound impact on someone, and when you put that together with a woman who is his love, his fiancée who is hysterical and crying and looking for comfort it's the perfect storm for a man to just say, yes, Dear, whatever you say.

(V26-2795). 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). He testified that he had counseled three or four civilians after they had shot someone. (V26-2797). He had never testified as an expert in a criminal case but he had testified in juvenile cases. (V26-2797-98).

He believed that Appellant felt threatened at the gas station. (V26-2799). He had no opinion as to whether the feeling of being threatened was justified or not. (V26-2799).

The trial judge questioned Dr. Abuso extensively, adding that Appellant, in the judge's view,

> [t]ook off. He shouldn't have, but we already have two different ways of looking at it if you would. The state making their argument he took off. He shouldn't have. He should have called 911. He should have done a lot of different things and we have [Fiancée'] Rouer already saying here's what he did and here is why he did some of the things that he did.

(V26-2800-01). Dr. Abuso testified that what Appellant "did was very consistent with 50 years of research on acute stress response. (V26-2801). He added that "fight or flight" was a part of the response,

> but there's a lot else that goes into it, too, depersonalization, just hyper[vigilance], inability to focus generally. We become very, very focused on one thing that needs to be done. In this case he was very focused on bringing some comfort to a fiancée who is—who is losing it.

(V26-2801). In response to the judge's question, Dr. Abuso testified that acute stress disorder was fully reflected in DSM-IV, a standard for psychological diagnoses. (V26-2803-04).

At the close of the proffer, the judge indicated that he had several problems. One is he's assuming that there was a traumatic threat that triggered this acute stress response which is the defense of self-defense which there is no evidence of before the jury at this point, so I would be very concerned about this man testifying before that defense is really placed into evidence so I don't see even if I let him testify that he can be the next witness. That's number one. Number two, I am very concerned about his qualification as it would relate to this acute stress response. He's not a clinical psychologist. He's not a psychologist of any kind. He's basically a licensed marriage and family counselor. I recognize he's got some experience with law enforcement previously but he's never testified as an expert in any type of a case similar to this. I just have serious, serious reservations about his qualifications. Thirdly as I mentioned yesterday, I think in reviewing the previous what was a true stand your ground case I had concerns about the expert in that case testifying, and again the facts of that case were somewhat different obviously, but I was concerned that what the expert was going to testify to was not particularly helpful to a jury to help them decide in that case the ultimate fact. In that case it was whether or not stand your ground applied or whether or not self-defense applied and there was a justification for the shooting.

So the additional problem I have here is we're not talking about the ultimate fact, this witness rendering an opinion about the ultimate that, that is was Mr. Dunn justified in some way, shape or form in the shooting? We've gone beyond that. We're talking about a collateral matter now where this—this gentleman is offering an opinion, I guess, that Mr. Dunn's reaction after the fact could be explained which again has got nothing to do with the ultimate issue and that is was the shooting justified or not.

(V26-2805-07). The judge then expressed concerns about an appellate court reversing a high-profile case "because the defendant didn't get to put on a witness...." (V26-2807).

Appellant's counsel expressed that he had no problem with calling Dr. Abuso after Appellant had testified so that the testimony regarding the fear and traumatic event would be in evidence. (V26-2808). He testified that there was ample case law that every expert has to have a first case in which he or she is admitted as an expert. (V26-2808). Appellant's counsel also clarified that this case was different from the stand your ground case cited by the judge because

> we are not here to have him say to the jury because of the way he acted he was justified in the shooting[or i]t was stand your ground. I even said I want to stay far away from that because I don't want to impute on that jury. And I just want to tell the Court respectfully I don't consider it a collateral matter and this is why: I filed the Motion in Limine intentionally to prohibit the state from taking about everything that happened after what he was indicted for. Your Honor, in argument and case law Your Honor denied that motion and allowed the state to go into it. This is not my case in chief. Part of the defendant's case in chief is to rebut things that were said and made an argument by the state in their case in chief, so it's not like I'm bringing in a new theory or principle.... An extensive education is not necessarily a prerequisite to expertise. In order to qualify as an expert witness one needs only to have acquired such special knowledge of the subject matter of his testimony either by study or by practical experience.

(V26-2810-11). The judge conceded that he accepted the testimony that the science on acute stress disorder was well-established. (V26-2811). The trial judge noted that Dr. Abuso had not testified in a criminal matter, he had not published peer-reviewed papers, and he had not interviewed Appellant personally. (V26-2815). The judge stated that he was inclined

to exclude the witness, but he would "defer to the state." (V26-2813). State Attorney Corey argued that Doctor Abuso was unqualified to testify. (V26-2813). She argued that the State did not believe that Dr. Abuso could aid the jury in deciding whether to believe that Appellant intentionally fled the scene or whether, instead, he was "catering to his girlfriend." (V26-2814). The State and the judge, then, brought up several cases (identified specifically in the argument section) as a basis for excluding experts, and then the judge excluded Dr. Abuso. (V26-2815-19).

Appellant took the stand in his own defense. (V26-2824). He corroborated the testimony that he attended his son's wedding. (V26-2824-44). He testified that he did not drink alcohol on the day of the wedding prior to leaving the hotel to attend the wedding. (V26-2844). He drank three or four small alcoholic drinks at the wedding reception. (V26-2846). He drank water and ate dinner, and he testified that he felt no effect from the alcohol. (V26-2847). He testified that they had to leave around 7 p.m. because the dog was locked in a crate in the hotel room and would need to be let out for "a potty break." (V26-2848). He corroborated that they stopped at the gas station for a bottle of white wine because Fiancée Rouer preferred white wine and they had none available at the wedding reception. (V26-2850).

He testified that after he parked at the gas station, he heard loud, thumping bass music. (V26-2852). He could not make out lyrics; he only heard bass. (V26-2853). He agreed that he complained to Fiancée Rouer about the music, but he thought that

he used the phrase "rap crap." (V26-2853, 2941). He testified that both the Durango and his own car were shaking, his rearview mirror was shaking, and his eardrums vibrated. (V26-2854). He testified that he had asked people in the past to turn their loud music down, as he lived near a beach, but they had always done it happily and it had never caused him to be angry. (V26-2854-55). He testified that he habitually thanked people for turning down music when he requested it. (V26-2855). He did not recall telling the Durango passengers that he could not hear himself think. (V26-2855-56). He corroborated that prior testimony that he asked for the music to be turned down, that the music was turned down, and that he "said thank you." (V26-2856). He corroborated that he asked for the music to be turned down; he did not order or command. (V26-2865). He testified that he had lowered his window "because, you know, who's going to hear you when the window's up...." (V26-2857). He directed his request to the front passenger seat occupied by Victim Thompson though he could not see Victim Thompson through the tinted window. (V26-2856-57). After saying thank you, he saw that the rear passenger window was down. (V26-2857). He then put his window back up. (V26-2858). He testified that very soon after that, he started hearing "things like F him and F that" in a mean-spirited or annoyed tone. (V26-2858). He stated that he did not react to the comments "even a little bit." (V26-2858). He testified that he was not angered. (V26-2858). He corroborated the testimony that the music was then turned back up. (V26-2859).

Appellant testified that he suffered from ear damage in his right ear and his left ear "kind of compensates for it." (V26-2860). He testified that the bass thumping caused pain in his left ear, the sensitive ear. (V26-2860). He testified that when "they turned the music on the second time I wasn't going to ask them for any more favors again." (V26-2860). He testified that at that point, the comments "got ugly. I heard, you know, something something cracker...." (V26-2860). He testified that he did not react. (V26-2861). He looked forward and hoped that Fiancée Rouer would come back from the gas station store. (V26-2861). He testified that the angry voice from the Durango elevated and he could now be heard over the loud music. (V26-2861). Appellant testified that "after hearing the something something cracker and this and that I hear I should kill that mother fucker, and I'm flabbergasted. I—I—I must not be hearing this right." (V26-2862). He testified that he started to listen closely, thinking he had heard wrong. (V26-2862). He testified that then, "in an even more elevated voice I hear I should fucking kill that mother fucker and now he's screaming." (V26-2862). Appellant testified, "There's no—there's no mistake of what he said. That is what he said." (V26-2862). He thought that it was time to try to de-escalate the tension and calm things down. (V26-2862). He put his window down. (V26-2863). He then saw Victim Stornes walk in front of the two vehicles. (V26-2863). Appellant looked at Decedent Davis in the rear passenger seat. (V26-2863). He disagreed that the window was halfway down; he testified that the Durango's window was all the way down.

(V26-2863-64). Appellant then asked, "[A]re you talking about me?" (V26-2864). He wanted to be clear whether Decedent Davis was directing the remarks at him and if he was, he wanted "to make it clear that I had said thank you. I mean I didn't mean any disrespect by asking him to turn the music down." (V26-2864-65). Appellant testified that Decedent Davis immediately picked something up and slammed it against the door. (V26-2866). He testified that he saw what looked like four inches of a shotgun barrel. (V26-2867, 2869). He testified he did not reach for his gun. (V26-2870). He felt in fear of his life. (V26-2870). He felt incredulous. (V26-2870). He was aware that anyone firing from the Durango could hit someone in the gas station including Fiancée Rouer. (V26-2871). He testified that Decedent Davis then cracked his door open. (V26-2871). He heard the door hinge move and he saw the door move "just a little bit." (V26-2872). Appellant testified that Decedent Davis then said, "[Y]ou're dead, Bitch." (V26-2872). He testified that he became even more fearful. (V26-2872). He thought that Decedent Davis was going to shoot him. (V26-2872). He testified that Victim Brunson was not saying anything, but continued to scowl with an angry expression. (V26-2873). He testified that Decedent Davis began to exit the vehicle. (V26-2874-75). Appellant testified that Decedent Davis said, "[T]his shit's going down now."(V26-2875). Appellant testified that he said, "[Y]ou're not going to kill me, you son of a bitch." (V26-2876). He corroborated that he retrieved his gun. (V26-2876). He testified that he removed the gun from the holster, put it up to the window, cocked it, and

pointed it "in the direction of my attacker at that point." (V26-2881). He testified that he fired only in self-defense, that he had never met any of the occupants of the Durango, and that he had no malice or intent other than to defend himself from Decedent Davis's attack. (V26-2882). After he fired the initial shots, he denied that he moved the gun to find any second target. (V26-2884). He testified that he had "tunnel vision. My hearing kind of dimmed." (V26-2884). He only fired at Decedent Davis's door, as that was "the last place I saw my attacker...." (V26-2884). He felt that he was fighting for his life. (V26-2887). He was attempting to aim at Decedent Davis's door when the Durango backed up, causing some of the bullets to strike the front passenger door. (V26-2888). He testified that he was not trying to shoot the front passenger. (V26-2888). The Durango backed up behind Appellant's Jetta. (V26-2888). Any shot coming from the Durango would now possibly hit someone exiting the gas station. (V26-2889-90). Appellant thought he fired one further shot at the Durango at that point, but admitted that the photographic evidence convinced him that in his "panicked state...I shot three times." (V26-2890). He was still in fear for himself and Fiancée Rouer. (V26-2891). He stopped firing when the Durango had driven forward enough that "it appeared that the threat was over." (V26-2892).

When Fiancée Rouer emerged from the store, he told her to get in the car. (V26-2893). He was worried that the Durango might return. (V26-2893). He was worried about retaliation. (V26-2894). He was shaking. (V26-2894). Fiancée Rouer was hysterical.

(V26-2894). He did not think he had hurt anyone. (V26-2897). Returning to the hotel, he kept looking outside, thinking that the Durango was going to come back. (V26-2897). He tried to remain stoic and comfort Fiancée Rouer, who was hysterical. (V26-2898). He testified that he saw the news of a fatality in the shooting while searching news stories on his cellular telephone, and he "ran to the bathroom" and "vomited." (V26-2905). He testified that he did not fall asleep until 5 a.m. (V26-2904).

He corroborated the testimony that Fiancée Rouer woke up, saw a television news story about the death, and became panicked. (V26-2907). He corroborated that she asked him to take her home. (V26-2907). They departed the hotel at 8 a.m. (V26-2909).

Appellant testified that he called his neighbor, Ken Lescallett, at 8:30 a.m. (V26-2909). He told Ken that he was going to arrive home around 10:30, that he had something very important to discuss with him, and he wanted to make sure that Ken would be home. (V26-2912). He said that he would be. (V26-2913). Ken was a federal law enforcement officer who knew him personally, and he hoped that Mr. Lescallett would accompany him to the Brevard County Sheriff's office to "tell them what happened, and, you know, hopefully they would listen to my side." (V26-2909). He testified that he was not in a normal mental state. (V26-2901). He testified they rode home mostly in silence broken by fits of Fiancée Rouer crying. (V26-2910). He did not think he would be arrested. (V26-2910-11). He had a valid pilot's license, access to a plane, and money in the bank

if he had wanted to flee. (V26-2911-12). When they arrived home and received the call from Detective Musser, Appellant said,

> I know why you're calling. It was self-defense. I'm on my way to a law enforcement officer's home right now. My intention is to make my report to the Brevard County Sheriff.

Appellant testified that Detective Musser told him that that was a good idea, but that he only had about 10 minutes to be on his way. (V26-2916). He left his firearm in his car, did not try to conceal it, and went to Ken's house where he told him the basic facts of the shooting. (V26-2917). Ken called the local sheriff's office to talk to an officer that he knew. (V26-2918). Appellant then received another phone call on Fiancée Rouer's cell phone that he should come outside and surrender. (V26-2919). He did so. (V26-2920). He actually emerged outside of the police team's perimeter, approached them from behind, and identified himself. (V26-2921).

During cross-examination, Appellant testified that Decedent Davis's body had been inside the car, but his feet had been outside. (V26-2935). He stated that

> at the time his threats and actions left no doubt in my mind that [what Decedent Davis was holding] was a firearm. It looked like a firearm. He was treating it like a firearm. He wasn't saying I'm going to beat you up. He was saying I'm going to kill you. You're dead.

(V26-2974). He testified that when he fired, he

> was pointing towards my attacker. I hit the door, and unfortunately he was right there behind the door. My intention was to stop the attack, not necessarily end a life. It just worked out that way.

(V26-2977). He corroborated Witness Atkins's testimony that as the Durango was moving, he "opened my door and I like took a little hop out" and continued to fire. (V26-2978). He testified that he moved behind the Jetta to make it more difficult for Decedent Davis to shoot directly behind him. (V26-2983). He fired the final shots at the rear of the Durango in order to prevent Decedent Davis from shooting back at him, not to kill anyone. (V26-2983-84) He 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).

At the close of Appellant's case, Appellant renewed the motion for judgment of acquittal. (V27-3027). Appellant argued that the State had not met its burden to offer evidence rebutting self-defense. (V27-3027-28). The State answered that conflicts in the evidence and the issue of Appellant's credibility prevented judgment of acquittal. (V27-3028-29). The judge denied judgment of acquittal. (V27-3029).

The State put on a rebuttal case. The State called Fiancée Rouer, who testified that Ken Lescallett called Appellant on the

cell phone on the drive from the hotel home, that the call was on speaker phone, and that Appellant did not tell Ken Lescallett that he had to discuss something important with him later on. (V27-3061). She had no memory of Appellant, prior to his arrest, telling her that he saw a firearm in the Durango. (V27-3063).

Detective Mark Musser was called in order to introduce the videotape of his interrogation of Appellant on the day of his arrest. (V27-3070). His description of the shooting incident was largely the same as his testimony. (V27-3095-96). He did state that Fiancée Rouer had pushed him to contact law enforcement, but Appellant admitted that he had insisted on "waiting until we got around people we knew." (V27-3096). During the interview, Detective Musser told Appellant, "[B]elieve me, we deal with guys who [if] you ask them to turn the radio down they would get out of the car and shoot you. We dealt with those kind of dudes all the time." (V27-3108). Appellant admitted that it was possible that he imagined something else to be a shotgun barrel, opining that perhaps Decedent Davis was holding a stick. (V27-3115-16). He insisted that he did not imagine that Decedent Davis began to emerge from the car saying, "You're dead, Bitch." (V27-3115-16).

The State was able to show from Appellant's call records that Ken Lascallett may actually have called Appellant at 8:30. (V26-3010).

Over Appellant's objection, the trial judge refused to read an instruction on a presumption of fear where a person attempts to remove someone from an occupied vehicle because "there's no

evidence of it....” (V28-3241-45). The State argued that the instruction did not apply to an attempted entry into a vehicle. (V28-3244-45).

During closing argument, the State argued that the motive for the murder was that Appellant “got angry at the fact that” Decedent Davis “decided not to listen to him” and “shot to kill.” (V28-3300). The State added that he was “shooting for his target and aiming at Jordan Davis.” (V28-3301). The State argued that Appellant “intentionally engaged these boys, and he’s the one who escalated that situation.” (V28-3302). The State argued that every “step in this process was under his control. Every action [Appellant] took was a conscious decision that he made to escalate the situation and ultimately kill Jordan Davis.” (V28-3308). The State argued that after the shooting, Appellant fled the authorities. (V28-3311).

On second closing, the State argued that Appellant “didn’t shoot into a car full of kids to save his life. He shot into it to preserve his pride, period.” (V28-3407). In the final summation, the State told the jurors, “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 jury submitted a written question as follows: “Is it possible to not reach a verdict on one count and reach a verdict on other counts?” (V29-3558). Without objection, the trial judge informed the jury that the answer to the question was “yes.” (V30-3564-65).

The jury submitted another written question asking,

> Is the defense of self-defense separate for each person in each count? For example, self-defense against person A, [self-defense against person] B, [self-defense against person] C, [self-defense against person] D[?]
>
> Are we determining if deadly force is justified against each person in each count? For example, deadly force against person A, [deadly force against person] B, [deadly force against person] C, [deadly force against person] D....
>
> Or if we determine deadly force is justified against one person is it justified against the others[?]

(V6-1020; V30-3574-75). The judge stated that his way of looking at the question was whether "the defense of self-defense [was] separate for each person in each count and the answer to that is yes." (V30-3575). The State agreed. (V30-3575). The State argued that because Appellant knew there were multiple people the car and multiple shots, "self-defense would have to apply to each individual victim." (V30-3584). The trial judge agreed. (V30-3584). Appellant asked the judge to additionally remind the jurors to re-read the instructions. (V30-3586). The judge denied that request, assuming that the jurors had already read the instructions but had been unable to understand them. (V30-3586). Appellant objected to the third answer, but the trial judge opted to read his answer as prepared. (V30-3589).

The jury informed the judge that they had reached a verdict on four charges, but they had deadlocked on one. (V30-3591). The judge read an Allen charge. (V30-3593-94). When the deadlock

continued, the judge and parties agreed a mistrial was proper on count I. (V30-3603).

In regard to counts II, III, and IV, the jury acquitted Appellant of attempted first degree murder, but did find him guilty of attempted second degree murder. (V5-942-47; V30-3604-05). Under all three counts, the jury found that Appellant discharged a firearm during the commission of the offense. (V5-942-47; V30-3604-05). Under Count 5, the jury found Appellant guilty as charged of shooting into an occupied vehicle. (V5-948).

On March 3, 2014, Appellant filed a motion for new trial. (V6-1062-63). On March 10, 2014, the trial court held a hearing on Appellant's motion for new trial. (VSupp1-8). In regard to the issue of the jury questions, the judge reviewed the written argument and then stated that the jury

> posed three separate, if I remember correctly. All three basically referenced the same concept and that was if they were hung on one count, if they had reached the verdict on the others, did the verdict on the others still count? The way I just posed that, the answer is yes. The way they posed some of those questions, the first two, I think, in essence the answer was yes. The last, quote, part of the question, they kind of reversed it and said would the whole case be a mistrial if they were hung on one count? The simple answer was no.

(VSupp1-15-16). The trial court denied the motion. (V6-1067). The judge then lauded the jury for its efforts and denied the motion for new trial. (VSupp1-16-17).

Second Trial on Count I

On September 2, 2014, Appellant re-filed the motion to prohibit spectators from wearing supportive clothing or messages. (V6-1163; V7-1166-1178). The trial court again granted the motion. (V7-1201-1216, 1291; V8-1514-1523).

On September 2, 2014, Appellant filed a motion for change of venue, arguing that the case had been overly publicized in Duval County. (V7-1179-1186). The motion was argued at a hearing on September 11, 2014. (V8-1531). The judge found that it was premature to rule on the motion without attempting to first empanel a jury. (V8-1533-34).

On September 16, 2014, Appellant filed a motion *in limine* to exclude the expected testimony of Dr. Stacey Simons on the ground that Dr. Simon's expected expert scientific opinions about bullet trajectory and the location of the Victim Davis at the time of the shooting did not satisfy the requirements of section 90.702, Fla. Stat. (2013). (V7-1217-82). At argument on the motion, held on September 18, 2014, Appellant made it clear that there was no objection to Dr. Simons's testimony on matters relating to forensic pathology or paths that bullets took through Victim Davis's body. (V9-1571). The objection was to accident reconstruction testimony where Dr. Simons would testify concerning where Victim Davis was sitting at the time of the shooting, the position of Decedent Davis at the time of the shooting, and the path of the bullets between the gun and Victim Davis's body. (V9-1571-73). The State argued that because Dr. Simons could identify exit and entrance wounds, she could look at the dowels placed through bullet holes by other technicians

and then opine concerning the path of the bullets because "it is common knowledge that bullets go in a straight path unless and until they hit something." (V9-1575). Appellant argued that Dr. Simons was an expert on "the path of a wound of a bullet through a body" and the determination of entrance and exit wounds, but argued that Dr. Simons was not an expert on—and had not been trained in—firearms analysis, ballistics, or trajectory analysis. (V9-1576). Appellant argued that to the extent that Dr. Simons thought that her opinions were simply common sense or common knowledge about how bullets would travel, they did not qualify as expert opinion and her lay opinions were inadmissible. (V9-1576-77). The trial court noted that Dr. Simons had rechecked her impressions based on new possibilities raised during her cross-examination during the first trial. (V9-1581). She "made some measurements that she hadn't done." (V9-1581). She examined the vehicle for the first time. (V9-1581). She had never placed dowels before, but she "had seen the pictures where the Sheriff's Office had done that themselves on their investigation." (V9-1582). The trial court denied Appellant's motion, finding Dr. Simons had the necessary scientific, technical, or specialized knowledge necessary to testify as an expert on Decedent Davis's position at the time of the shooting. (V9-1582). The trial court then entered an order finding Dr. Simons to be a reliable witness. (V7-1303-08).

On September 22, 2014, the State brought Appellant to trial on Count I, premeditated murder of Decedent Davis, before the

Honorable Russell L. Healey. (V31-1). Appellant was represented, however, by the Office of Regional Conflict Counsel. (V1-31-2).

At the outset of the trial, Appellant renewed the motion for change of venue. (V31-11-12). Appellant noted that extensive media coverage had continued from the time of the filing of the motion. (V31-12). Appellant noted that the local newspaper, Florida Times-Union, carried the story of the trial as its front page story. (V31-12). Appellant also noted that a public rally was being held and that the rally was sanctioned by Decedent Davis's parents. (V31-12). Appellant noted that the rally took place at the time that potential jurors were arriving at the courthouse and that protesters were using megaphones and chanting. (V31-13). Appellant's counsel stated that she was able to hear the chanting in her fourth-floor office, adding that the jurors were on the second floor. (V31-13). The State responded that it had done "everything humanly possible" to ensure the "integrity of the process...." (V31-14). The judge noted that the previous trial had forced judges "to move out of their offices" in order to work. (V31-16). The judge noted that he had heard that the rally was being moved to the same side of the building as where the potential jurors were sitting. (V31-16). The judge added that it was "not helpful to us getting a jury here in Jacksonville." (V31-16). The judge stated that potential jurors could be examined as to the effect of the protests on their mindset. (V31-16-17).

Potential jurors were brought into court for *voir dire* through an unusual door because "they were worried about people seeing

them out in public." (V31-22). The judge noted, "Well, they're going to get seen in public when they go to lunch." (V31-22). Most or all of the prospective jurors stated that they had seen media reports of the case and the first trial. (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).

During a bench conference, the judge noted that he expected that Appellant would move to exclude jurors for cause if they said that they had developed a strong opinion about the case based on media reports, but the judge noted that such jurors need not be removed for cause if they testified that they could set that opinion aside unless the parties agreed that that should be done. (V31-130-31). The judge opined that *voir dire* would be pointless if the attorneys asked whether potential jurors had formed a strong opinion about the case because he suspected that, "regardless of what they say, 90 percent of these" jurors would hold an opinion about the case. (V31-134-35). Appellant suggested removing any potential jurors who stated that they already had a strong opinion about the case. (V31-135-36). The State disagreed, arguing that even potential jurors with strong opinions as to guilt might be able to set those opinions aside. (V31-136). The judge declined to make a premature decision as to what to do with jurors who had already formed a strong opinion in the case. (V31-137).

Prospective Juror 32, who was eventually selected as a juror, testified that he knew about the case and he had formed a fixed opinion about the case, but he could set his opinion aside. (V32-207). He admitted that he had followed the case on several news sites and that he had had discussions about the case with his colleagues and students concerning "the nature of trial and bad choices and decisions." (V32-209). He watched highlights of the first trial on CNN after work. (V32-211). He spent "a couple hours a day" watching the first trial. (V32-212). He stated that his opinion of guilt was a proverbial six out of 10, but that could be set aside in favor of impartiality. (V32-214-15).

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). She did not recall any testimony. (V4-244). She did not know specifics about the trial. (V4-244).

Prospective Juror 58, who was eventually selected for the jury, knew about the prior case but did not know details about the charges or verdicts from the prior trial. (V32-255).

Prospective Juror 71, who was eventually selected for the jury, had seen local and national news regarding the first trial and the case. (V32-301). He watched some of the actual trial. (V32-302). He had "a general idea of the whole case." (V32-303). He claimed that such knowledge would not impact his ability to act as a juror. (V32-303-05). Prospective Juror 71 was

eventually placed on the jury, first as an alternate and then as a regular juror replacing Juror 4.

During a recess, Appellant's attorney showed the court photographs of protests outside the courthouse that occurred "along the central walkway that directly leads from the front door of the courthouse to the street, just around the time you were dismissing some of our jurors to come back today." (V32-289). The photos showed signs that said "Justice for Jordan" and "Michael Dunn is a murderer; we will get justice for Jordan." (V32-289-90). The photos and a new local news story about the trial and demonstrations were attached as Exhibits 2 and 3 to the motion for change of venue. (V32-291).

During another recess, it was stated that protesters had used a bullhorn outside of the room where potential jurors were placed, and Decedent Davis's mother was one of the people speaking on the bullhorn. (V32-650-52).

Appellant noted, at one recess, that only 11 of 140 prospective jurors had not heard of the case. (V35-891-92).

Appellant renewed all objections, and the judge again denied them, mentioning the motion to change venue in particular. (V35-44). The jury was sworn. (V35-923).

On September 26, 2014, the trial court denied Appellant's renewed motion for a change of venue. (V7-1336-40).

Midway through the State's case in chief, the trial court dismissed Juror 4, substituting an alternate. The State noted that the online version of Folio, a Jacksonville tabloid, had printed an interview with a rejected prospective juror. (V38-

1588). Folio quoted that rejected juror as saying that Juror 4 sat next to him during jury selection and had remarked that State Attorney Angela Corey, one of the three prosecutors on the case, was unprofessional in laughing during *voir dire* and that she would have trouble convincing a jury even that Juror 4—who was obese and enjoyed making self-deprecating remarks about his own weight-was fat. (V38-1591-95). In light of the comment, the State moved to remove Juror 4 and replace him with an alternate. (V38-1589). Appellant argued that if Juror 4 had made such a comment, it would not have constituted misconduct as it would not have been in violation of any court order that had been in effect at the time. (V38-1589-90). The judge conceded that there was no court order in effect at the time that would have barred the comment, but argued that the comment would constitute misconduct because questions had been asked as to whether anyone had bias against the State. (V38-1590). Juror 4 initially stated that he did not recall "Juror 30," the man quoted in the tabloid. (V38-1596). Once he was physically described to Juror 4, Juror 4 recalled speaking to the man, admitted that he frequently made jokes about his own weight, and stated that he thought State Attorney Corey's levity during *voir dire* had been unprofessional in light of the seriousness of the case, though he did not recall saying that Attorney Corey would not be able to prove to jury that he was fat. (V38-1596-1605, 1615). He opined that State Attorney Corey was competent to try the case. (V39-1605). He stated that he maintained that he was "100

percent" certain that he could be fair and impartial in the case, adding:

> I'm a joking kind of guy, but I take this 100 percent serious. This is—this is life and death, and this is justice on the other side.... And I've formed no opinion one way or another because I haven't heard all of the evidence.

(V39-1606-07). The State again moved to replace the juror with an alternate. (V39-1607-10). Appellant argued that Juror 4 had not committed any misconduct and could not, under Washington v. State, 955 So.2d 1165 (Fla. 1st DCA 1997), be removed. (V39-1610). Appellant argued that any negative first impression created by Attorney Corey during *voir dire* was something "she's created...on her own, and that's just the risk of going to trial that you create a negative impression of yourself as an attorney." (V39-1611). Without input from the State, the trial judge opined that Wilson v. State, 608 So.2d 842 (Fla. 3d DCA 1992) supported his right to remove the juror. (V39-1611). The judge added that even if removing the juror was improper, it would be harmless error to replace him with an alternate juror who had been present for the entire trial. (V39-1612). When asked by Appellant if the judge was making a finding of juror misconduct, the judge answered:

> I guess it would be a form of misconduct in that he did not reveal his displeasure with the State Attorney's Office and apparently particularly Miss Corey and that he is of the opinion she could not prove much of anything to a jury beyond a reasonable double, including his size, which is very apparent....
>
> And I know misconduct sounds like a harsh word. And maybe that's the word that's used in a lot of these cases, but it's not like he violated a direct Court

> order. Obviously, that's not the case. But it's being less than candid.

(V39-1626, 1627).

The rejected juror in the article was located, and he testified on the matter. (V39-1634). He testified that Juror 4, who he described as a 400-pound white schoolteacher, had stated that he "really hated Corey's humor and made a joke that she would have a hard time proving to the court that I am fat. There would still be reasonable doubt." (V39-1635). He added that Juror 4 made the comment in the hallway, and that he said it "pretty much to everybody around him." (V39-1635). He added that Juror 4 said that State Attorney Corey "needed to stop making jokes and get on with the trial." (V39-1637).

The judge removed Juror 4 from the jury, remarking:

> [T]here is reasonable doubt as to whether or not Juror [4] could be fair and impartial, that he did not disclose his seeming animosity for Miss Corey or her—his belief in her lack of ability, I guess, is one way to put it, that she couldn't prove the he was—I hate to use the term but it's in the article—fat to a jury. There would still be reasonable doubt and he's a large man. So he's excused. And that will bring No. 71 as Juror No. 12.

(V39-1639). Appellant objected to Juror 4 being removed because no misconduct occurred. (V39-1639). After being informed of his dismissal, Juror 4 stated:

> If I offended Prosecutor Corey, I apologize. I don't think I said it but I might have. It's nothing personal. I promise. And also I just want the Court to know that my notes, if you look over my notes at some point when this is over, you'll see that I took fair notes, just to make sure you know I was taking my job seriously.

(V39-1644). Juror 4 noted that he was concerned about the matter reflecting on his character, adding that he had only been joking. (V39-1645, 1648). The judge added, "Well, it—I'm trying—it's just a matter of everybody being comfortable, I guess, that...you could be completely fair and impartial...." (V39-1645). During a later recess, the judge *sua sponte* cited Wiley v. State, 427 So.2d 283 (Fla. 1st DCA 1983) and James v. State, 843 So.2d 933, 936 (Fla. 4th DCA 2003) as further support for his decision to dismiss Juror 4. (V39-1778-79).

During her testimony at the second trial, Fiancée Rouer testified that her engagement and relationship with Appellant had ended. (V40-1835-36).

Prior to Dr. Simons's testimony, Appellant reiterated the objection to her testimony about bullet trajectory and use of dowels to illustrate the position of the car door and Decedent Davis. (V40-1951).

Dr. Wendy Meacham, forensic investigator with the Medical Examiner's Office for Duval County, testified that she worked in that office in November 2012, she worked under the supervision of Dr. Stacey Simons, and she assisted in Decedent Davis's autopsy. (V40-1962-63). She collected the personal effects that were located on Decedent Davis's person at the time of his death. (V40-1964). She collected a key and keychain, $1.25, a bracelet, earrings with jewels, a cellular telephone, a watch, and a Smith and Wesson brand knife. (V40-1965).

Dr. Stacey Simons testified. (V40-1969). She had been a licensed physician in Florida since 2011. (V40-1970). She was

currently an oncological surgical pathologist at the Moffitt Cancer Center. (V40-1970). Prior to medical school, Dr. Simons had a career as a graphic artist. (V40-1974). She completed medical school in 2006. (V40-1970). She performed a four-year residency with combined anatomic and clinical pathology residency with one year at Brigham and Women's Hospital in Boston and three years at the University of Washington in Seattle. (V40-1970). She then accepted a one-year fellowship in forensic pathology with the Miami-Date County medical examiner department. (V40-1971). After that, she worked as an associate medical examiner for Duval County from July 2011 to January 2014. (V40-1971). She had completed approximately 800 autopsies in Florida. (V40-1972). She testified eight times as an expert in forensic pathology in Florida courts. (V40-1972). 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). The defense had no objection to Dr. Simons being declared an expert on pathology and forensic

pathology. (V40-1981). Dr. Simons testified about her autopsy of Decedent Davis. (V40-1987). There were no drugs or alcohol found in Decedent Davis's system. (V40-1991). His death was caused by multiple gunshot wounds and was deemed a homicide. (V40-1992). She located three gunshot wounds to Decedent Davis's body. (V41-2012). The first was a "penetrating gunshot wound of the abdomen and chest" that entered Decedent Davis's right side. (V41-2012). That bullet passed through to the left side of Decedent Davis's body, causing significant internal damage. (V41-2015). The oval shape of the wound indicated that the bullet had struck something—perhaps the car door—before entering Decedent Davis's body. (V41-2014). That wound alone would have been fatal. (V41-2022). A second gunshot entered Decedent Davis's left thigh, penetrating muscle and soft tissue heading from right to left with no significant vertical change. (V41-2024). That gunshot would not have been fatal on its own. (V41-2025). A third gunshot wound was a "perforating gunshot wound to the inner right thigh. (V41-2035). The third wound would not have been fatal on its own. (V41-2040).

Dr. Simons testified that she had observed three gunshot holes to the rear passenger door of the Durango, she had put dowels through the doors, and she opined that she was "able to match those bullet wounds with the bullet holes through a range of motions." (V41-2047). She testified that there was a

> range of motion that a person might engage in when they want to move [to] possibly protect themselves. And that range of motion includes reaching over for cover, trying to duck, trying to lift a leg up. And

> the reason that this is important is because with a shot coming from the door into the chest, to have that diagonal position become horizontal, based on the bullet track through the door, we need to account for the body bending over.

(V41-2048). She testified that the wounds were not consistent with the body leaning out of the car door. (V41-2049). She testified, "If somebody is trying to make a move in their seat, maybe make some sort of evasive or protective action, they're going to try and duck. They're going to get small. They're going to crouch and do anything they can to change their position." (V41-2050). She admitted that she could not tell "which bullet created which path" through Decedent Davis's body. (V41-2051). She testified that the wounds to Decedent Davis's thighs "appeared just like somebody who is in a movement, either ducking for cover or getting hit and then further falling backwards." (V41-2051). She opined that Decedent Davis was not standing between the car and the open car door because that space was "too compact of a space for him to have been able to move and pivot his body in a way that you could have sustained a shot on the front of the left thigh and then from the back on the right thigh, as well, the chest." (V41-2052). Dr. Simons listened to the audio of the gunshots in order to hear the "quickness of the sequence" of the shots. (V41-2053). Though she admitted that not even the chest wound would have immediately immobilized Decedent Davis, she opined that Decedent Davis would not have been able to "make it [back] into the vehicle" during the shots. (V41-2054). She studied a photograph of dowels placed

by Detective Kipple into the door of the Durango. (V41-2056). She then stated that she herself had gone to the Durango and "placed those dowels myself," using the photographs of the detective's work as a reference in order to "place them in a way that was close enough to make a common-sense judgment as to whether or not I had come close enough in a common-sense judgment as to whether or not those matched with my opinion of Jordan Davis's position within the car." (V41-2057). She used the dowels to help formulate her opinion that Decedent Davis was sitting in the car at the time of the shooting. (V41-1058). She added that her opinions were meant "in a common-sense way—this was in no way meant to be a reconstruction." (V41-2059). She added that the vehicle had been moved, and she didn't have the benefit of seeing the Durango in the position it was in during the shooting. (V41-2059). She then testified that she had examined the angles of the door as it opened, reasoned that doors swing back shut unless they are completely opened, and then examined the door when it was fully propped open and when it was closed. (V41-2060-61). She opined that it was important to consider the short time in between the three shots. (V41-2061). She thought that it was important that Decedent Davis was seated. (V41-2061). She opined that Decedent Davis was not leaning out of the Durango or leaning out of the door at the time of the shooting. (V41-2061-62). She then stepped down from the stand to use a bendable, poseable dummy nicknamed "Bendy" as a demonstration to the jury. (V41-2062). She was asked by the State to assume that an ordinary table in the room was the back

seat of the Durango even though "it's not a great back seat." (V41-2062). The prosecutor also asked Dr. Simons to assume that "there is a car parked at some distance next to the red Dodge Durango." (V41-2062). The prosecutor also asked Dr. Simons to assume that the "shooter was firing the first shots from the driver's window and that he was firing with a 9mm Luger." (V41-2063). The doctor was then asked to bend the dummy into the position she felt Decedent Davis was in at the time of the shooting. (V41-2063). She testified that Decedent Davis's arm was not at his side because the bullet would have penetrated it instead of moving directly into the chest. (V41-2064). She opined that Decedent Davis was not sitting upright at the time of the shooting. (V41-2064). She used the dummy to illustrate the body moving to its left away from the door. (V41-2064). Dr. Simons admitted that the dummy was "a challenge" to use because the legs did not move in a natural way. (V41-2065). She opined that Decedent Davis was not standing outside the vehicle when he was shot. (V41-2065). She did not believe that he was leaning out of the vehicle when he was shot. (V41-2066). She did not believe that he was leaning out of the window when he was shot. (V41-2066). She believed 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). She opined that the three bullets that entered the car door were the three that injured Decedent Davis, and none of the other bullets struck him. (V41-2081).

On cross-examination, Dr. Simons testified that if Decedent Davis were sitting with his left arm raised and resting on the top of the back seat, he would not have been hit by the bullet that passed through the top bullet hole on the car door. (V41-2085). She admitted that she did not know the size of Appellant's Jetta or where it had been located in relation to the Durango. (V41-2093-94).

When the State rested, Appellant moved for judgment of acquittal based on the lack of sufficient evidence of the element of premeditation. (V41-2119). Appellant argued that the evidence, in the light most favorable to the State, was that Decedent Davis escalated the situation and Appellant "acted immediately and instinctively to that escalation." (V41-2121). The State responded that Appellant

> pulled out a semiautomatic weapon, pointed it directly at Jordan Davis and shot ten times in the vehicle in which he was sitting, meaning he had a specific intent to kill. Because there is no time limit on it, the evidence is abundantly clear he had sufficient time to make a conscious decision to kill and then proceed to pull the trigger, which he knew would result in the death of a human being. That's all that's required for premeditation.

(V41-2122). The judge found that there was "no time limit or time frame required for premeditation," and that the remark to the effect that that "you're not going to talk to me like that" in combination with retrieving and firing the firearm constituted sufficient evidence of premeditation. (V41-2123). The motion was denied. (V41-2123).

The trial court also denied the defense's request to use diagrams—which had been updated in light of the trial court rejecting the earlier version—because the Jetta was not depicted as so close that the Durango doors could not open all the way and because the Jetta was not completely parallel to the Durango. (V41-2129-35).

The Defense called Michael Knox, a forensic consultant. (V41-2145). Mr. Knox testified that he was an accident reconstruction expert. (V41-2145). His company had been paid for his testimony, but he was a salaried employee who had testified for the State in criminal cases in the past. (V41-2147). He testified about his extensive expertise and was accepted as an expert by the court and State without objection. (V41-2147-52). He had reviewed all of the crime scene photographs, and he had examined the Durango. (V41-2159). He took photographs of the Durango, placed dowels through the bullet holes, used laser mapping equipment, and took measurements of the vehicle. (V41-2159). He measured the parking places. (V41-2161). He examined the spots where crime scene photos had placed bullet casings. (V41-2164). He observed in photographs that the **front** passenger window of the Durango had been partially open at the time the bullet went through it. (V41-2168-70). He testified that the window shattered because of a bullet striking part of the window that was housed in the car door. (V41-2171). He also opined that, based on an analysis of the glass and the door, Decedent Davis's window, the rear passenger window, was "certainly not fully up or close to fully up." (V41-2172). He added, "It's got to be

close to fully down. It can't be close to fully up." (V41-2173). He concurred that the child locks were not engaged at the time the police took crime scene photos of the Durango. (V41-2192). He stated that the second shot was fired .243 seconds after the first, the third shot was fired .227 seconds later, and the total time for all three shots was .47 seconds. (V41-2196). He testified that there was only a gap of .842 seconds and then a series of four more shots began, "occurring at about a quarter second" intervals. (V41-2196). He was able to determine that the Durango was not moving during the first three shots but was moving during the second group of shots. (V41-2197). He testified that Decedent Davis's car door was 40 inches long and when opened fully, it was open at a 53 degree angle. (V41-2199). One needed a clearance of 2'8" to open the door fully. (V41-2199). The parking spaces were nine feet wide. (V41-2199). He opined that the physical evidence was that because the cars were close together and Appellant fired from a front seat toward someone at the rear passenger area of the Durango, behind and to Appellant's left, Decedent Davis's door had to be open in order for the three bullets to strike it in the way that it did. (V42-2207-08). He opined that for the bullets to have been fired at the rear passenger door while the door was closed, Appellant's Jetta would have had to have been much further away from the Durango. (V42-2209). He was able to say with 100 percent certainty that the car door was open to some extent. (V42-2210-11). He opined that if the door had been closed, Decedent Davis would had to have been pressed "against the seat in front of

him" in order to be hit by the shots coming through the door, but if the door had been open, he could have been closer to a seated position. (V42-2217-19). He opined that it was improper to do accident reconstruction by looking at the wounds. (V42-2219). He agreed that Decedent Davis had to be on the interior side of the door, not the exterior, and that Decedent Davis had to have been leaned over toward his left. (V42-2220). He opined that no one could determine the position of the body solely from the placement of the wounds

> because what you have is the alignment of the torso for that particular shot, alignment of his upper legs for the other shots in the groin area. But what the rest of his body is doing, his arms, his head, his feet, there's no way to tell that.

(V42-2221). The torso had to have been "at least a good bit inside but not necessarily entirely...." (V42-2221). He was able to say that Decedent Davis was partially outside of the car, but he could not say whether Decedent Davis had placed his feet on the ground. (V42-2222). He opined that

> you have to be at least partially out just to open the door and to be—to get into this position. Because if he's leaning [to the left] and gets hit...he can't go through the seat [in front of him], which means he's now got to be further forward on the seat in order for [the bullet strikes] to align. So he'd have to be at least partially out, but I couldn't tell you where his feet were.

(V42-2222). He opined that

> at least part of his torso would probably be out or just getting back into the vehicle. But he'd have to be towards the edge of the seat. Again, I mean, you pointed out, he can't go through the seat [in front of him], so if he's leaned at that angle and it's

> aligned, then it means he's forward on the seat, [not] sitting back in the seat.

(V2-2222-23). He opined that Decedent Davis was re-entering the vehicle at the time he was shot. (V42-2223). He opined that the door was not fully open; that it was "somewhere in between fully open and closed." (V42-2224).

As in the first trial, Appellant called character witnesses. Appellant called Randy and Beverly Berry, family friends of Appellant's parents' aviation community, to testify that Appellant was a peaceful man. (V42-2256-72). Appellant again called Frank Thompson, another friend from the same community, to testify that Appellant visited and flew with the aviation community nearly every weekend and that Appellant was a "gentle man," a very nice guy, and not a "hothead." (V42-2272-74).

Appellant also called Phyllis Austin, Appellant's ex-wife. (V42-2278). She testified that Appellant was in a good mood at the wedding reception and that he had not appeared intoxicated. (V25-2681-85).

As in the first trial, Appellant testified in his own defense. (V42-2313). He testified the he lived in Satellite Beach, Florida in November 2012 and that he had been employed as a computer programmer and software developer. (V42-2313). He again recounted attending his son's wedding in Jacksonville with his then-fiancée, Fiancée Rouer. (V42-2314). He testified that he ate at the wedding reception, that he drank around three small drinks during the reception, and that they left the wedding reception early to let their dog out of its cage. (V42-2314-20).

He again testified that Witness Rouer wanted a bottle of white wine for their hotel room, so they stopped at the Gate Gas Station. (V42-2320). He recounted hearing the loud bass music coming from the Dodge Durango. (V42-2320-26). He testified that he lowered his window and said to the closed, dark-tinted front passenger seat, "Hey, would you mind turning that down, please?" (V42-2326). He testified that he was not angry and that he spoke only loudly enough to be heard over the music. (V42-2326). He testified that the music was lowered, that he said "thank you," and that he raised his window. (V42-2327). He recounted hearing Decedent Davis cursing and the music coming back on. (V42-2327). He heard Decedent Davis shouting racial epithets like "something cracker, something, white boy, just impolite things being said" about him. (V42-2328-29). Decedent Davis's window was down. (V42-2329). He was not looking at Decedent Davis because he was in the driver's seat looking forward, and Decedent Davis was behind him and to his left in the rear passenger seat. (V42-2329). He heard "snips of things but what came through is, I should f'ing kill that mf'er." (V42-2329). He then paid more attention to what was being said. (V42-2330). He heard Decedent Davis shout, "I should fucking kill that motherfucker." (V42-2330). He put his window down to look in that direction and saw Decedent Davis looking very angry. (V42-2330) Appellant asked, "Are you talking about me?" (V42-2331).

Appellant testified:

> That's where I see the movement. I see the young man lean down. I see his shoulders and he comes back up

> with something in his hands. And he banged it against his door and says: Yes. I'm going to fucking kill you.

(V42-2331). He testified that he looked at what Appellant had banged against the door and thought he saw "the barrel of a gun." (V42-2331). He testified that he feared for his life. (V42-2331). Appellant testified that Decedent Davis opened the car door and said, "You're dead, bitch." (V42-2332). He testified that Decedent Davis opened the door, exited the vehicle, and said, "This shit's going down now." (V42-2332). Appellant reached for the weapon in his glove box, shouted "You're not going to kill me, you son of a bitch," and fired at Decedent Davis's car door. (V42-2332-33). He leaned the gun out of the window and rested it on the windowsill when firing. (V42-2333). He intended to aim only at Decedent Davis's door. (V42-2333). He fired as the Durango sped away to prevent being shot at the Durango drove away. (V42-2335).

He recounted telling Fiancée Rouer, who returned to the vehicle, to re-enter the vehicle because he was panicked and terrified. (V42-2336). He did not think he had shot anyone. (V42-2337). He recounted driving back to the hotel, walking the dog, drinking alcohol with Fiancée Rouer to calm their nerves, and paying for a pizza for Fiancée Rouer. (V42-2337-2340). He testified that he was in a highly paranoid state, thinking that every vehicle he saw was the red Durango full of "people out to kill me," and this mental state kept him looking out of the hotel window constantly. (V43-2406). He recounted seeing the news of Decedent Davis's death on the news and then vomiting in

the hotel bathroom. (V42-2340). He recounted Fiancée Rouer shouting to him when she saw the news, and he testified that they were so frightened that they "weren't in our right minds." (V42-2341). He testified that he wanted to call the police, but Fiancée Rouer told him to take her home immediately and he did so. (V42-2341). He testified that when they got home, he went to a trusted neighbor who knew people in law enforcement in order to help turn himself in for questioning to local police. (V42-2342). He surrendered to the police without incident. (V42-2343). Appellant denied seeing police lights on the drive to the hotel. (V42-2353). He agreed that by the time he retrieved his weapon, Decedent Davis had moved behind the car door and possibly back into the vehicle. (V42-2365-68). He still felt sure at trial that he had seen Decedent Davis with a single shotgun barrel at the window. (V42-2372).

After the defense rested, the defense renewed the motion for judgment of acquittal on the element of premeditation and the lack of evidence disproving self-defense. (V43-2431). The State responded:

> Judge, we believe that we still have the right to go to the jury with this case, that Mr. Dunn's statements have to be considered in light of his interest in the case. He's now become a witness in this case, and the jury is entitled to assign whatever weight they deem appropriate to his testimony. So we believe that we are still able to take this case to the jury and ask that you deny their second motion for judgment of acquittal.

(V43-2431). The judge found that the State had made "a prima facie case that should be presented to the jury. So the motion for judgment of acquittal is denied." (V43-2432).

Fiancée Rouer was recalled by the State to testify that while Appellant spoke to their neighbor on the morning that they headed home, she did not hear him tell the neighbor that he needed to speak with him later about something important. (V43-2435-36). She admitted that she had not paid much attention to what was said during the phone conversation. (V43-2437). She also testified that Appellant never told her immediately after the shooting that the occupant of the Durango had a gun. (V43-2436). She did recall Appellant saying that the occupant of the Durango had threatened him and advanced upon him and Appellant had feared for his life. (V43-2438-39). She confirmed that she was in a state of shock during that conversation. (V43-2439). She admitted that she could not recall everything Appellant had said during that conversation. (V43-2440). She opined that she thought she would have remembered if Appellant had mentioned a gun. (V43-2440).

The neighbor, Ken Lescallett, testified that he called Appellant on the morning after the shooting, that Appellant seemed upbeat, and that he did not tell him that he had to talk with him later in the evening. (V43-2446-47). Mr. Lescallett saw Appellant arrive home and let the dog out. (V43-2447). He and Appellant exchanged waves. (V43-2447). Ten minutes later, Appellant came to his house. (V43-2448). Appellant told him about the shooting, and Ken Lescallett called 911. (V43-2451).

During that call was when Appellant received the phone call from police that they were already on their way. (V43-2451-52).

The State also called Detective Mark Musser, who interrogated Appellant on the day of his arrest. (V43-2475). He stated that Appellant did not tell him in the original interview that Decedent Davis said "[T]his shit is going down now." (V43-2481). He testified that Appellant did not report saying, "You're not going to kill me, you son of a bitch" in the initial interrogation. (V43-2481). Appellant stated, during that initial interview, that Fiancée Rouer had wanted him to call the police. (V43-2482). Portions of the interrogation video were played. (V43-2495). During the video, Appellant told the police that he asked nicely for the Durango occupants to turn down the loud music, they did, and he thanked them. (V43-3495). He told the police that Decedent Davis, the rear right passenger, became highly agitated and "there's a lot of fuck him and fuck that, fuck that bitch," and then the music was turned back on. (V43-2496). He told the police that he heard someone say "kill him." (V43-2496). He reported asking, "Are you talking about me?" (V43-2496). He told the police that someone said, "[K]ill that bitch." (V43-2496). He reported that Decedent Davis lifted what something—"I thought it was a shotgun"—and said, "[Y]ou're dead bitch," and opened his door. (V43-2496). He became frightened, retrieved his gun, and shot. (V43-2497). He thought he shot four times, the Durango pulled out, and he thought they had a gun, so he kept firing in order to "keep their heads down and not catch any return fire." (V43-2497). He told the police that he fled

out of fear of further attacks. (V43-2498). He reported returning to the hotel, admitted to ordering the pizza, and accurately reported checking out around 8 a.m. and heading for home. (V43-2500). He reported wanted to come home prior to contacting police because he "didn't want to bring a shit storm down in Jacksonville." (V43-2504). The police agreed that they understood why someone would leave the scene of a shooting out of fear that the "guys are coming back." (V43-2505). He told the police that Fiancée Rouer had urged him to call the police the night before, but he told the police that he had "was insistent on waiting until we got around people we knew." (V43-2506). He told the police that Decedent Davis pulled the latch on his door and was "stepping out" of the vehicle, which prompted him to reach for his gun. (V43-2517). Appellant reported that Decedent Davis said that after the music was briefly shut off, he could hear Decedent Davis yelling and saying "kill that son of a bitch or kill that motherfucker, I think was what he was saying." (V43-2523). He reported that Decedent Davis had been "coming out of his car and saying, you're dead, bitch." (V43-2528). He told the police that she shot at the door because "he was coming out of his door, and I guess he went back in [the vehicle while I was retrieving my gun,] but that's where he was prior." (v43-2528).

During closing arguments, the State Attorney told the jury that Appellant had testified that "every single one of those shots was intended for Jordan Davis." (V43-2569). The State told

the jury that Appellant fired 10 bullets, "[a]iming at Jordan Davis." (V43-2574-75).

The jury found Appellant guilty of first degree murder as charged and found that he discharged a firearm causing death during the commission of the offense. (V8-1366; V44-2756).

Appellant filed a motion for new trial arguing seven grounds. (V8-1462). On October 17, 2014, the trial court held the sentencing hearing. At the outset of the hearing, the judge denied the motion for new trial. (V8-1463, 1622).

The trial court sentenced Appellant to life in prison on Count I, first degree murder. (V8-1466-69; V9-1664-66). On Counts II-IV, the counts of attempted second degree murder with a firearm, the trial court sentenced Appellant to 30 years in prison. (V8-1470; V9-1664-66). On Count V, the trial court sentenced Appellant to 15 years in prison. (V8-1471; V9-1664-66). The trial judge ordered that the sentences in counts II-IV run consecutive to each other and count I, and that the sentence in count V run concurrent to the sentence in count IV. (V8-1472; V9-1664-66). The trial court imposed a minimum mandatory life sentence under the 10-20-Life statute. (V8-1473; V9-1664-66). For counts II-IV, the trial court ordered consecutive minimum mandatory 20 year sentences under the 10-20-Life statute. (V8-1474; V9-1664-66).

Appellant timely appealed. (V8-1493, 1505).

SUMMARY OF ARGUMENT

I. The lower court erred in denying the motions for judgment of acquittal in both trials because there was insufficient evidence rebutting self-defense. The State bore the burden of proving not only murder but also the burden of *disproving* Appellant's claim of self-defense beyond a reasonable doubt. The State failed to offer evidence disproving the *prima facie* claim of self defense. The State's witnesses confirmed that Appellant was polite, but his request that the Durango's loud music be turned down sent Decedent Davis into a rage directed at Appellant. It is unrebutted that Decedent Davis threatened Appellant's life. It is also unrebutted that Decedent Davis was holding something in his hand and at least *attempting* to exit the Durango, which reasonably caused Appellant to fear that Decedent Davis was attempting to commit a forcible felony against him. The only accident reconstruction expert confirmed that Decedent Davis's car door was partially open and that he was partially out of the vehicle when he was shot. As no sufficient evidence rebutted the claim of self defense, a judgment of acquittal on all counts is warranted.

II. The trial court erred in denying the motion for judgment of acquittal and motion for new trial with respect to Counts II, III, and IV because no evidence showed that Appellant intended any harm to Victims Stornes, Thompson, or Brunson; rather, all of the evidence showed that Appellant's gunshots were aimed at Decedent Davis. Where the State alleged multiple victims were intended, it was obliged to prove intent to murder with respect

to each victim. The State's witnesses and Appellant agreed that every shot fired was aimed at Decedent Davis, and the State confirmed in closing argument at both trials that Decedent Davis was the sole target. Thus, there was no evidence of intent to murder Victims Thompson, Brunson, and Stornes. Judgment of acquittal on those counts is warranted.

III. The trial court erred in denying Appellant's request for a 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. A standard instruction must be read if there is any evidence supporting it. Standard Jury Instruction 3.6(f) and section 776.013, Fla. Stat. (2012), provides a presumption of fear justifying deadly force if the victim was in the process of unlawfully entering the defendant's vehicle or attempting to remove the defendant from the vehicle. Appellant's theory of the case was that Decedent Davis was emerging from the Durango while threatening to kill him, something that would have necessitated either entering Appellant's Jetta or removing Appellant from the Jetta. It was error to deny the instruction.

IV. The trial court erred in allowing Dr. Simons, the State's medical examiner, to offer lengthy and detailed testimony on accident reconstruction including her opinion that Decedent Davis was seated in the Durango with the door closed at the time of the shooting. A witness may not testify on matters that fall outside her area of expertise. Nothing in Dr. Simons's training, education, or medical expertise qualified her to offer opinions

on the physics involved in the shooting and the position of Decedent Davis. The error was harmful in that it served to undercut Appellant's claim of self defense and the testimony from the actual accident reconstruction expert that Decedent Davis was partially outside the Durango with the door partially open.

V. The lower court erred in excluding all testimony from Appellant's acute stress expert in the first trial, Dr. Abuso. Dr. Abuso had nearly three decades of education, training, and experience in studying and treating people for acute stress reaction. His testimony was offered to explain a scientific, chemical basis for Appellant's poor decision to leave the scene of the shooting. The testimony would have rebutted the State's argument that the action was consistent only with flight that confirmed criminal intent and consciousness of guilt.

VI. During the second trial, the trial court erred in removing Juror 4 from the jury and substituting an alternate. To remove a juror mid-trial, the State had to demonstrate juror misconduct. To show misconduct, the State had to show that a joke made by Juror 4 during *voir dire* at State Attorney Corey's expense was relevant and material to jury service in the case, that the juror concealed the information during *voir dire*, and that the failure to disclose the information was not attributable to the complaining party's lack of diligence. Juror 4's joke at Attorney Corey's expense was not an example of true bias. Regardless, none of the questions at *voir dire* fairly placed

Juror 4 on notice of the need to disclose his joke. The error cannot be harmless because it was structural.

VII. The trial court erred in granting Appellant's motion to change the venue of the second trial. Appellant demonstrated an inherent prejudice in holding the second trial in Duval County. National media attention and protest rallies were visible to the jurors, something that the judge admitted was "not helpful to us getting a jury here in Jacksonville." The judge admitted that it was pointless to ask jurors whether they had strong feelings about the case because, "**regardless of what they say, 90 percent of these**" jurors would hold an opinion about the case. Media attention and community awareness of the case pervaded the trial, and protestors and reporters filled the courtroom and an overflow room. It was impossible to receive a fair trial. Count I should be reversed and remanded for new trial.

VIII. 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. In the middle of enormous national and international media attention on the case, the State, in its closing argument, told the jurors, "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**." Under Florida case law, this qualified as a call upon the jury to send the community a message, which is forbidden. This Court should reverse and remand for new trial.

IX. The trial court erred in incorrectly answering a jury question regarding self-defense that vitiated Appellant's first

trial. The jury asked if self defense against Decedent Davis could be a defense to the other counts. The trial judge answered that for Appellant to be acquitted on Counts II-V, the jury had to believe that it was justifiable to use deadly force against Victims Thompson, Brunson, and Stornes, who did nothing to provoke deadly force by Appellant. Appellant only used the deadly force against Decedent Davis. The answer was incorrect. Self-defense against one attacker, Decedent Davis, was a defense to charges of forcible felonies against unintentionally threatened bystanders. The incorrect answer guaranteed a swift verdict in the State's favor on Counts II-V, which is just what occurred. The answer vitiated Appellant's first trial.

ARGUMENT

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.

Standard of Review

Because a motion for judgment of acquittal presents an issue of law, the trial court's order on the motion is reviewed on appeal by the *de novo* standard of review. Jones v. State, 790 So.2d 1194, 1197 (Fla. 1st DCA 2001).

Preservation

This issue was preserved by multiple motions for judgment of acquittal and motions for new trial, all of which were denied. (V6-1062-63; V8-1462-63, 1622; V24-2530-35; V27-3027-29; V41-2119-23; V43-2431-32). At the first trial, the State argued—and the judge accepted—that self-defense was an affirmative defense that could not result in a judgment of acquittal, something that was obviously incorrect. (V24-2535). See Fowler v. State, 921 So.2d 708, 711 (Fla. 2d DCA 2006).

> Our standard of review on the denial of a motion for judgment of acquittal is *de novo*. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). The State must prove the defendant's guilt beyond a reasonable doubt, and when the defendant presents a prima facie case of self-defense, the State's burden includes "'proving beyond a reasonable doubt that the defendant did not act in self-defense.'" Thompson v. State, 552 So.2d 264, 266 (Fla. 2d DCA 1989)(quoting Hernandez Ramos v. State, 496 So.2d 837, 838 (Fla. 2d DCA 1986)). In Brown v. State, 454 So.2d 596, 598 (Fla. 5th DCA 1984),

> superseded by statute on other grounds as stated in Thomas v. State, 918 So.2d 327, 2005 Fla. App. LEXIS 17928, 30 Fla. L. Weekly D 2584 (Fla. 1st DCA 2005), the court explained as follows:
>
> While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt.
>
> We recognize that the question of whether a defendant committed a homicide in justifiable self-defense is ordinarily one for the jury. Id. However, when the State's evidence is legally insufficient to rebut the defendant's testimony establishing self-defense, the court must grant a motion for judgment of acquittal. State v Rivera, 719 So.2d 335, 337 (Fla. 5th DCA 1998); Sneed v. State, 580 So. 2d 169, 170 (Fla. 4th DCA 1991). In Sneed, the court concluded that a motion for judgment of acquittal should have been granted when "the state's evidence was legally insufficient to prove guilt beyond a reasonable doubt, because the state failed to rebut the defendant's direct testimony that he acted in self-defense and, in fact, some of the state's evidence corroborated defendant's testimony of self-defense." 580 So.2d at 170 (quoting Hernandez Ramos, 496 So.2d at 838).

Fowler, 921 So.2d at 711-712.

Merits

It is important to remember that the State bore not only the burden of proving murder but also bore the burden of *disproving* Appellant's claim of self-defense beyond a reasonable doubt.

> As applied to the theory of self-defense in particular, the following rules should be taken into consideration regarding the state's burden:
>
> The state is required to prove beyond a reasonable doubt that the defendant did not act in self-defense. See Brown v. State, 454 So.2d 596, 598 (Fla. 5th DCA 1984). "If a defendant establishes a *prima facie* case

> of self-defense, the state must overcome the defense by rebuttal, or by inference in its case in chief." See State v. Rivera, 719 So.2d 335, 337 (Fla. 5th DCA 1998). Rules applicable to the showing required by a defendant include: A demonstration by him or her of "a real necessity for taking a life and a situation causing a reasonably prudent person to believe that danger is imminent." See Hunter v. State, 687 So.2d 277, 278 (Fla. 5th DCA 1997). See also Pressley v. State, 395 So.2d 1175, 1177 (Fla. 3d DCA 1981). A person may use deadly force in self-defense if he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm.

Rasley v. State, 878 So.2d 473, 476 (Fla. 1st DCA 2004). If the state fails to sustain its burden, the trial court must grant a judgment of acquittal in favor of the defendant. Morgan v. State, 127 So.3d 708, 717 (Fla. 5th DCA 2013)(citation omitted); Fowler, 921 So.2d at 711.

In the instant case, the State failed to rebut Appellant's reasonable hypothesis of innocence and *prima facie* claim of self defense; thus, Appellant is entitled to a judgment of acquittal as a matter of law.

> Though it is axiomatic that an appellate court is not entitled to reweigh sufficient evidence, see Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982); Tsavaris v. NCNB National Bank of Florida, 497 So.2d 1338 (Fla. 2d DCA 1986), it is also axiomatic that the state "has the burden of proving guilt beyond a reasonable doubt, which includes [when defendant has established a prima facie case of self-defense] proving beyond a reasonable doubt that the defendant did not act in self-defense."

Thompson v. State, 552 So.2d 264, 266 (Fla. 2d DCA 1989). In a case involving a claim of self-defense,

> 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). This is just such a case.

In Diaz v. State, 387 So.2d 978 (Fla. 3d DCA 1980), a case that pre-dated the State's obligation to rebut Appellant's hypothesis of innocence under State v. Law, the Third District applied these general propositions of law to facts that are remarkably similar to the instant case. In Diaz, the Third District reversed a conviction for manslaughter on the ground that the State failed to rebut Appellant's claim of self-defense. Diaz stated, in pertinent part:

> The only point with which we are concerned is whether the trial court erred in denying the defendant's motion for judgment of acquittal and subsequent motion for new trial on the ground that the state failed to rebut, according to the established circumstantial evidence rules, that the defendant, in the commission of a homicide, had acted in self defense.
>
> Curiously, the homicide occurred in a small restaurant in Key West and the incident per se was observed neither by the owner nor the employees nor any of the other patrons. Those witnesses recalled the defendant seated close to the victim but did not observe any weapon in the victim's possession. 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.
>
> The defendant, who testified in his own behalf, stated that while he was drinking beer the victim, who was seated at an adjacent table, started to make trouble

for the defendant's companion. The defendant inquired why the victim (a person he had never met before) wished to cause trouble and was twice told by the victim: "I'm going to shoot you five times." According to the defendant, the victim then rose from his table and approached the defendant again making the same oral threat while apparently reaching in his pocket for a weapon. It was later determined that the victim was unarmed. The defendant admitted drawing his pistol and pointing it at the victim. However, he claimed the pistol fired accidentally. The defendant exited the restaurant and hid the weapon outside. He shortly returned and requested the proprietor to call the police. She advised him that she had already done so. An investigating officer testified that the defendant told him of the victim's threat to "shoot him five times."

The defendant is five feet four inches tall and weighs 126 pounds. At the time of the incident, he was forty-two years of age. A breathalizer test performed on the defendant shortly following his arrest indicated a reading of ".08." An expert testified that when a reading of ".10" is reached, the examinee is considered intoxicated. The defendant stated he did not realize that the fatal weapon had a safety. A detective who had examined the weapon testified that the thumb-safety of the pistol was inoperative but that the safety cock notch was functional.

The defendant's direct testimony concerning the victim's threats and his menacing approach together with the defendant's assertion that he was in fear of his life made out a prima facie case of self defense under Section 776.012, Florida Statutes (1977). The state presented no evidence to rebut the defendant's direct testimony that he acted in self defense nor was it able to diminish his testimony on cross-examination. Under these circumstances, only those inferences properly arising out of the state's testimony in chief could be considered to rebut the defendant's assertion of self defense. In this posture, that evidence, circumstantial in its entirety, was **woefully inadequate** to rebut the direct testimony that the defendant committed homicide in

> self defense. Mayo v. State, 71 So.2d 899 (Fla. 1954); cf. McArthur v. State, 351 So.2d 972 (Fla. 1977).

Diaz, 387 So.2d at 979-980)(emphasis supplied). In both cases, the defendant claimed that the victim threatened to kill him. Though no one else heard the threat, no witnesses affirmatively disputed the defendants' claims of a threat. In both cases, the defendant thought that the victim was reaching for a weapon while threatening to kill him, but a subsequent search revealed no weapon on the victim's person. In Diaz, Diaz attempted to hide his gun before the police arrived. In the instant case, Appellant drove away in order to turn himself in to police in his hometown. In Diaz, Diaz was intoxicated, while Appellant had consumed only a small amount of alcohol and the unrebutted evidence was that he was not intoxicated. In Diaz, the evidence was "woefully inadequate to rebut the direct testimony that the defendant committed homicide in self defense," and the same is true here. It is unrebutted that Appellant was unfailing polite to the occupants of the Durango when asking for the music to be turned down. Appellant was a 45-year old male with no prior felony history. (V42-2405). He was employed, engaged to be married, and at the time of the shooting, Appellant had just come from his son's wedding. (V22-2293-95; V39-1798-99; V42-2313). Decedent Davis, Victim Thompson, Victim Brunson, and Victim Stornes were mid-way through an evening of "girl shopping." (V18-1629; V19-1712-13; V37-1213-14; V37-1253, 1305). Victim Stornes, the driver, had a felony on his record, he was on probation, and his friends knew that he had a 7 p.m. curfew

as part of his probation. (V19-1680-81, 1810). While in the Durango that night, Victim Brunson heard Decedent Davis say, "I'm tired of people telling me what to do." (V19-1746; V37-1339). When parked at the gas station convenient store, Victim Stornes left his car on with loud rap music playing at sufficient volume to make the windows shake. (V18-1634; V19-1716, 1739-40, 1793; V37-1218, 1308, 1335-36, 1368, 1399). Appellant parked his Jetta to the right of the red Durango. (V18-1418, 1635; V19-1717-18; V22-2304; V37-1219; V40-1813). The Jetta was so close to the Durango that Victim Thompson later testified that he, being a large person, would not have been able to exit the Durango, though there was room for someone the size of Decedent Davis to exit the vehicle. (V18-1636, 1668; V22-2304; V37-1271). Decedent Davis had his window down; the other windows in the Durango were closed. (V18-1634; V19-1719). The Durango sat higher than the Jetta, so the Durango occupants were looking down at Appellant. (V19-1758; V37-1270). Victims Thompson and Brunson later testified that Appellant lowered his window and spoke generally to the occupants of the Durango, asking "Can you turn the music down[?] I can't hear myself think." (V18-1638, 1672; V19-1718, 1738-39; V37-1273-75, 1310). Victim Brunson testified that Appellant was asking a question, not making a demand. (V19-1739). Victim Brunson later testified that Appellant's request was a demand for common courtesy, and he asked his question in a normal tone of voice. (V19-1739; V37-1221). Appellant testified that he was not angry and that he spoke only loudly enough to be heard over the music. (V42-2326).

Appellant did not point his finger, yell, curse, or say anything derogatory. (V19-1738; V37-1274, 1310). The Durango's windows were tinted so much that Appellant would only have been able to see Decedent Davis, whose window was down. (V19-1672). Victim Thompson turned the music down. (V18-1638; V37-1310). Appellant testified that the music was lowered, and that he said "thank you." Appellant put his window back up. (V37-1275; V42-2327).

The State's witnesses—including Decedent Davis's friends and companions—admit that Decedent Davis flew into a rage in response to the police request to lower the music. Victim Thompson later testified that the request to turn down the music enraged Decedent Davis. (V19-1674, 1739; V37-1276, 1338). Victim Thompson did not see Appellant throw his hands up in the air, give anyone the middle finger, or mouth anything else. (V19-1675; V37-1275). In Victim Thompson's opinion, Decedent Davis was enraged, and he began to curse at Appellant. (V19-1675). Victim Thompson later testified that Decedent David told him, "Fuck that nigger. Turn the music back up." (V18-1638, 1674; V19-1719; V37-1222, 1276). Victim Thompson complied, turning the music back up. (V18-1639; V37-1223). The music was loud enough that the windows and doors were vibrating. (V19-1669). Decedent Davis was cursing loudly at Appellant. (V37-1277). Victim Thompson and Victim Brunson both heard Decedent Davis say to Appellant, "Fuck you." (V18-1640; V19-1719; V37-1311). Victim Thompson could not hear some of what was said because the music was so loud. (V18-1640, 1642; V19-1670, 1675; V37-1223, 1280, 1340). Victim Thompson did not notice Appellant point or curse

at him or say anything derogatory to him or anybody else in the Durango. (V19-1672). Victim Thompson did not hear Decedent Davis threaten Appellant, but he could not deny that a threat was made. (V37-12). Victim Brunson agreed at trial that he could not hear all of what was being said because the music was so loud. (V19-1720). 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). Victim Brunson noted that Decedent Davis appeared angry. (V19-1721). Victim Thompson later opined that the situation was escalating because of Decedent Davis's behavior. (V19-1684). Decedent Davis was gesticulating with his right hand during the argument, resting his left hand on the back seat. (V19-1721, 1755-56). Victim Brunson noted that Decedent Davis did have a cellular telephone in his right hand during the argument, and he was gesturing angrily toward Appellant with that hand. (V19-1723, 1756; V37-1313). Both a cellular telephone and a Cuttin' Horse Smith & Wesson brand pocketknife were collected as items on Decedent Davis's person when he was shot. (V22-2359-66). Victim Brunson admitted that during the argument, Appellant never cursed at Decedent Davis, never threatened him, and never raised his voice despite the fact that Decedent Davis was yelling at him. (V19-1743; V37-1342). Victim Brunson admitted that the more Appellant didn't 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). Victim

Brunson saw Decedent Davis point his finger at Appellant. (V37-1312).

Appellant corroborated the testimony about Decedent Davis's rage, testifying that very soon after politely asking for the Durango's music to be turned down, he started hearing "things like F him and F that" in a mean-spirited or annoyed tone. (V26-2858). He stated that he did not react to the comments "even a little bit." (V26-2858). He testified that he was not angered. (V26-2858). He corroborated the testimony that the music was then turned back up. (V26-2859; V42-2327). He testified that at that point, the comments "got ugly" and that he heard Decedent Davis shouting racial epithets like "something cracker, something, white boy, just impolite things being said" about him. (V26-2860; V42-2328-29). He testified that he did not react. (V26-2861). He looked forward and hoped that Fiancée Rouer would come back from the gas station store. (V26-2861). Appellant was not looking at Decedent Davis because he was in the driver's seat looking forward, and Decedent Davis was behind him and to his left in the Durango's rear passenger seat. (V42-2329).

Returning to the vehicle, Victim Stornes did not see Appellant threatening anyone. (V19-1838).

Due to the music, Victim Brunson could not hear what Decedent Davis said to Appellant. (V19-1744). He couldn't hear what Appellant was saying from the other vehicle either. (V19-1745). Appellant asked Decedent Davis, "Excuse me? What did you say?" (V37-1314). Victims Thompson and Brunson heard Appellant ask

Decedent Davis, "Are you talking to me?" (V18-1644; V19-1683, 1725; V37-1227, 1314). Victim Brunson heard Decedent Davis answer, "Yeah, I'm talking to you." (V19-1725). Victim Stornes saw Appellant mouthing words through his window, but he could not hear or understand what Appellant was saying. (V19-1797).

Appellant's testimony corroborated all of this, but Appellant was able to hear the threats that Victims Thompson and Brunson claimed they were unable to hear over the music. Appellant testified that the angry voice from the Durango elevated and he could now be heard over the loud music. (V26-2861). Appellant testified that "after hearing the something something cracker and this and that I hear I should kill that mother fucker, and I'm flabbergasted. I—I—I must not be hearing this right." (V26-2862). He heard "snips of things but what came through is, I should f'ing kill that mf'er." (V42-2329). He testified that he started to listen closely, thinking he had heard wrong. (V26-2862; V42-2330). He heard Decedent Davis shout, "I should fucking kill that motherfucker." (V26-2862; V42-2330). Appellant testified, "There's no—there's no mistake of what he said. That is what he said." (V26-2862). He put his window down to look in that direction and saw Decedent Davis looking very angry. (V26-2863; V42-2330). Appellant thought that it was time to try to de-escalate the tension and calm things down. (V26-2862). Appellant looked at Decedent Davis in the rear passenger seat. (V26-2863). He testified that the Durango's window was all the way down. (V26-2863-64). Appellant asked, "Are you talking about me?" (V26-2864; V42-2331). Appellant wanted to be clear as to

whether Decedent Davis was directing the remarks at him and if he was, he wanted "to make it clear that I had said thank you. I mean I didn't mean any disrespect by asking him to turn the music down." (V26-2864-65). Appellant testified:

> That's where I see the movement. I see the young man lean down. I see his shoulders and he comes back up with something in his hands. And he banged it against his door and says: Yes. I'm going to fucking kill you.

(V26-2866; V42-2331). He testified that he saw what looked like four inches of a shotgun barrel. (V26-2867, 2869; V42-2331). He testified that he feared for his life. (V42-2331). Taking the evidence in a light most favorable to the State, however, the object in Decedent Davis's hand was actually a cellular telephone according to Victim Brunson. (V19-1723, 1756; V37-1313). It must be recalled that Florida law on self defense allows for mistakes of this type.

> 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). In Diaz, of course, no weapon was recovered either. Thinking the object was a shotgun barrel, however, Appellant testified that he still did not reach for his gun at that point. (V26-2870). He felt in fear

of his life. (V26-2870). He felt incredulous. (V26-2870). He was aware that anyone firing from the Durango could hit someone in the gas station including Fiancée Rouer. (V26-2871).

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. (V19-1721, 1742-43, 1745, 1764; V37-1312, 1344). In regard to whether Decedent Davis was prevented from exiting the Durango by child locks on the doors, 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).

Appellant testified that Decedent Davis cracked his door open. (V26-2871). He heard the door hinge move and he saw the door move "just a little bit." (V26-2872). Appellant testified that Decedent Davis's body had been inside the car, but his feet had been outside. (V26-2935). Appellant testified that Decedent Davis then said, "[Y]ou're dead, Bitch." (V26-2872; V42-2332). He testified that he became even more fearful. (V26-2872). He thought that Decedent Davis was going to shoot him. (V26-2872). He testified that Decedent Davis began to exit the vehicle.

(V26-2874-75). Appellant testified that Decedent Davis said, "[T]his shit's going down now."(V26-2875; V42-2332). Appellant testified that he said, "[Y]ou're not going to kill me, you son of a bitch." (V26-2876; V42-2332-33). Appellant retrieved a silver firearm from his glove compartment. (V17-1341; V18-1457, 1644; V19-1726, 1795; V35-979; V37-1226; V37-1281, 1315; V37-1372). He testified that he removed the gun from the holster, put it up to the window, cocked it, and pointed it "in the direction of my attacker at that point." (V26-2881). He testified that he fired only in self-defense, that he had never met any of the occupants of the Durango, and that he had no malice or intent other than to defend himself from Decedent Davis's attack. (V26-2882).

Appellant leaned the gun out of the window and rested it on the windowsill when firing. (V42-2333). He intended to aim only at Decedent Davis's door. (V42-2333). Appellant fired three shots at Decedent Davis's car door before the Durango moved and then fired four more shots as the Durango quickly reversed. (V19-1686, 1702, 1726; V37-1228, 1281, 1316). After he fired the initial shots, he denied that he moved the gun to find any second target. (V26-2884). He testified that he had "tunnel vision. My hearing kind of dimmed." (V26-2884). He only fired at Decedent Davis's door, as that was "the last place I saw my attacker...." (V26-2884). He felt that he was fighting for his life. (V26-2887). He was attempting to aim at Decedent Davis's door when the Durango backed up, causing some of the bullets to strike the front passenger door. (V26-2888). He testified that

he was not trying to shoot the front passenger. (V26-2888). The Durango backed up behind Appellant's Jetta. (V26-2888). Any shot coming from the Durango would now possibly hit someone exiting the gas station. (V26-2889-90).

He corroborated Witness Atkins's testimony that as the Durango was moving, he "opened my door and I like took a little hop out" and continued to fire. (V26-2978). He testified that he moved behind the Jetta to make it more difficult for Decedent Davis to shoot directly behind him. (V26-2983). Appellant thought he fired one further shot at the Durango at that point, but admitted that the photographic evidence convinced him that in his "panicked state...I shot three times." (V26-2890). He was still in fear for himself and Fiancée Rouer. (V26-2891). He fired as the Durango sped away because he was afraid that he was still in range of a weapon fired from the Durango. (V42-2335). He stopped firing when the Durango had driven forward enough that "it appeared that the threat was over." (V26-2892). He did not pursue the Durango. He stated that

> at the time his threats and actions left no doubt in my mind that [what Decedent Davis was holding] was a firearm. It looked like a firearm. He was treating it like a firearm. He wasn't saying I'm going to beat you up. He was saying I'm going to kill you. You're dead.

(V26-2974). He testified that when he fired, he

> was pointing towards my attacker. I hit the door, and unfortunately he was right there behind the door. My intention was to stop the attack, not necessarily end a life. It just worked out that way.

(V26-2977).

The only actual accident reconstruction expert, Michael Knox, corroborated that Decedent Davis was partially outside the Durango and leaping back in when he was shot. He testified about his extensive expertise and was accepted as an expert by the court and State without objection. (V41-2147-52). Mr. Knox reviewed all of the crime scene photographs, and he had examined the Durango. (V41-2159). He took photographs of the Durango, placed dowels through the bullet holes, used laser mapping equipment, and took measurements of the vehicle. (V41-2159). He measured the parking places. (V41-2161). He examined the spots where crime scene photos had placed bullet casings. (V41-2164). He observed in photographs that the front passenger window of the Durango had been partially open at the time the bullet went through it. (V41-2168-70). He testified that the window shattered because of a bullet striking part of the window that was housed in the car door. (V41-2171). He also opined that, based on an analysis of the glass and the door, Decedent Davis's window, the rear passenger window, was "certainly not fully up or close to fully up." (V41-2172). He added, "It's got to be close to fully down. It can't be close to fully up." (V41-2173). He concurred that the child locks were not engaged at the time the police took crime scene photos of the Durango. (V41-2192). He stated that the second shot was fired .243 seconds after the first, the third shot was fired .227 seconds later, and the total time for all three shots was .47 seconds. (V41-2196). He testified that there was only a gap of .842 seconds and then a series of four more shots began, "occurring at about a quarter

second" intervals. (V41-2196). He was able to determine that the Durango was not moving during the first three shots but was moving during the second group of shots. (V41-2197). He testified that Decedent Davis's car door was 40 inches long and when opened fully, it was open at a 53 degree angle. (V41-2199). One needed a clearance of 2'8" to open the door fully. (V41-2199). The parking spaces were nine feet wide. (V41-2199). He opined that the physical evidence was that because the cars were close together and Appellant fired from a front seat toward someone at the rear passenger area of the Durango, behind and to Appellant's left, Decedent Davis's door had to be open in order for the three bullets to strike it in the way that it did. (V42-2207-08). He opined that for the bullets to have been fired at the rear passenger door while the door was closed, Appellant's Jetta would have had to have been much further away from the Durango. (V42-2209). He was able to say with 100 percent certainty that the car door was open to some extent. (V42-2210-11). He opined that if the door had been closed, Decedent Davis would had to have been pressed "against the seat in front of him" in order to be hit by the shots coming through the door, but if the door had been open, he could have been closer to a seated position. (V42-2217-19). He agreed that Decedent Davis had to be on the interior side of the door, not the exterior, and that Decedent Davis had to have been leaned over toward his left. (V42-2220). He opined that no one could determine the position of the body solely from the placement of the wounds

> because what you have is the alignment of the torso for that particular shot, alignment of his upper legs for the other shots in the groin area. But what the rest of his body is doing, his arms, his head, his feet, there's no way to tell that.

(V42-2221). The torso had to have been "at least a good bit inside but not necessarily entirely...." (V42-2221). He was able to say that Decedent Davis was partially outside of the car, but he could not say whether Decedent Davis had placed his feet on the ground. (V42-2222). He opined that

> you have to be at least partially out just to open the door and to be—to get into this position. Because if he's leaning [to the left] and gets hit...he can't go through the seat [in front of him], which means he's now got to be further forward on the seat in order for [the bullet strikes] to align. So he'd have to be at least partially out, but I couldn't tell you where his feet were.

(V42-2222). He opined that

> at least part of his torso would probably be out or just getting back into the vehicle. But he'd have to be towards the edge of the seat. Again, I mean, you pointed out, he can't go through the seat [in front of him], so if he's leaned at that angle and it's aligned, then it means he's forward on the seat, [not] sitting back in the seat.

(V2-2222-23). He opined that Decedent Davis was re-entering the vehicle at the time he was shot. (V42-2223). He opined that the door was not fully open; that it was "somewhere in between fully open and closed." (V42-2224).

There was insufficient evidence rebutting the claim of self defense. The State argued that the motive for the murder was that Appellant "got angry at the fact that" Decedent Davis "decided not to listen to him" and "shot to kill." (V28-3300).

The State also argued that Appellant "didn't shoot into a car full of kids to save his life. He shot into it to preserve his pride, period." (V28-3407). Respectfully, no evidence supported that claim. Both occupants of the Durango admitted that Decedent Davis was cursing at Appellant in a rage, but both claimed that they could not hear everything that Decedent Davis was saying because the Durango's stereo was so loud. Appellant's statement that Decedent Davis threatened to kill him is completely unrebutted and is in harmony with all of the evidence. The State offered no evidence that Appellant evinced any rage or physical aggression prior to retrieving a weapon he had owned for 20 years without ever firing at a person, and the State offered no evidence rebutting the claim that Appellant shot only in response to Decedent Davis's murderous threat. The only accident reconstruction expert testified that Decedent Davis was partially outside the Durango and leaping back in when he was shot. This was entirely consistent with Appellant's testimony that he lost sight of Decedent Davis, who ducked behind the car door when Appellant reached for his gun and started shooting.

Relying on Diaz, the Fifth District in, State v. Rivera, 719 So.2d 335 (Fla. 5th DCA 1998), affirmed a post-verdict judgment of acquittal. In that case, the victim was one of several people in a truck trying to "mess with" Rivera, who was also in his vehicle. Rivera, 719 So.2d at 336-38. The victim denied intent to kill Rivera and the occupants of the truck denied possessing a firearm, although Rivera claimed that he saw the victim in possession of a firearm. Id. Rivera claimed that when the victim

exited his vehicle, he feared for his life and he shot the victim. Id. The jury found Rivera guilty of attempted manslaughter and aggravated battery with a firearm, but the trial judge granted a post-verdict judgment of acquittal that the Fifth District affirmed on appeal because "the state failed to rebut Rivera's *prima facie* case of self-defense." Rivera, 719 So.2d at 338. Likewise, in the instant case, Appellant thought he saw a gun in Decedent Davis's hand, though no firearm was recovered at the scene. It is unrebutted that Decedent Davis was in a rage and threatening Appellant. It is also unrebutted that Decedent Davis was holding something in his hand and at least *attempting* to exit the Durango, which reasonably caused Appellant to fear that Decedent Davis was attempting to commit a forcible felony against him. As in Diaz, the evidence was "woefully inadequate" to rebut the claim of self-defense. This Court should reverse and remand for entry of an acquittal and for immediate discharge.

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

The trial court erred in denying the motion for judgment of acquittal and motion for new trial with respect to Counts II, III, and IV because no evidence showed that Appellant intended any harm to Victims Stornes, Thompson, or Brunson; rather, all of the evidence showed that Appellant's gunshots were aimed at Decedent Davis.

Standard of Review

As with Issue I, the standard of review is *de novo*. Jones, 790 So.2d at 1197.

Preservation

This claim was preserved during the motion for judgment of acquittal and the motion for new trial, both of which were denied. (V6-1063, 1067; V24-2530-35).

Merits

Appellant attempted to shoot in self defense at Decedent Davis, not at Victims Thompson, Brunson, or Stornes. "[I]f the issue is whether the defendant attempted to murder multiple victims, then such specific intent is not subject to transfer but rather such intent should be independently evaluated as to each victim." Bell v. State, 768 So.2d 22, 28 (Fla. 1st DCA 2000)(citation omitted); but see State v. Brady, 745 So.2d 954 (Fla. 1999)(evidence sufficient where unintended bystander victim was injured); Brown v. State, 75 So.3d 352 (Fla. 1st DCA 2011)(same). There was no evidence that Appellant attempted to

commit second degree murder against Victims Thompson, Brunson, or Stornes. There is no basis for charging attempted murder against all persons nearby when the defendant intentionally shoots at—and strikes—only the intended target and no other person. Consequently, the convictions for attempted second degree murder and the 90 year sentence for those crimes should be reversed. None of the State's evidence showed that Appellant acted with any intent to harm anyone other than Decedent Davis.

> To prove the crime of Attempted Second Degree Murder, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Defendant) intentionally committed an act which would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he] [she] failed to do so.
>
> 2. The act was imminently dangerous to another and demonstrating a depraved mind without regard for human life.

In re: Std. Jury Instructions in Crim. Cases-Report No. 2013-02, 137 So.3d 995, 1004-1005 (Fla. 2014)(citing §§ 782.04(2); § 777.04, Fla. Stat. (2014).

> To prove that an act demonstrates a depraved mind, the State must prove that it done from "ill will, hatred, spite or an evil intent." Fla. Std. Jury Instr. (Crim.) 7.4; Rayl v. State, 765 So.2d 917, 919 (Fla. 2d DCA 2000). Florida courts have held that an impulsive overreaction to an attack or injury is, at times, insufficient to prove ill will, hatred, spite, or evil intent. See, e.g., Dorsey, 74 So.3d at 524; Light v. State, 841 So.2d 623, 626 (Fla. 2d DCA 2003); McDaniel v. State, 620 So.2d 1308, 1308 (Fla. 4th DCA 1993). "Although exceptions exist, the crime of second-degree murder is normally committed by a person who knows the victim and has had time to develop a level of enmity toward the victim." Light, 841 So.2d at 626.

Morgan, 127 So.3d at 718. The facts relating to Decedent Davis's hostility toward Appellant and Appellant's politeness and failure to respond in kind of Appellant's rage were detailed under Issue I. There was no evidence that Appellant shot at anyone but Decedent Davis. The State's witnesses established that fact. Victim Thompson agreed that Appellant pointed the gun in Decedent Davis's direction and that due to his position and visibility, "if he wasn't aiming [at Decedent Davis,] I would have been the first target." (V19-1686, 1702; V37-1228, 1281). Appellant was not aiming blindly. (V19-1702). Victim Brunson corroborated that Appellant was aiming toward Decedent Davis's window. (V19-1726; V37-1316). Appellant fired three shots at the Decedent Davis's passenger side rear door. (V17-1342; V18-1645; V19-1726; V37-1283; V37-1373). Victim Stornes backed the Durango out. (V17-1342-43, 1415; V19-1727, 1799). Appellant fired seven more shots as the Durango first reversed and then turned and drove out of the parking lot. (V17-1342-43; V19-1728; V37-1374).

During Appellant's testimony, he testified that only Decedent Davis threatened to kill him, that Decedent Davis opened the door, that he thought he saw a firearm in Decedent Davis's possession, and that Decedent Davis began emerging from the Durango. (V26-2862-64, 2871-72, 2874-75). Appellant testified that he removed his gun from the holster, put it up to the window, cocked it, and pointed it "in the direction of my attacker at that point." (V26-2881). He testified that he fired only in self-defense, that he had never met any of the occupants of the Durango, and that he had no malice or intent other than

to defend himself from Decedent Davis's attack. (V26-2882). After he fired the initial shots, he denied that he moved the gun to find any second target. (V26-2884). He testified that he had "tunnel vision. My hearing kind of dimmed." (V26-2884). He only fired at Decedent Davis's door, as that was "the last place I saw my attacker...." (V26-2884). He felt that he was fighting for his life. (V26-2887). He was attempting to aim at Decedent Davis's door when the Durango backed up, causing some of the bullets to strike the front passenger door. (V26-2888). He testified that he was not trying to shoot the front passenger. (V26-2888). The Durango backed up behind Appellant's Jetta. (V26-2888). Appellant thought he fired one further shot at the Durango at that point, but admitted that the photographic evidence convinced him that in his "panicked state...I shot three times" to keep from being fired upon himself. (V26-2890). He was still in fear for himself and Fiancée Rouer. (V26-2891). He stopped firing when the Durango had driven forward enough that "it appeared that the threat was over." (V26-2892).

During closing argument, the State argued that the motive for the murder was that Appellant "got angry at the fact that" Decedent Davis "decided not to listen to him" and "shot to kill." (V28-3300). The State told the jury that Appellant was "shooting for his target and **aiming at Jordan Davis**. This defendant told you himself yesterday **his intention was for Jordan Davis**. He even told you that the next three set of shots that his [Victim Thompson's] door, **those were for Jordan Davis**." (V28-3301-02)(emphasis supplied). The State continued, "Every

step in this process was under [Appellant's] control. **Every action he took was a conscious decision that he made to escalate the situation and ultimately kill Jordan Davis.**" (V28-3308) (emphasis supplied). During closing arguments at the second trial, the State Attorney told the jury that Appellant had testified that "**every single one of those shots was intended for Jordan Davis.**" (V43-2569) (emphasis supplied). The State told the jury that Appellant **fired 10 bullets, "[a]iming at Jordan Davis.**" (V43-2574-75) (emphasis supplied). Appellant only asks that the State's own trial strategy and theory of prosecution be recognized. Even the "victims" agreed that Appellant was certainly only aiming at Decedent Davis. Decedent Davis was the only person hit. There is insufficient evidence that Appellant attempted to murder Victims Brunson, Thompson, and Stornes. Appellant was found guilty of premeditated murder of Decedent Davis at the second trial. Appellant was also found guilty of firing into an occupied vehicle, a conviction that would stand if the conviction on Count I stands. (V5-948). The sole intended target was Decedent Davis. The named victims in Counts II, III, and IV were not victims of attempted second degree murder. Those three counts cannot stand. This Court should reverse them.

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.

Standard of Review

> We review a trial court's decision on the giving or withholding of a proposed jury instruction under the abuse of discretion standard. See Langston v. State, 789 So.2d 1024, 1026 (Fla. 1st DCA 2001). However, "that discretion is fairly narrow because appellant is entitled, upon request and by law, to have the jury instructed on his theory of defense if any evidence supports that theory, so long as the theory is valid under Florida law." See Goode v. State, 856 So.2d 1101, 1104 (Fla. 1st DCA 2003).

Chavers v. State, 901 So.2d 409, 410-411 (Fla. 1st DCA 2005); Mann v. State, 135 So.3d 450, 453 (Fla. 5th DCA 2014)(same).

Preservation

This claim is raised with respect only to Counts II-V because the matter was preserved only at the first trial.

Merits

The trial court erred in denying Appellant's request to read the "presumption of fear" portion of the standard self defense instruction.

> **In deciding whether to give a requested charge, a "'trial judge may not weigh the evidence before him in determining whether the instruction is appropriate; it is enough if the defense is suggested by the evidence presented**.'" See Thomas v. State, 547 So.2d 989, 990 (Fla. 1st DCA 1989)(quoting Terwilliger v. State, 535 So.2d 346, 347 (Fla. 1st DCA 1988)). Accord Goode, 856 So.2d at 1104; 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). The instruction on presumption of fear was part of the standard instruction, not a special instruction. There was evidence to support the theory of defense that justified reading the instruction. Thus, the trial court erred. Standard Jury Instruction 3.6(f), which explains the justifiable use of deadly force, includes the following paragraph:

> Presumption of Fear (dwelling, residence, or occupied vehicle).
>
> Give if applicable. § 776.013(2)(a)-(d), Fla. Stat.
>
> **If the defendant was in a(n)**[dwelling] [residence] **[occupied vehicle]** where [he] [she] had a right to be, **[he]** [she] **is presumed to have had a reasonable fear of imminent death or great bodily harm to [himself]** [herself] [another] **if (victim) had [unlawfully and forcibly** entered] [removed or **attempted to remove another person against that person's will from**] that [dwelling] [residence] **[occupied vehicle] and the defendant had reason to believe that had occurred.** The defendant had no duty to retreat under such circumstances.

Likewise, section 776.013, Fla. Stat. (2012), the statute governing justifiable use of deadly force, explains:

> **(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself** or herself or another when using or threatening to use defensive force that is intended or

> likely to cause death or great bodily harm to another **if:**
>
> (a) **The person against whom the defensive force was used or threatened was *in the process* of unlawfully and forcefully entering**, or had unlawfully and forcibly entered, **a** dwelling, residence, or **occupied vehicle, or if that person** had removed **or was attempting to remove another against that person's will from the** dwelling, residence, or **occupied vehicle**; and
>
> (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Appellant requested that that standard instruction be read. (V24-2751; V28-3244-45). The State argued that the presumption did not apply because even if Decedent Davis had exited the Durango, "he didn't put his hand into Mr. Dunn's car" and he wasn't committing a felony in the car at the time the bullets were fired. (V24-2744). She repeated that Decedent Davis would had to have been "reaching into his car or doing something in his car" in order to justify the instruction. (V24-2745). Appellant requested both the self defense standard instructions under section 782.02 and section 776.013, Fla. Stat. (V24-2747-54). At a later jury conference, the State objected specifically to the portion of the standard instruction that related to the presumption of fear for persons in a vehicle. (V28-3240-42). The trial court read the selection, and opined that it applied only if Decedent Davis "entered the vehicle or attempted to remove someone from the vehicle against their will which never happened. There's no evidence whatsoever of that. [It says g]ive if applicable. Over your objection, Mr. Strolla, let's just show

you want it. I'm not going to give it because there's no evidence of it and at that state's request not to give it, correct?" (V28-3242). The State then disagreed with Appellant's contention that any evidence of an attempt by Decedent Davis would trigger the instruction, arguing that only evidence of a *completed* entrance into the vehicle would trigger the jury instruction. (V28-3243). Appellant's attorney then referenced section 776.013 from which the jury instruction was derived, arguing that an attempt to enter the vehicle did in fact trigger the presumption of fear because the statute applied where the victim was "in the process of unlawfully and forcefully entering" the defendant's vehicle. (V28-3243-44). The trial court repeated that that instruction would be omitted from the jury instructions. (V28-3244-45). The standard instruction, as shown above, applies where there is any evidence that a person attempts to remove the defendant from his vehicle or where the defendant has reason to believe that that is the case. The statute expressly grants the presumption of fear also where the victim "was **in the process** of unlawfully and forcefully entering" the vehicle. Decedent Davis was unquestionably in a rage that was directed at Appellant. (V19-1640, 1674-75, 1684, 1719, 1739, 1747; V26-2860, 2862; V37-1276-77, 1311, 1338). Appellant offered his own unrebutted testimony that Decedent Davis threatened to kill him. (V26-2862-64, 2872). Appellant testified that Decedent Davis began exiting the Durango. (V26-2871-72, 2874-75). Victim Brunson saw Decedent Davis try to exit the vehicle, but claimed he was prevented from doing so by the

child locks, locks that all of the other State's witnesses agreed were not engaged. (V19-1632, 1667, 1764; V20-2080, 2086; V21-2202; V22-2202; V26-2688; V37-1344-45; V38-1499; V41-2192). The only accident reconstruction expert, Mr. Knox, testified that the car door was partially open, and Decedent Davis was partially outside of the vehicle when he was shot. (V42-2199-2224). Appellant's entire defense was that he thought Decedent Davis was coming to get him while threatening to murder him. That would have necessitated Decedent Davis either entering Appellant's Jetta or removing him from the Jetta or attacking him in the Jetta. The jury should have been read the instruction and should have been allowed to decide the weight of the evidence that Decedent Davis was "in the process" of entering the Jetta or removing Appellant from the Jetta when Appellant resorted to self defense. The error is not harmless because the presumption of fear in Appellant's favor would have been a critical factor in the jury's deliberation, especially in a trial with a hung jury and a partial acquittal on three counts. This Court should reverse and remand Counts II, III, IV, and V 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, a 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.

Standard of Review

> It is well established that a trial court has broad discretion concerning the admissibility of expert testimony, and a court's determination will not be disturbed on appeal absent a clear showing of error. Way v. State, 496 So.2d 126 (Fla. 1986); Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 88 L. Ed. 2d 907, 106 S. Ct. 869 (1986); Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 79 L. Ed. 2d 724, 104 S. Ct. 1329(1984). This discretion, however, is not boundless. Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 70 L. Ed. 2d 191, 102 S. Ct. 364(1981).

Hall v. State, 568 So. 2d 882, 884 (Fla. 1990).

Preservation

This claim was well-preserved with respect to the second trial[1], so this argument only applies to Count I. On September

[1] The only objection to Dr. Simons's testimony during the first trial was her use of demonstrative aids that were not to scale. (V23-2500-01). The judge's response to that objection is notable in that it highlights the different treatment received by Appellant and the State over the course of the two trials. When Dr. Simons wished to use demonstrative aids that bore no similarity to the Durango and Jetta in this case, the State responded, "It's a hypothetical to help the jury understand the doctor's testimony." (V23-2501). The trial judge overruled the objection, stating, "And I believe the jury understands that that's what it is and obviously it's not apples to apples but it's a demonstrative aid so the objection is overruled. "(V23-2501). When Appellant's expert accident reconstruction expert

16, 2014, prior to the second trial, Appellant filed a motion *in limine* to exclude the expected testimony of Dr. Stacey Simons on the ground that Dr. Simons's expected expert scientific opinions about bullet trajectory and the location of the Victim Davis at the time of the shooting did not satisfy the requirements of section 90.702, Fla. Stat. (2013). (V7-1217-82). At argument on the motion held on September 18, 2014, Appellant made it clear that there was no objection to Dr. Simons's testimony on matters relating to forensic pathology or paths that bullets took through Victim Davis's body. (V9-1571). The objection was to accident reconstruction in regard to where Victim Davis was sitting at the time of the shooting, the position of Decedent Davis at the time of the shooting, and the path of the bullets between the gun and Victim Davis's body. (V9-1571-73). The State argued that because Dr. Simons could identify exit and entrance wounds, she could look at the dowels placed through bullet holes by other technicians and then opine concerning the path of the bullets because "it is common knowledge that bullets go in a straight path unless and until they hit something." (V9-1575). Appellant argued that Dr. Simons was an expert on "the path of a wound of a bullet through a body" and the determination of

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prepared a detailed demonstrative aid, a video recreation of the shooting incident, the judge excluded it on the basis that it did not comport with the exact positions of the vehicles by the State's witnesses. (V7-1298-99; V9-1583-1613). The trial court then allowed Dr. Simons, in her accident reconstruction, to use an ordinary courtroom table to represent the Durango and a dummy to represent Decedent Davis without any representation of the position of the Jetta at all.

entrance and exit wounds, but argued that Dr. Simons was not an expert on—and had not been trained in—firearms analysis, ballistics, or trajectory analysis. (V9-1576). Appellant argued that to the extent that the State thought that Dr. Simons's opinions were simply common sense or common knowledge about how bullets would travel, they did not qualify as expert opinion and her lay opinions were inadmissible. (V9-1576-77). The trial court noted that Dr. Simons had rechecked her impressions based on new possibilities raised during her cross-examination during the first trial. (V9-1581). She "made some measurements that she hadn't done." (V9-1581). She examined the vehicle for the first time. (V9-1581). She had never placed dowels before, but she "had seen the pictures where the Sheriff's Office had done that themselves on their investigation." (V9-1582). The trial court denied Appellant's motion, finding Dr. Simons had the necessary scientific, technical, or specialized knowledge necessary to testify as an expert on Decedent Davis's location at the time of the shooting. (V9-1582). The trial court then entered an order finding Dr. Simons to be a reliable witness. (V7-1303-08). Prior to Dr. Simons's testimony, Appellant reiterated the objection to her testimony about bullet trajectory and use of dowels to illustrate the position of the car door and Decedent Davis, but the objection remained overruled. (V40-1951).

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.

> Expert testimony is governed by sections 90.702-90.706, Florida Statutes (2005). Section 90.702 provides that experts may testify in the form of an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue." The expert's testimony "is not objectionable because it includes [an opinion on] an ultimate issue to be decided by the trier of fact." § 90.703, Fla. Stat. (2005). In other words, the evidence code permits an expert to give an opinion on any disputed issue if the expert has specialized knowledge that will assist the trier of fact in resolving that issue.

Linn v. Fossum, 946 So.2d 1032, 1036 (Fla. 2006).

Appellant does not contend that Dr. Simons, a medical examiner, was unqualified to offer expert testimony on medical matters such as the cause of death or the path of the three bullets through Decedent Davis or the identification of entrance and exit wounds. Appellant did object, however, and contends on appeal, that it was an abuse of discretion to allow Dr. Simons to employ the use of dowels, to use a table and a poseable dummy, and to testify on matters that should be left to accident reconstruction, physics, or ballistics experts as to the location and pose of Decedent Davis's body at the time of the shooting.

> A witness may only testify as an expert in those areas of his expertise. Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Kelly v. Kinsey, 362 So.2d 402 (Fla. 1st DCA 1978); Upchurch v. Barnes, 197 So.2d 26 (Fla. 4th DCA 1967). See § 90.702, Fla. Stat. (1989).

Hall, 568 So.2d at 884. "A witness may not testify to matters that fall outside her area of expertise." Jordan v. State, 694 So.2d 708, 715 (Fla. 1997)(citing Hall, 568 So.2d at 884).

> In order to qualify as an expert in a given area, a witness must show that he has acquired special knowledge of the subject matter by either education, training or experience. Upchurch v. Barnes, 197 So.2d 26 (Fla. 4th DCA 1967). Expert testimony may be given only by persons skilled in the subject matter of the inquiry. Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961). The opinion of an expert witness cannot be used to form the basis for a conclusion in the absence of evidence. Arkin Construction Company v. Simpkins, 99 So.2d 557 (Fla. 1957). An opinion is worth no more than the reasons on which it is based. Le Fevre v. Bear, 113 So.2d 390 (Fla. 2d DCA 1957).

Kelly, 362 So.2d at 404. Dr. Stacey Simons had been a licensed physician in Florida since 2011. (V40-1970). She was currently an oncological surgical pathologist at the Moffitt Cancer Center. (V40-1970). Prior to medical school, Dr. Simons had a career as a graphic artist. (V40-1974). She completed medical school in 2006. (V40-1970). She performed a four-year residency with combined anatomic and clinical pathology residency with one year at Brigham and Women's Hospital in Boston and three years at the University of Washington in Seattle. (V40-1970). She then accepted a one-year fellowship in forensic pathology with the Miami-Date County medical examiner department. (V40-1971). After that, she worked as an associate medical examiner for Duval County from July 2011 to January 2014. (V40-1971). She had completed approximately 800 autopsies in Florida. (V40-1972). She testified eight times as an expert in forensic pathology in

Florida courts. (V40-1972). 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). The defense had no objection to Dr. Simons being declared an expert on pathology and forensic pathology. (V40-1981).

After claiming that Dr. Simons was not offered as an expert in accident reconstruction, the State first elicited medical opinions about Decedent Davis's three bullet wounds and the cause of death, but then proceeded to devote most of the doctor's testimony to what can only be classified as non-medical accident reconstruction. This case is similar to Jordan v. State, 694 So.2d 708 (Fla. 1997). In that case, the Supreme Court of Florida reversed a death sentence where the State called Mr. Brown, a therapist with a bachelor's degree in psychology and master's degree in counseling, and the trial court allowed the expert to testify. Over defense objection, the trial court found the expert to be qualified as a mental health expert in general and allowed her to testify that the defendant

was a sociopath. Jordan, 694 So.2d at 716. On appeal, the Supreme Court of Florida reversed, finding:

> Brown's area of expertise was never clearly defined by the trial judge. Her education was not definitively focused in the areas to which she testified. Degrees in psychology and counseling do not necessarily qualify one to testify to complicated profile evidence taken from scientific literature. Here, it seems to us, Brown cannot reasonably be considered an expert in offender profile evidence. Her experiences confirm our finding. She was not, at the time of her testimony, working with either compiling or studying profile evidence. Her opinion as to the inner workings of Jordan's mind at the time of the killing was based heavily on literature she had read. There is no absolute prohibition against qualifying an expert based upon "his or her study of authoritative sources without any practical experience in the subject matter." Ehrhardt, § 702.1, at 512. The problem in this case is that Brown did not demonstrate, in the record, a sufficient study of the scientific literature. Simply reading large amounts of scientific literature, all of which falls well outside a person's area of educational expertise, cannot serve to create an expert out of a non-expert. In this case, Brown testified to matters that were demonstrably outside of her areas of expertise. It was clearly an error for the trial judge to qualify her as an expert. We find that the error cannot be considered harmless in this case. Jordan was labeled a "sociopath without conscience" in front of the jury. The jury recommendation of death was only by an eight-to-four margin. The error in qualifying Brown as an expert necessitates a new sentencing proceeding.

Jordan, 694 So.2d at 716-717 (footnotes omitted). This case is far worse. Here, the trial court allowed a medical expert to testify as to matters of accident reconstruction, allowing her to use dowels for the first time, allowing her to use a table and a dummy to represent the Durango and the decedent, and allowing her to testify that Decedent Davis was sitting in the

car with the door closed when the shots were fired, something directly contradicted by the actual accident reconstruction expert. She read three books in preparation for her first time out as an accident reconstructionist. Dr. Simons testified that she had observed three gunshot holes to the rear passenger door of the Durango, she had put dowels through the doors, and she opined that she was "able to match those bullet wounds with the bullet holes through a range of motions." (V41-2047). She testified that there was a

> range of motion that a person might engage in when they want to move [to] possibly protect themselves. And that range of motion includes reaching over for cover, trying to duck, trying to lift a leg up. And the reason that this is important is because with a shot coming from the door into the chest, to have that diagonal position become horizontal, based on the bullet track through the door, we need to account for the body bending over.

(V41-2048). She testified that the wounds were not consistent with the body leaning out of the car door. (V41-2049). She testified, "If somebody is trying to make a move in their seat, maybe make some sort of evasive or protective action, they're going to try and duck. They're going to get small. They're going to crouch and do anything they can to change their position." (V41-2050). She admitted that she could not tell "which bullet created which path" through Decedent Davis's body. (V41-2051). She testified that the wounds to Decedent Davis's thighs "appeared just like somebody who is in a movement, either ducking for cover or getting hit and then further falling backwards." (V41-2051). She opined that Decedent Davis was not

standing between the car and the open car door because that space was "too compact of a space for him to have been able to move and pivot his body in a way that you could have sustained a shot on the front of the left thigh and then from the back on the right thigh, as well, the chest." (V41-2052). Dr. Simons listened to the audio of the gunshots in order to hear the "quickness of the sequence" of the shots. (V41-2053). Though she admitted that not even the chest wound would have immediately immobilized Decedent Davis, she opined that Decedent Davis would not have been able to "make it [back] into the vehicle" during the shots. (V41-2054). She studied a photograph of dowels placed by Detective Kipple into the door of the Durango. (V41-2056). She then stated that she herself had gone to the Durango and "placed those dowels myself," using the photographs of the detective's work as a reference in order to "place them in a way that was close enough to make a common-sense judgment as to whether or not I had come close enough in a common-sense judgment as to whether or not those matched with my opinion of Jordan Davis's position within the car." (V41-2057). She used the dowels to help formulate her opinion that Decedent Davis was sitting in the car at the time of the shooting. (V41-1058). She added that her opinions were meant "in a common-sense way—this was in no way meant to be a reconstruction." (V41-2059). She added that the vehicle had been moved, and she didn't have the benefit of seeing the Durango in the position it was in during the shooting. (V41-2059). She then testified that she had examined the angles of the door as it opened, reasoned that

doors swing back shut unless they are completely opened, and then examined the door when it was fully propped open and when it was closed. (V41-2060-61). She opined that it was important to consider the short time in between the three shots. (V41-2061). She thought that it was important that Decedent Davis was seated. (V41-2061). She opined that Decedent Davis was not leaning out of the Durango or leaning out of the door at the time of the shooting. (V41-2061-62). She then stepped down from the stand to use a bendable, poseable dummy nicknamed "Bendy" as a demonstration to the jury. (V41-2062). She was asked by the State to assume that a table in the room was the back seat of the Durango even though "it's not a great back seat." (V41-2062). The prosecutor also asked Dr. Simons to assume that "there is a car parked at some distance next to the red Dodge Durango." (V41-2062). The prosecutor also asked Dr. Simons to assume that the "shooter was firing the first shots from the driver's window and that he was firing with a 9mm Luger." (V41-2063). The doctor was then asked to bend the dummy into the position she felt Decedent Davis was in at the time of the shooting. (V41-2063). She testified that Decedent Davis's arm was not at his side because the bullet would have penetrated it instead of moving directly into the chest. (V41-2064). She opined that Decedent Davis was not sitting upright at the time of the shooting. (V41-2064). She used the dummy to illustrate the body moving to its left away from the door. (V41-2064). Dr. Simons admitted that the dummy was "a challenge" to use because the legs did not move in a natural way. (V41-2065). She opined

that Decedent Davis was not standing outside the vehicle when he was shot. (V41-2065). She did not believe that he was leaning out of the vehicle when he was shot. (V41-2066). She did not believe that he was leaning out of the window when he was shot. (V41-2066). She believed 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). She opined that the three bullets that entered the car door were the three that injured Decedent Davis, and none of the other bullets struck him. (V41-2081). On cross-examination, Dr. Simons testified that if Decedent Davis were sitting with his left arm raised and resting on the top of the back seat, he would not have been hit by the bullet that passed through the top bullet hole on the car door. (V41-2085). She admitted that she did not know the size of Appellant's Jetta or where it had been located in relation to the Durango. (V41-2093-94). Such facts were critical to the State's case, as the State hoped to show that Decedent Davis was cursing at—but not advancing toward—Appellant when Appellant retrieved his gun. The testimony could not be harmless because it undercut the claim of self-defense.

Likewise, in Mattek v. White, 695 So.2d 942 (Fla. 4th DCA 1997), the Fourth District reversed finding that it was error to allow an accident reconstruction expert to testify that, based on "literature he had studied, in an impact of less than twelve miles per hour," a person could not be permanently injured. Mattek, 695 So.2d at 943. The Fourth District held that only a

doctor could testify about permanent injury. Id. The same logic applies here. A doctor cannot testify about the physics involved in accident reconstruction after looking at photographs of some dowels and reading three publications in preparation for trial.

The fact that the State and Dr. Simons excused her accident reconstruction opinions as application of mere common sense does not bolster the argument in favor of their admission. First, experts are barred from offering "common sense" opinions because that is the opposite of "expert" opinion. Matters of "common sense" are to be left to the jury, and the expert cannot usurp that role by offering "common sense" opinions. The Supreme Court of Florida has made clear that

> before expert testimony is admitted the trial court must make the following determinations: " First, the **subject must be beyond the common understanding of the average layman**. Second, the witness must have such knowledge as 'will probably aid the trier of facts in its search for truth.'" Huff v. State, 495 So.2d 145, 148 (Fla. 1986)(quoting Buchman v. Seaboard Coast Line R.R., 381 So.2d 229, 230 (Fla. 1980)).

Jones v. State, 748 So.2d 1012, 1025 (Fla. 1999).

> In order to be helpful to the trier of fact, expert testimony must concern a subject which is beyond the common understanding of the average person. State v. Nieto, 761 So.2d 467, 468 (Fla. 3d DCA 2000). Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980).

Mitchell v. State, 965 So.2d 246, 251 (Fla. 4th DCA 2007).

Second, the "common sense" testimony was anything but. Dr. Simons's accident reconstruction testimony was in direct

conflict the testimony of the only actual accident reconstruction expert, Michael Knox. He testified about his extensive expertise and was accepted as an expert by the court and State without objection. (V41-2147-52). Mr. Knox reviewed all of the crime scene photographs, and he had examined the Durango. (V41-2159). He took photographs of the Durango, placed dowels through the bullet holes, used laser mapping equipment, and took measurements of the vehicle. (V41-2159). He measured the parking places. (V41-2161). He examined the spots where crime scene photos had placed bullet casings. (V41-2164). He concurred that the child locks were not engaged at the time the police took crime scene photos of the Durango. (V41-2192). He stated that the second shot was fired .243 seconds after the first, the third shot was fired .227 seconds later, and the total time for all three shots was .47 seconds. (V41-2196). He testified that there was only a gap of .842 seconds and then a series of four more shots began, "occurring at about a quarter second" intervals. (V41-2196). He was able to determine that the Durango was not moving during the first three shots but was moving during the second group of shots. (V41-2197). He testified that Decedent Davis's car door was 40 inches long and when opened fully, it was open at a 53 degree angle. (V41-2199). One needed a clearance of 2'8" to open the door fully. (V41-2199). The parking spaces were nine feet wide. (V41-2199). He opined that the physical evidence was that because the cars were close together and Appellant fired from a front seat toward someone at the rear passenger area of the Durango, behind and to

Appellant's left, Decedent Davis's door had to be open in order for the three bullets to strike it in the way that it did. (V42-2207-08). He opined that for the bullets to have been fired at the rear passenger door while the door was closed, Appellant's Jetta would have had to have been much further away from the Durango. (V42-2209). He was able to say with 100 percent certainty that the car door was open to some extent. (V42-2210-11). He opined that if the door had been closed, Decedent Davis would had to have been pressed "against the seat in front of him" in order to be hit by the shots coming through the door, but if the door had been open, he could have been closer to a seated position. (V42-2217-19). **He opined that it was improper to do accident reconstruction by looking at the wounds.** (V42-2219). He agreed that Decedent Davis had to be on the interior side of the door, not the exterior, and that Decedent Davis had to have been leaned over toward his left. (V42-2220). He opined that no one could determine the position of the body solely from the placement of the wounds

> because what you have is the alignment of the torso for that particular shot, alignment of his upper legs for the other shots in the groin area. But what the rest of his body is doing, his arms, his head, his feet, there's no way to tell that.

(V42-2221). The torso had to have been "at least a good bit inside but not necessarily entirely...." (V42-2221). He was able to say that Decedent Davis was partially outside of the car, but he could not say whether Decedent Davis had placed his feet on the ground. (V42-2222). He opined that

> you have to be at least partially out just to open the door and to be—to get into this position. Because if he's leaning [to the left] and gets hit...he can't go through the seat [in front of him], which means he's now got to be further forward on the seat in order for [the bullet strikes] to align. So he'd have to be at least partially out, but I couldn't tell you where his feet were.

(V42-2222). He opined that

> at least part of his torso would probably be out or just getting back into the vehicle. But he'd have to be towards the edge of the seat. Again, I mean, you pointed out, he can't go through the seat [in front of him], so if he's leaned at that angle and it's aligned, then it means he's forward on the seat, [not] sitting back in the seat.

(V2-2222-23). He opined that Decedent Davis was re-entering the vehicle at the time he was shot. (V42-2223). He opined that the door was not fully open; that it was "somewhere in between fully open and closed." (V42-2224). Dr. Simons's opposite conclusions[2] confused the jury on a critical fact—whether Decedent Davis began exiting the car in order to physically attack Appellant

[2] A careful review of Dr. Simons's testimony shows that most of her opinion is not necessarily in conflict with Mr. Knox's. They agreed that Decedent Davis was leaning to the left and in motion. Dr. Simons appeared only appeared to choose between two scenarios: that Decedent Davis was either sitting in the car with the door closed, falling to the left, or standing outside of the car and re-entering the car after being shot. Mr. Knox's superior analysis, using actual laser mapping and the proper dimensions and locations of the vehicles and taking into account the mobile nature of a body and a car door, confirmed that the door was partially open and Decedent Davis was partially in and partially out of the car, something consistent with leaping back in to avoid the gunshots. Dr. Simons's inability to imagine such a scenario prompted her to incorrectly opine that Decedent Davis was fully inside the vehicle with the door fully closed. This is unsurprising since Dr. Simons candidly admitted that she assumed Decedent Davis was seated inside the Durango because that is what law enforcement told her. (V23-2509).

just prior to Appellant retrieving his gun. The State was permitted to wage a "battle of experts" where there should have been none. Dr. Simons was opining on matters that she had no business discussing. Her testimony should have been restricted to medical matters such as the injuries and cause of death. Allowing her to testify on matters of physics where both the decedent and the car door could be moved, where she had not taken measurements of the location of the Jetta and Durango, and where she was completely unfamiliar with the forces at play allowed the State to muddy waters that should have been clear: the physical evidence showed that Appellant's claim that Appellant had emerged from the Durango was true. This Court should reverse and remand for new trial on Count I.

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.

Standard of Review

The standard of review is a modified abuse of discretion standard. See Ramirez v. State, 810 So.2d 836, 843, ft. 6 (Fla. 2001)).

> A trial court has wide discretion in determining which matters are proper subjects of expert opinion testimony. See McMullen v. State, 714 So.2d 368 (Fla. 1998); State v. Townsend, 635 So.2d 949 (Fla. 1994); State Farm Mut. Auto. Ins. Co. v. Penland, 668 So.2d 200 (Fla. 4th DCA 1995).

Bryant v. Buerman, 739 So.2d 710, 712 (Fla. 4th DCA 1999). That discretion, however, is not without limits. Nathanson v. Houss, 717 So.2d 114 (Fla. 4th DCA 1998). While the standard of review is abuse of discretion, the trial court's discretion on evidentiary matters is limited by the rules of evidence. See Masaka v. State, 4 So.3d 1274, 1279 (Fla. 2d DCA 2009)(citing McDuffie v. State, 970 So.2d 312, 326 (Fla. 2007); Johnston v. State, 863 So.2d 271, 278 (Fla. 2003)). The discretion afforded trial judges is even more proscribed in cases involving exclusion of a key defense witness.

> Generally, an expert should be permitted to testify when his or her specialized knowledge will "assist the trier of fact in understanding the evidence or determining a fact in issue." § 90.702, Fla. Stat. (1997).

Bryant, 739 So.2d at 712.

Merits

At his first trial, Appellant attempted to call Dr. Abuso, an expert in acute stress responses, in order to explain a scientific basis for why he left the scene of the shooting, spent the night in a hotel, and returned home to Satellite Beach before surrendering to authorities instead of contacting the police immediately after the shooting. Admission and exclusion of expert witnesses is governed by Florida's evidence code. Section 90.702, Fla. Stat. (2013), states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

An expert witness "is normally permitted to testify relative to generally accepted scientific theory in the witness's area of expertise. The witness's testimony is subject to the balancing test set forth in section 90.403, Florida Statutes (2000), which focuses on 'legal' reliability and applies to all evidence," requiring the trial court to admit relevant evidence that is not outweighed by the prejudicial effect of admitting the evidence. See Ramirez, 810 So.2d 836 at 842. Under section 90.702, Fla.

Stat. (2012), relevant expert testimony that does not fail the 90.403 balancing test should be admitted if it will assist the trier of fact in his or her task and can be applied to evidence at trial. See Ramirez, 810 So.2d at 842; § 90.702, Fla. Stat. (2010). In other words, testimony that "tend[s] to prove or disprove an issue in dispute" should be admitted. Id.

> The intent of the evidence code is to admit expert testimony if it will assist the jury in determining a factual issue, particularly one that is hotly contested at trial, where the testimony is not merely cumulative, but is critical in helping the jurors resolve the factual issues. Barfield v. State, 880 So. 2d 768, 770 (Fla. 2d DCA 2004).

Council v. State, 98 So.3d 115, 117 (Fla. 1st DCA 2012)(reversing where biomechanical defense expert was excluded). In the instant case, the acute stress expert was necessary to help explain why Appellant left the scene of the shooting. After the shooting, Appellant drove back to his hotel, approximately three miles away from the scene of the shooting. (V21-2200-01; V22-2312; V40-1824). Neither Appellant nor Fiancée Rouer used Rouer's cellular telephone to call 911. (V22-2313). Fiancée Rouer was highly emotional and still frightened even by the time they arrived at the hotel. (V22-2326). The drive did not take long, and Appellant parked normally with no attempt at concealing the vehicle. (V40-1824-25, 1858). Appellant later testified that he was shaken and in shock. (V22-2327). Appellant took the dog out of the room to relieve itself. (V22-2315; V40-1826). Fiancée Rouer went to the front desk and obtained the phone number for a pizza delivery restaurant, ordering a pizza

because she felt physically ill. (V22-2316, 2338; V40-1821, 1854-55). Appellant left the room to pay for the pizza. (V22-2316, 2338; V40-1821, 1854-55). Fiancée Rouer ate only a few bites, and she did not observe Appellant eat anything. (V40-1828). They both drank a rum and Coke. (V22-2317; V40-1829). Appellant was trying to take care of Fiancée Rouer, and he appeared concerned for her. (V22-2338). They were tense and afraid. (V22-2343-44). Fiancée Rouer fell asleep. (V22-2317; V40-1829).

Fiancée Rouer awoke at 7 a.m. (V40-1829). Appellant was in the restroom. (V40-1830). The television was on. (V40-1830). Fiancée Rouer saw television news regarding the shooting and the death of Decedent Davis. (V22-2344; V40-1830). Fiancée Rouer became panicked and told Appellant multiple times that they had to get home. (V22-2348; V40-1830, 1857). At 8 a.m., they headed home to Satellite Beach even though they had planned to visit St. Augustine. (V22-2318-19; V40-1830-31). Fiancée Rouer feared that she would be arrested, so she asked Appellant to take her home because she wanted to arrange for her puppy to be taken care of. (V22-2318). Fiancée Rouer later testified that they were not trying to flee; they were trying to get their affairs in order. (V22-2348). They arrived home at around 10:30 a.m. (V22-2320; V40-1831). Upon arriving home, Fiancée Rouer walked the puppy while Appellant unloaded the luggage from the car. (V22-2320; V40-1832). Appellant surrendered to police in his neighborhood after contacting his neighbor in law enforcement and after receiving a phone call from the police telling him that they

would arrive shortly. (V20-2128-35; V22-2320-21, 2350-51; V39-1656, 1661, 1680; V40-1833-34, 1859).

During the defense portion of the first trial, Appellant noted that he intended to call Dr. John Abuso, an expert on acute stress reaction, in regard to the issue of why the stress of the shooting could have caused Appellant to leave the area. (V25-2708). The State had deposed Dr. Abuso, but State Attorney Corey expressed ignorance as to whether the Frye or Daubert standard applied in Florida courts[3], and she then objected to Appellant's witness testifying because she had no idea what he was going to say and felt he had only limited knowledge of the facts and could only offer personal opinions. (V25-2708-11). The trial judge told State Attorney Corey that she could meet with Dr. Abuso that evening or take a supplemental deposition, and the expert could be called the following day. (V25-2711).

Appellant stated that the expert was a Ph.D, a clinical psychologist, with 30 years experience in treating law enforcement workers. (V25-2756). Attorney Corey again stated that she did not know whether Daubert or Frye applied in Florida, but she declined to further depose Dr. Abuso, asking instead that the defense proffer the witness testimony. (V26-2770).

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[3] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The correct answer is that Daubert applies, though no Daubert issue is presented in this appeal because the trial judge found that acute stress science was sufficiently established.

Appellant proffered Dr. Abuso's testimony. (V26-2773). Dr. Abuso testified that he was a licensed marriage and family therapist with a Masters degree in Divinity and a Doctorate of Ministry in Counseling Psychology. (V26-2773). His license was issued by the Florida Department of Health. (V26-2802). He was originally trained as a prison chaplain. (V26-2773). He obtained his Masters in 1987 and his Doctorate in 1990. (V26-2773). He had between 50 and 100 hours training in acute stress responses. (V26-2773-74). He worked in prison settings from the 1980s onward. (V26-2774). He had trained hundreds of officers and civilians on "stress, work and family, [and] helping officers to deal with stress." (V26-2776). He read extensively on "fight or flight type scenarios." (V26-2776). He counseled officers in New York, particularly in the aftermath of shootings or other on-the-job violent trauma. (V26-2777-78). He provides counseling for all Sheriff's deputies, police officers, and fire rescue in Palm Beach County, Florida. (V26-2777). He trained Palm Beach County Sheriff's officers in approximately 36 8-hour training courses over three years. (V26-2777). He was a mental health consultant for the Florida Department of Juvenile Justice. (V26-2781). He was a member of the Association for the Treatment of Sexual Abusers and the American Association for Marriage and Family Therapy. (V26-2784). Dr. Abuso had not interviewed Appellant personally, but he had viewed Appellant's videotaped interview with police and listened to Appellant's jailhouse telephone calls. (V26-2771, 2779, 2793). He also interviewed Fiancée Rouer. (V26-2771, 2779). He read the police reports in

the case. (V26-2771, 2779). He listened to the 911 calls. (V26-2771, 2779). He testified that the science of studying the physical issues related to emotional stress began in 1939 and was fully developed by the 1970s. (V26-2780). He stated that he was not going to testify as to whether Appellant had the right to use self-defense in this case. (V26-2782). Appellant tendered Dr. Abuso as an expert witness. (V26-2786).

State Attorney Corey asked what expert testimony Dr. Abuso could offer in regard to Appellant's mental state after the shooting and prior to his arrest. (V26-2787). Dr. Abuso answered:

> When someone is faced with a traumatic threat there is 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. 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). He continued:

> What [Appellant] did was protect a very, very upset fiancée who was very erratic, who even in my meeting with her was very upset, and the passivity that he showed in doing whatever she wanted done was---is very typical of someone after an incident like this. If she was worried about the dog, if she was worried about getting arrested[,] everything I've seen in him indicates that he was in a very passive place attempting to comfort her and nothing else mattered.

(V26-2789). On re-direct, he opined

> The...thing that I see consistently post shootings with officers, with civilians, the thing that I see

> consistently is a sense of very strong passivity. Even very strong people, even officers tend to become very passive after a shooting and that will last 72 hours. That could last longer than that. It has a profound impact on someone, and when you put that together with a woman who is his love, his fiancée who is hysterical and crying and looking for comfort it's the perfect storm for a man to just say, yes, Dear, whatever you say.

(V26-2795). 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). He testified that he had counseled three or four civilians after they had shot someone. (V26-2797). He had never testified as an expert in a criminal case but he had testified in juvenile cases. (V26-2797-98).

He believed that Appellant felt threatened at the gas station. (V26-2799). He had no opinion as to whether the feeling of being threatened was justified or not. (V26-2799).

The trial judge questioned Dr. Abuso extensively, adding that Appellant, in the judge's view,

> [t]ook off. He shouldn't have, but we already have two different ways of looking at it if you would. The state making their argument he took off. He shouldn't have. He should have called 911. He should have done a lot of different things and we have [Fiancée'] Rouer already saying here's what he did and here is why he did some of the things that he did.

(V26-2800-01). Dr. Abuso testified that what Appellant "did was very consistent with 50 years of research on acute stress response. (V26-2801). He added that "fight or flight" was a part of the response,

> but there's a lot else that goes into it, too, depersonalization, just hyper[vigilance], inability to focus generally. We become very, very focused on one thing that needs to be done. In this case he was very focused on bringing some comfort to a fiancée who is—who is losing it.

(V26-2801). In response to the judge's question, Dr. Abuso testified that acute stress disorder was fully reflected in DSM-IV, a standard for psychological diagnoses. (V26-2803-04).

At the close of the proffer, the judge indicated that he had

> several problems. One is he's assuming that there was a traumatic threat that triggered this acute stress response which is the defense of self-defense which there is no evidence of before the jury at this point, so I would be very concerned about this man testifying before that defense is really placed into evidence so I don't see even if I let him testify that he can be the next witness. That's number one. Number two, I am very concerned about his qualification as it would relate to this acute stress response. He's not a clinical psychologist. He's not a psychologist of any kind. He's basically a licensed marriage and family counselor. I recognize he's got some experience with law enforcement previously but he's never testified as an expert in any type of a case similar to this. I just have serious, serious reservations about his qualifications. Thirdly as I mentioned yesterday, I think in reviewing the previous what was a true stand your ground case I had concerns about the expert in that case testifying, and again the facts of that case were somewhat different obviously, but I was concerned that what the expert was going to testify to was not particularly helpful to a jury to help them decide in that case the ultimate fact. In that case it was whether or not stand your ground applied or whether or not self-defense applied and there was a justification for the shooting.
>
> So the additional problem I have here is we're not talking about the ultimate fact, this witness rendering an opinion about the ultimate that, that is was Mr. Dunn justified in some way, shape or form in the shooting? We've gone beyond that. We're talking about a collateral matter now where this—this

> gentleman is offering an opinion, I guess, that Mr. Dunn's reaction after the fact could be explained which again has got nothing to do with the ultimate issue and that is was the shooting justified or not.

(V26-2805-07). The judge then expressed concerns about an appellate court reversing a high-profile case "because the defendant didn't get to put on a witness...." (V26-2807).

Appellant's counsel expressed that he had no problem with calling Dr. Abuso after Appellant had testified so that the testimony regarding the fear and traumatic event would be in evidence. (V26-2808). He testified that there was ample case law that every expert has to have a first case in which he or she is admitted as an expert. (V26-2808). Appellant's counsel also clarified that this case was different from the stand your ground case cited by the judge because

> we are not here to have him say to the jury because of the way he acted he was justified in the shooting[or i]t was stand your ground. I even said I want to stay far away from that because I don't want to impute on that jury. And I just want to tell the Court respectfully I don't consider it a collateral matter and this is why: I filed the Motion in Limine intentionally to prohibit the state from taking about everything that happened after what he was indicted for. Your Honor, in argument and case law Your Honor denied that motion and allowed the state to go into it. This is not my case in chief. Part of the defendant's case in chief is to rebut things that were said and made an argument by the state in their case in chief, so it's not like I'm bringing in a new theory or principle.... An extensive education is not necessarily a prerequisite to expertise. In order to qualify as an expert witness one needs only to have acquired such special knowledge of the subject matter of his testimony either by study or by practical experience.

(V26-2810-11). The judge conceded that he accepted the testimony that the science on acute stress disorder was well-established. (V26-2811). Stunningly, the trial judge stated that he was inclined to exclude the witness, but he would "defer to the state." (V26-2813). The State and the judge then brought up several cases—all of which will be discussed and distinguished below—as a basis for excluding experts, and then the judge excluded Dr. Abuso. (V26-2816). The trial court erred.

> "[O]ne of a party's most important due process rights is the right to call witnesses," Keller Indus. v. Volk, 657 So.2d 1200, 1202-03 (Fla. 4th DCA 1995). "A trial court should only exclude witnesses under the most compelling of circumstances," Keller Indus., 657 So. 2d at 1203, especially "when the witness sought to be excluded is a party's only witness or one of the party's most important witnesses because if the witness is stricken, that party will be left unable to present evidence to support his or her theory of the case," Pascual v. Dozier, 771 So.2d 552, 554 (Fla. 3d DCA 2000).

State Farm Mut. Auto. Ins. Co. v. Bowling, 81 So.3d 538, 541 (Fla. 2d DCA 2012). That is even more true in the criminal context.

> As a general proposition, "the right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 So. 2d 404, 405 (Fla. 3d DCA 1988)(citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), and Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). In Chambers, the Supreme Court noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302.

Masaka v. State, 4 So.3d 1274, 1284 (Fla. 2d DCA 2009). This Court, in Allen v. State, 365 So.2d 456, 458 (Fla. 1st DCA 1978), reversed under similar facts. In Allen, this Court considered facts where a defense witness, Mr. Boercker, was excluded as an expert witness after a proffer.

> The testimony sought of him was of particular importance because of the conflict as to which of the two occupants were the driver of the Dodge automobile. The state emphasized that although Mr. Boercker had a Bachelor of Arts degree **he did not hold a Doctorate and had never before testified in court. Neither are essential to his qualifications. There must always be a first time for everyone and extensive education is not necessarily a prerequisite to expertise. In order to qualify as an expert witness one needs only to have acquired such special knowledge of the subject matter of his testimony either by study or by practical experience that he can give the jury assistance and guidance in solving a problem to which their equipment of good judgment and average knowledge is inadequate.** (See 13 Fla. Jur., Evidence, § 310, et seq.; Hosbein v. Silverstein, 358 So.2d 43 (Fla. 4th DCA 1978); Seibels, Bruce & Company v. Giddings, 264 So.2d 103 (Fla. 3rd DCA 1972) and Cromarty v. Ford Motor Co., 341 So.2d 507 (Fla. 1976).) The record reveals that Mr. Boercker had a Bachelor of Arts degree in Physics and as a graduate student at the University of Florida had earned 180 credit hours of Physics toward his Doctorate degree and had co-authored a paper in Physics that had been published. The state also urges that there was insufficient evidence in the record of physical facts and circumstances upon which Mr. Boercker could have based his testimony. Although Mr. Boercker testified on the proffer of his testimony that such additional facts and circumstances would be helpful, he testified that they were not essential as a basis for the testimony sought to be elicited from him. We are of the view that the learned trial judge abused his discretion in rejecting Mr. Boercker as an expert witness.

Allen v. State, 365 So.2d 456, 458 (Fla. 1st DCA 1978). The trial judge in this case excluded Dr. Abuso partially on the basis that Dr. Abuso had not testified in a criminal matter, he had not published peer-reviewed papers, and he had not interviewed Appellant personally. (V26-2815). Dr. Abuso had decades of training and experience in acute stress responses, a settled science that the judge recognized as legitimate. The fact that Dr. Abuso had never testified in court was of no importance. There must always be a first time for everyone. Dr. Abuso had viewed Appellant's videotaped interview with police and listened to Appellant's jailhouse telephone calls. (V26-2771, 2779, 2793). He also interviewed Fiancée Rouer. (V26-2771, 2779). He read the police reports in the case. (V26-2771, 2779). He listened to the 911 calls. (V26-2771, 2779). In his nearly 30 years of acute stress reaction counseling, he had undoubtedly "acquired such special knowledge of the subject matter of his testimony either by study or by practical experience that he" could "give the jury assistance and guidance."

In Rose v. State, 506 So.2d 467, 470-471 (Fla. 1st DCA 1987), rev. denied, 513 So.2d 1063 (Fla. 1987), this Court reversed after a trial court denied Rose's request to call James Beller as a mental health expert. The record in Rose clearly showed

> that the reason the trial court refused to qualify Beller as an expert was because it agreed with the prosecutor that Beller is not qualified since he is not licensed in this state as a psychologist. However, it is equally clear that a witness need not have a specific degree or license in order to testify as an expert. Section 90.702, Florida Statutes, specifically provides that a witness may be qualified as an expert

"by knowledge, skill, experience, training, or education...." In Allen v. State, 365 So.2d 456 (Fla. 1st DCA), cert. dismissed, 368 So.2d 1373 (Fla. 1978), this Court expressly held that neither a doctorate nor prior experience as an expert witness are essential prerequisites to being qualified as an expert witness. See also Salas v. State, 246 So.2d 621 (Fla. 3d DCA 1971). As pointed out by Professor Ehrhardt:

An expert is defined in section 90.702 as a person who is qualified as an expert in a subject matter "by knowledge, skill, experience, training, or education."... It applies not only to persons with scientific or technical knowledge but also to anyone with any specialized knowledge.... A witness may qualify as an expert by his study of authoritative sources without any practical experience in the subject matter.

C. Ehrhardt, Florida Evidence § 702.1 (Second Ed. 1984) [footnotes omitted] [emphasis added]. In the instant case, although Beller admittedly did not possess a doctoral degree in psychology, at the time of the competency hearing he would have been eligible within a year to be licensed as a mental health counselor. Further, Beller testified that he had taught at the University of Southern California, had given seminars before three public agencies in Florida, had previously testified in court three times as an expert, had taught biology and physics, and had studied temporal lobe epilepsy. As a psychological associate working under Dr. Warriner's license and supervision, he performed psychotherapy, psychological assessments, and neuropsychological assessments. Moreover, Dr. Warriner testified that the reason he asked Beller to do the testing [was that he was more familiar with the testing than Dr. Warriner.] Although whether a witness is qualified as an expert is a preliminary question of fact which must be determined by the trial court in the court's discretion, Ehrhardt, Florida Evidence, supra, at 396, in the instant case, because the trial court premised its denial to qualify Beller as an expert on the fact that Beller was not a licensed psychologist, we find the trial court abused its discretion. By that abuse, appellant was effectively deprived of his right to a fair trial and to present witnesses on his behalf. This is so because Beller was the only witness who was

> willing to categorically diagnose appellant as suffering from episodic dyscontrol syndrome which would have rendered him incapable of forming a premeditated intent to commit the murder.... Accordingly, we must reverse on this point and remand for a new trial.

Rose, 506 So.2d at 470-471. In 2009, the Supreme Court of Florida observed:

> A witness may be qualified as an expert through specialized knowledge, training, or education, which is not limited to academic, scientific, or technical knowledge. An expert witness may acquire this specialized knowledge through an occupation or business or frequent interaction with the subject matter. See Weese v. Pinellas County, 668 So.2d 221, 223 (Fla. 2d DCA 1996)(citing Harvey v. State, 129 Fla. 289, 176 So. 439, 440 (Fla. 1937)(witnesses were qualified as expert cattlemen and butchers based upon many years of experience in such business and occupation and knowledge acquired thereby)). However, general knowledge is insufficient. The witness must possess specialized knowledge concerning the discrete subject related to the expert opinion to be presented. See Charles W. Ehrhardt, Florida Evidence § 702.1, at 686-87 (2008 ed.).

Chavez v. State, 12 So.3d 199, 205 (Fla. 2009). Dr. Abuso's training and extensive experience qualified him as an expert. The trial court's ruling deprived Appellant of a constitutional right to present witnesses on his behalf. Excluding him was an abuse of discretion that prevented Appellant from providing a scientific basis for why he left the scene without contacting the police.

None of the cases cited *sua sponte* by the trial judge or the State were on point. The judge cited State v. Nazario, 726 So.2d 349 (Fla. 3d DCA 1999) in support of excluding Dr. Abuso.

Nazario is not on point. In that case, Nazario wanted to call a battered-spouse syndrome expert to testify that she lacked the mental capacity to form the intent to kill her husband due to suffering from the syndrome, but the Third District recognized this as a diminished capacity defense that, absent evidence of actual insanity, was not a defense to murder in Florida. Thus, the expert had nothing to offer on a material fact. Nazario is not applicable to the facts of this case at all. It is simply an example of an appellate court affirming a trial court's exclusion of an expert witness, but it does not stand for the proposition that a trial court may do so when the qualified expert can assist the jury on a material issue of fact. In the instant case, the judge described the acute stress reaction evidence as testimony pertaining to a mere collateral matter, but it was not. Flight as evidence of consciousness of guilt was used by the State to help prove criminal intent. "It is well-established that evidence of flight may be probative of" consciousness of guilt. See Leon v. State, 68 So.3d 351, 353 (Fla. 1st DCA 2011); Twilegar v. State, 42 So.3d 177, 196 (Fla. 2010). The State used the evidence of Appellant leaving the scene in precisely this way. During the State's cross-examination of Appellant, the State delved into the supposedly "collateral" matter of his failure to contact the police on the night of the shooting. 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 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). Appellant was entitled to call a qualified witness to rebut the State's theory.

The judge also referred to State v. Mizell, 773 So.2d 618, 619 (Fla. 1st DCA 2000), arguing that the case supported expert testimony on self-defense, but Dr. Abuso was not testifying

about self-defense. (V26-2815). Mizell is a case that distinguished itself from Nazario. Id. Mizell offers compelling and binding precedent for reversal. In Mizell, the trial court ruled that it would allow an expert on post-traumatic stress disorder (PTSD) to explain Mizell's state of mind during a scenario that resulted in a charge of attempted second degree murder. Mizell, 773 So.2d at 620. The State filed a petition for certiorari, asking this Court to reverse that pretrial ruling under Nazario on the basis that the testimony was only relevant to diminished capacity, which was not a valid defense in Florida. Id. This Court agreed that diminished capacity was not a defense to murder in Florida, but sided with Mizell, observing: "We view the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times." Mizell, 773 So.2d at 620. The trial judge raised Mizell *sua sponte*, but then distinguished this case because Dr. Abuso would not be testifying about Appellant's state of mind during the shooting; he would be testifying about his state of mind right after the shooting, especially his decision to leave the scene. The trial judge called that a "collateral" matter. As the State argued that Appellant's departure from the scene was relevant to intent, though, Mizell stands for the proposition that Dr. Abuso's evidence would have assisted the trier of fact

in deciding on a material fact—whether leaving the scene was indeed evidence of consciousness of guilt.

The judge cited Humble v. State, 652 So.2d 1213 (Fla. 1st DCA 1995) in support of his decision to exclude Dr. Abuso. (V26-2816). The most brief perusal of the facts shows that Humble is not at all on point.

> Humble stabbed and killed her husband on September 5, 1992, and asserted the battered-spouse syndrome as a defense. At trial, the defense sought to qualify Joan Wilson as an expert witness for the sole purpose of describing the syndrome to the jury, but not to give her opinion concerning whether appellant was suffering from the syndrome when she killed her husband. Wilson has 17 years experience working in the field of domestic violence, operating shelters and domestic-violence programs, and has attended and taught numerous workshops on spouse abuse. She has a bachelor's degree in music, however, and no formal education in the field of mental health. The trial court concluded that Wilson's administrative experience in planning and operating domestic-violence programs was extensive, but that her lack of academic training in the disciplines of psychology or mental health, or clinical experience involving the study, treatment or diagnosis of battered-wife syndrome rendered her unqualified to describe the syndrome to the jury. We agree that the trial court properly exercised its discretion by concluding that Wilson's experience was insufficient to enable her to "assist the trier of fact in understanding the evidence or in determining a fact in issue."

Humble, 652 So.2d at 1213-1214 (footnotes omitted). Wilson was going to describe battered wife syndrome to the jury, but she was not going to express an opinion as to whether Humble suffered from that syndrome. She was an administrator who had seen a lot of battered women, but she had no training or

experience in diagnosing and treating such women. Though Wilson had administrative experience in planning and operating domestic-violence programs and she had participated in workshops on spousal abuse, she had only a bachelor's degree in music and no formal education in the field of mental health. In contrast, Dr. Abuso was being called as an expert on acute stress reactions, and his credentials qualified him to offer assistance to the jury on this issue. Dr. Abuso was going to testify that Appellant was indeed suffering from an acute stress reaction after the shooting. (V26-2787-89, 2799, 2801). Dr. Abuso was a licensed marriage and family therapist with a Masters degree in Divinity and a Doctorate of Ministry in Counseling Psychology. (V26-2773). His license was issued by the Florida Department of Health. (V26-2802). He was originally trained as a prison chaplain. (V26-2773). He obtained his Masters in 1987 and his Doctorate in 1990. (V26-2773). He had between 50 and 100 hours training in acute stress responses. (V26-2773-74). He worked in prison settings from the 1980s onward. (V26-2774). He had trained hundreds of officers and civilians on "stress, work and family, [and] helping officers to deal with stress." (V26-2776). He read extensively on "fight or flight type scenarios." (V26-2776). He counseled officers in New York, particularly in the aftermath of shootings or other on-the-job violent trauma. (V26-2777-78). He provides counseling for all Sheriff's deputies,

police officers, and fire rescue in Palm Beach County, Florida. (V26-2777). He trained Palm Beach County Sheriff's officers in approximately 36 8-hour training courses over three years. (V26-2777). He was a mental health consultant for the Florida Department of Juvenile Justice. (V26-2781). He testified that the science of studying the physical issues related to emotional stress began in 1939 and was fully developed by the 1970s. (V26-2780). He 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). Humble, then, is entirely distinguishable. Dr. Abuso had training, education, and experience that qualified him to speak as an expert on acute stress reactions.

The State cited Filomeno v. State, 930 So.2d 821, 822 (Fla. 5th DCA 2006) as a case preventing Dr. Abuso from testifying. (V26-2813). Attorney Corey argued that Dr. Abuso could not aid the jury in deciding whether to believe that Appellant intentionally fled the scene or whether, instead, he was "catering to his girlfriend." (V26-2814). In Filomeno, however, the Fifth District actually found that it was error to exclude the defense expert psychologist, though the error in that case was harmless. Filomeno testified fully as to why he felt he had to fight rather than flee, and the jury instructions provided legal guidance as to when fight or flight is appropriate. That is completely different from the instant case, where the jury instructions did not explain the physiological process that led to Appellant's muddled mental state for 72 hours following the shooting. The State harped on flight as evidence of consciousness of guilt in its cross-examination and its closing argument, and without an expert to testify regarding the scientific reason for that flight, the best that Appellant could offer was that his decision to leave "sounded crazy." Filomeno, then, does not support the decision to exclude Dr. Abuso.

The judge cited Hood v. Matrixx Initiatives, 50 So.3d 1166 (Fla. 4th DCA 2000), for the proposition that Dr. Abuso's testimony should be excluded. (V26-2816). Appellant cannot conceive of why the trial judge thought that this case supported

excluding Dr. Abuso. First, the case is a civil one that does not include the due process implications of excluding a defense witness in a criminal case. Second, in Hood, the Fourth District reversed due to improper exclusion of an expert, defending the "jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views." Hood, 50 So.3d 1175. Hood involved completely different issues, and it involved heavy Frye analysis that is not at issue in this case, but if Hood has anything to offer in analysis of this case, it would support reversal.

The judge found the "most telling" case to be Zile v. State, 779 So.2d 535 (Fla. 2d DCA 2000). Zile was convicted of murder for the "beatings of his seven-year-old stepdaughter, Christina Holt, which resulted in her death...." Zile, 779 So.2d at 536. Zile, unlike all of the other cases cited by the State and the trial judge, at least has some tangential relation to the instant case in that it involved affirming exclusion of an acute stress expert in a murder case. It is, however, distinguishable. In Zile, Zile challenged

> the trial judge's denial of appellant's request to present expert testimony to the effect that his conduct after Christina's death was the result of appellant's post-traumatic stress disorder resulting from the child's death at his hands. After Christina died, appellant did not notify the authorities because of his concern over the bruises on her body. The next day, appellant wrapped Christina's body in a blanket and hid it in a closet for several days in order that

> the other children in the home would not discover her. He instigated a missing child report and a public plea claiming Christina had been kidnaped. He purchased a shovel, tarpaulin, and other items in order to bury her body. He wrapped the body, secured it with duct tape, dug a hole, and buried it in a place he had previously chosen. He disposed of the shovel by throwing it off a bridge. The trial court's refusal to allow the expert testimony on the issue for which it was offered was an act of discretion which we conclude was not abused. We agree with the trial judge that the expert testimony of any acute stress disorder suffered by appellant as a result of his having killed Christina was not relevant to assist the jury in understanding the evidence of how or why he affected her death.

Zile, 779 So.2d at 536-537. The difference between the two cases is more one of fact than of law. No claim of self defense is mentioned in the opinion, and self-defense in the beating death of a seven-year-old girl by a fully grown man is hard to imagine. In fact, no defense at all is mentioned in the opinion. The post-murder diabolical concealment of Christina Holt's body by Zile was perhaps relevant to show a lack of mistake or accident and to show how Holt's body was discovered. Zile was not facing the death penalty, but the PTSD testimony offered by the defense appeared designed only to reduce the image of Zile as a monster, not to address any material issue pertaining to guilt or innocence. In the instant case, however, Appellant claimed self defense, the State argued that his leaving of the scene was flight that showed consciousness of guilt and intent to murder, and the expert testimony was relevant and important to rebut that claim. This was pointed out to the judge at V26-2819, but the judge disagreed and excluded Dr. Abuso. The cases

are factually different. This Court should apply the rule that due process and Florida's evidence code demand that Appellant should have been able to present a qualified expert, Dr. Abuso, to assist the jury in understanding Appellant's departure from the scene as something other than flight that indicated consciousness of guilt. In light of the fact that the State made the flight a part of its case, the error in excluding Dr. Abuso could not have been harmless. This Court should reverse and remand Counts II-V for new trial with instructions to permit the witness.

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.

Standard of Review

The standard of review is for abuse of discretion.

> The trial judge is vested with discretion in determining whether a juror has engaged in misconduct that warrants removal from the jury. Dery v. State, 68 So. 3d 252 (Fla. 2d DCA 2010); see also Wilson v. State, 608 So. 2d 842, 843 (Fla. 3d DCA 1992)(holding that trial court did not abuse discretion in removing juror who failed to disclose her ill feelings toward the State Attorney's Office during *voir dire*). **However, that discretion is not without bounds.**

McNeil v. State, 158 So.3d 626, 627 (Fla. 5th DCA 2014)(emphasis supplied); Perez v. State, 919 So.2d 347 (Fla. 2005), cert. denied, 126 S. Ct. 2359, 165 L. Ed. 2d 285 (2006).

Preservation

Juror 4 was removed pursuant to the State's motion, and Appellant objected to the removal repeatedly on the basis of lack of juror misconduct. (V38-1589-90; V39-1607-11, 1626-27, 1639). The trial judge removed Juror 4. (V39-1639). Appellant re-raised the issue in the motion for new trial. (V8-1462). The trial court denied the motion. (V8-1463). Thus, the claim was preserved.

Merits

In the instant case, the trial court erred in removing a juror in the middle of the second trial without any showing of juror

misconduct. In Washington v. State, 955 So.2d 1165 (Fla. 1st DCA 2007), this Court stated:

> **A party seeking to remove a juror for improper behavior in the course of a trial must first show that the juror's actions amount to misconduct.** See Hamilton v. State, 574 So.2d 124, 129 (Fla. 1991); Ramirez v. State, 922 So.2d 386, 389 (Fla. 1st DCA 2006). Here, the trial judge removed the juror in the absence of a request by a party, but the standard is no different. Whether removal is initiated by a party or by the trial judge, a finding of **misconduct requires evidence that the juror violated an order or instruction by the court.**

Washington, 955 So.2d at 1172 (emphasis supplied).

The specific form of misconduct found by the trial court was that Juror 4 concealed a bias against one of the prosecutors, Attorney Corey.

> The concealment by a juror of material information during voir dire is a form of misconduct. A juror's concealment of material information during voir dire may warrant relief in the form of the removal of the offending juror or a new trial. The question of whether a juror has concealed material information during voir dire so as to warrant the juror's removal or the grant of a new trial is subject to the three-part De La Rosa test:
>
> First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.
>
> De La Rosa v. Zequeira, 659 So.2d 239, 241 (Fla. 1995). Although De La Rosa is a civil case, the three-part test also applies in criminal cases. See Murray v. State, 3 So. 3d 1108, 1121-22 (Fla. 2009); Marshall v. State, 664 So. 2d 302, 304 n.2 (Fla. 3d DCA 1995).

Nicholas v. State, 47 So.3d 297, 312-313 (Fla. 2d DCA 2010; Wallace, J., concurring and dissenting); Nicholas, 47 So.3d at 303 (applied by majority, which came to different conclusion from Judge Wallace only on application of the "due diligence" prong); Dery v. State, 68 So.3d 252, 255 (Fla. 2d DCA 2010)(reversing under De La Rosa test); Marshall v. State, 664 So.2d 302, 304 (Fla. 3d DCA 1995)(reversing under De La Rosa test where juror concealed prior contact with defendant and witnesses during *voir dire*). It is certainly true that concealment of a material bias against the prosecution can constitute juror misconduct that justifies removal from a jury even if the juror insists he can by impartial. Nicholas, 47 So.3d at 303. In the instant case, however, there was no juror misconduct or concealment of a material fact relating to a bias against the prosecution. Midway through the State's case in chief, the trial court dismissed Juror 4, substituting an alternate. The State noted that the online version of Folio, a Jacksonville tabloid, had printed an interview with a rejected prospective juror. (V38-1588). Folio quoted the rejected juror as saying that Juror 4 sat next to him during jury selection and had remarked that Assistant State Attorney Angela Corey, one of the three prosecutors on the case, was unprofessional in laughing during *voir dire* and that she would have trouble

convincing a jury even that Juror 4—who was obese and enjoyed making self-deprecating remarks about his own weight-was fat. (V38-1591-95). In light of the comment, the State moved to remove Juror 4 and replace him with an alternate. (V38-1589). Appellant argued that if Juror 4 had made such a comment, it would not have constituted misconduct as it would not have been in violation of any court order that had been in effect at the time. (V38-1589-90). The judge conceded that there was no court order in effect at the time that would have barred the comment, but argued that the comment would constitute misconduct because questions had been asked as to whether anyone had bias against the State. (V38-1590). Juror 4 initially stated that he did not recall "Juror 30," the man quoted in the tabloid. (V38-1596). Once he was physically described to Juror 4, however, Juror 4 recalled speaking to the man, stated that he frequently made jokes about his own weight, and admitted that he thought State Attorney Corey's levity during *voir dire* had been unprofessional in light of the seriousness of the case, though he did not recall saying that Attorney Corey would not be able to prove to jury that he was fat. (V38-1596-1605, 1615). He opined that State Attorney Corey was competent to try the case. (V39-1605). He stated that he maintained that he was "100 percent" certain that he could be fair and impartial in the case, adding:

> I'm a joking kind of guy, but I take this 100 percent serious. This is—this is life and death, and this is justice on the other side.... And I've formed no opinion one way or another because I haven't heard all of the evidence.

(V39-1606-07). The State again moved to replace the juror with an alternate. (V39-1607-10). Appellant argued that Juror 4 had not committed any misconduct and could not, under Washington v. State, 955 So.2d 1165 (Fla. 1st DCA 1997), be removed. (V39-1610). Appellant argued that any negative first impression created by Attorney Corey during *voir dire* was something "she's created...on her own, and that's just the risk of going to trial that you create a negative impression of yourself as an attorney." (V39-1611). Without input from the State, the trial judge opined that Wilson v. State, 608 So.2d 842 (Fla. 3d DCA 1992) supported his right to remove the juror. (V39-1611).

When asked by Appellant if the judge was making a finding of juror misconduct, the judge answered:

> I guess it would be a form of misconduct in that he did not reveal his displeasure with the State Attorney's Office and apparently particularly Miss Corey and that he is of the opinion she could not prove much of anything to a jury beyond a reasonable double, including his size, which is very apparent....
>
> And I know misconduct sounds like a harsh word. And maybe that's the word that's used in a lot of these cases, but it's not like he violated a direct Court order. Obviously, that's not the case. But it's being less than candid.

(V39-1626-27).

The rejected juror in the article was located, and he testified on the matter. (V39-1634). He testified that Juror 4, who he described as a 400-pound white schoolteacher, had stated

that he "really hated Corey's humor and made a joke that she would have a hard time proving to the court that I am fat. There would still be reasonable doubt." (V39-1635). He added that Juror 4 made the comment in the hallway, and that he said it "pretty much to everybody around him." (V39-1635). He added that Juror 4 said that State Attorney Corey "needed to stop making jokes and get on with the trial." (V39-1637).

The judge removed Juror 4 from the jury, remarking:

> [T]here is reasonable doubt as to whether or not Juror [4] could be fair and impartial, that he did not disclose his seeming animosity for Miss Corey or her—his belief in her lack of ability, I guess, is one way to put it, that she couldn't prove the he was—I hate to use the term but it's in the article—fat to a jury. There would still be reasonable doubt and he's a large man. So he's excused. And that will bring No. 71 as Juror No. 12.

(V39-1639). Appellant objected to Juror 4 being removed because no misconduct occurred. (V39-1639). After being informed of his dismissal, Juror 4 stated:

> If I offended Prosecutor Corey, I apologize. I don't think I said it but I might have. It's nothing personal. I promise. And also I just want the Court to know that my notes, if you look over my notes at some point when this is over, you'll see that I took fair notes, just to make sure you know I was taking my job seriously.

(V39-1644). Juror 4 noted that he was concerned about the matter reflecting on his character, adding that he had only been joking. (V39-1645, 1648). The judge added, "Well, it—I'm trying—it's just a matter of everybody being comfortable, I guess, that...you could be completely fair and impartial...." (V39-

1645). The record was insufficient to show material concealment and due diligence by the State.

Materiality Prong

The fact that Juror 4 found Attorney Corey's laughter during a serious murder case off-putting was not a "material" bias. Under the De La Rosa test, "[n]o 'bright line' test for materiality has been established and materiality must be based on the facts and circumstances of each case." Roberts v. Tejada, 814 So. 2d 334, 341 (Fla. 2002)(citing Leavitt v. Krogen, 752 So.2d 730 (Fla. 3d DCA 2000)). The trial judge, *sua sponte*, cited Wilson v. State, 608 So.2d 842 (Fla. 3d DCA 1992), as a basis for removing Juror 4. (V39-1611). The case speaks mainly to the materiality prong.

> In Wilson the State had asked the entire venire whether they could be impartial. 608 So. 2d at 843. A particular juror did not respond to that question, nor did she ask for a side-bar. Id. During trial, the court was made aware of a potential problem with that juror. Id. When the court questioned the juror, she stated that "the State Attorney's Office was trying to do something to her mother that was unfair[,]" but that she could still be fair and impartial as a juror in the case. Id. The trial court removed the juror and replaced her with an alternate. Id. The defendant argued the trial court had erred in dismissing the juror after the start of testimony. The Third District concluded that the trial court had "properly resolved the problem." Id.

Nicholas v. State, 47 So.3d 297, 303 (Fla. 2d DCA 2010). There was no analogous material bias in the instant case. The juror's mother, in Wilson, was being prosecuted unfairly in the mind of the juror, and the juror had remained silent at *voir dire* when asked if she could be impartial. In the instant case, however,

the State Attorney was not prosecuting Juror 4 or a member of his family. Rather, Juror 4 made a joke during *voir dire* at Attorney Corey's expense because he thought her laughter during *voir dire* was unprofessional in light of the seriousness of the case. Viewing the facts in the State's favor, Juror 4 opined that an unprofessional attorney would have a difficult time proving her case. That is not material "bias." Rather, it was an early impression formed during the proceeding. Bias is an opinion that pre-dates the proceeding. If an opinion formed through observation at a proceeding constituted "bias," every verdict would be the result of bias. In Wilson, the juror had a grudge against the Office of the State attorney for unfairly prosecuting her mother. Juror 4 had no material basis for a grudge against Attorney Corey. He disapproved of something she did in open court. It was an abuse of discretion to equate Juror 4's observation that Attorney Corey acted unprofessionally in laughing during *voir dire* in the presence of the venire to some pre-existing bias. Every juror forms positive or negative opinions of attorneys during a trial. That is not the same thing as "bias." 3.10(4), Fla. Crim. Jur. Instr. (2015), as part of the rules for deliberation, instructs jurors, "Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case." Nothing in the record indicated the Juror 4 had any material bias; rather, he simply reacted negatively to one unprofessional act by one of the State's attorneys during the case. The jury instruction is sufficient to inform jurors that they must set those feelings

aside. Juror 4 assured the court that he had no bad feelings against State Attorney Corey and he was completely impartial.

Concealment and Due Diligence Prongs

Even assuming that Juror 4's negative reaction to Attorney Corey's laughter during a serious case constituted a fact that was material as to his impartiality and bias against one of the State's attorneys, the record contains no evidence of concealment (prong 2) or due diligence by the State in asking questions that would have prompted Juror 4 to discuss his feelings about Attorney Corey's laughter (prong 3). The State had to satisfy both prongs in order to justify removal of the juror.

> Information is considered concealed for purposes of the three part test where the information is "squarely asked for" and not provided. See Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A., 714 So.2d at 536; Bernal v. Lipp, 580 So. 2d 315, 316 (Fla. 3d DCA 1991); see also Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984)(in order for a juror to be held to have concealed information, the question propounded must be straight-forward and not reasonably susceptible to misinterpretation).

Birch v. Albert, 761 So.2d 355, 358 (Fla. 3d DCA 2000)(applying De La Rosa test and finding no concealment or due diligence). Nothing in the record shows that Juror 4 concealed anything. Juror 4 was, during *voir dire*, Prospective Juror #18. (V28-3286). The State was not diligent in asking, during *voir dire*, whether any juror was offended by the conduct of the State's attorneys during the proceedings. None of the questions fairly put Juror 4 on notice that he should raise or discuss the joke

that he had made. Thus, there was no sufficient basis to remove Juror 4 over Appellant's objection.

Wiley and James

During a later recess, the judge *sua sponte* cited Wiley v. State, 427 So.2d 283 (Fla. 1st DCA 1983) and James v. State, 843 So.2d 933, 936 (Fla. 4th DCA 2003) as further support for his decision to dismiss Juror 4. (V39-1778-79). Neither case was applicable. Wiley devoted two sentences to finding a lack of abuse of discretion where a trial judge removed a juror and substituted an alternate when the juror arrived late for trial. In James, the Fourth District affirmed the denial of a defendant's request for removal of a juror because the issue was unpreserved and the juror committed no misconduct. These cases stand only for general propositions of law that have no specific application to this case. This is the very same trial in which the judge agreed that jurors who had formed strong opinions about Appellant's guilt from watching the news would be allowed to serve on the jury if they promised that they could be impartial. (V31-130-31, 134-35-37). On this record, the trial judge abused his discretion in finding that Juror 4 omitted a material fact during *voir dire*.

Harmless Error Analysis

In this case, the judge added that even if removing the juror was improper, it would be harmless error to replace him with an alternate juror who had been present for the entire trial. (V39-1612). The error was not harmless. In Washington, binding precedent from this Court that was specifically brought to the

judge's attention during argument on this matter, this Court rejected the argument that replacing a juror with an alternate juror was harmless because "reconfiguration of the jury panel is the very error that must be corrected." Washington, 955 So.2d at 1173; McNeil v. State, 158 So.3d 626, 628 (Fla. 5th DCA 2014)(following Washington). In the instant case, the jury was improperly reconfigured in the middle of the trial. Just as in Washington, the error here was not harmless; it was structural. This Court should reverse and remand Count I—the only count decided at the second trial—and remand for new trial.

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

The trial court erred in granting Appellant's motion to change the venue of the second trial.

Standard of Review

"An application for change of venue is addressed to the sound discretion of the trial court, and the trial court's decision will ordinarily be upheld unless there is a showing of palpable abuse of discretion." Johnson v. State, 351 So. 2d 10, 12 (Fla. 1977)(citing Hawkins v. State, 206 So.2d 5 (Fla. 1968)).

Preservation

The argument was preserved repeatedly, and the trial court denied the motion for a change of venue. (V7-1179-1186, 1336-40; V8-1462). (V7-1179-1186; V8-34; V31-11-12). After the verdict, Appellant filed a motion for new trial arguing that the court again denied the argument. (V8-1462).

Merits

The trial judge erred in denying Appellant's motion for change of venue. Criminal trials must ordinarily take place in the county where the crime was alleged to have been committed.

> Since 1885, the Florida Constitution has guaranteed to persons accused of crime "a speedy and public trial by impartial jury in the county where the crime was committed." Art. I, § 16, Fla. Const. (1968); § 11, Declaration of Rights, Fla. Const. (1885).

Ward v. State, 328 So.2d 260, 261 (Fla. 1st DCA 1976). If, however, a "defendant cannot receive a fair and impartial trial in the county where the offense was committed, the defendant may request a change in venue." § 910.03(3); State v. Losada, 89

So.3d 1104, 1106 (Fla. 3d DCA 2012). In such cases, a motion to change venue is proper. "Pretrial publicity, standing alone, will not require a change in venue. The court must analyze the extent and nature of pretrial publicity, and the difficulty encountered in actually selecting a jury." Johnson v. State, 100 So.3d 1158, 1160 (Fla. 4th DCA 2012)(citation omitted). The Florida Supreme Court, in Griffin v. State, 866 So.2d 1 (Fla. 2003), stated:

> The test for determining whether to grant a change of venue is whether the inhabitants of a community are so infected by knowledge of the incident 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. See McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977). In exercising its discretion regarding a change of venue, a trial court must make a two-pronged analysis, evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. See Rolling v. State, 695 So.2d 278, 285 (Fla. 1997).

Johnson, 100 So.3d at 1160 (quoting Griffin, 866 So.2d at 12). Stated differently,

> the defendant's burden to merit a change of venue [is] as follows: "[T]he defendant must show inherent prejudice in the trial setting or facts which permit an inference of actual prejudice from the jury selection process..." McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977).

Rivera v. State, 859 So.2d 495, 511 (Fla. 2003). Appellant met this test, but the trial court abused its discretion in denying the motion. The need for a change of venue in this case was compounded by the fact that Appellant had just been tried in

Duval County on the same and other charges in the first trial, also nationally televised. This was the second trial of Appellant in the same county. It has been over 15 years since a trial was moved out of Jacksonville due to a motion to change venue. (V7-1310)(Dunn column 3); (V7-1319)(Dunn column 1). If a trial ever warranted a change of venue, the *second* nationally-televised trial of Michael Dunn in Duval County in a year certainly qualified. The first trial was a media circus. Appellant's attorney had to file a Motion to Prohibit Spectators From Wearing Items that Depict Support for the victims, which was granted. (V2-229, 248, 260). On December 28, 2013, in case 1D13-5721, this Court granted an emergency petition by interested media parties granting greater media access to records in this case. The jury had to be sequestered in a hotel. (V3-552; V4-657; V10-26). During jury selection, protesters shouted at potential jurors. (V11-279-80). The trial judge noted that there was nothing that could be done to address the situation because there was only one way into the building. (V11-280-82). The protesters used loudspeakers. (V11-282). During *voir dire*, the media was present, and several potential jurors remarked on the scrutiny and questions from friends or family. (V13-664-66, 668, 673). The prosecutor told the prospective jurors that ignoring media reports about the case and coming in with a mental "clean slate [is] a difficult thing

to do....” (V13-800). It took three days to select a jury, something that the judge had only seen “in a couple of cases....” (V15-1034). Victim Stornes was able to watch opening statements live on the internet prior to being called as a witness in the case. (V19-1773-74). Both the prosecutor and judge had not thought to instruct witnesses to refrain from watching the trial on the internet. (V19-1777-80). Jurors were interviewed on television after the case was finished. (V6-1063).

Months later, Appellant was brought to his second trial in Duval County on Count I due to the hung jury on that count in the first trial. The jury was again sequestered, and the spectators again had to be ordered to refrain from wearing supportive messages on clothing. (V6-1163; V7-1166-1178, 1201-1216, 1291; V8-1514-1523). On September 2, 2014, Appellant filed a motion for change of venue, arguing that the case had been overly publicized in Duval County. (V7-1179-1186). The motion was argued at a hearing on September 11, 2014. (V8-1531). The judge found that it was premature to rule on the motion without attempting to first empanel a jury. (V8-1533-34). At the outset of the trial, Appellant renewed the motion for change of venue. (V31-11-12). Appellant noted that extensive media coverage had continued from the time of the filing of the motion. (V31-12). Appellant noted that the local newspaper, Florida Times-Union,

carried the story of the trial as its front page story. (V31-12). Appellant also noted that a public rally was being held and that the rally was sanctioned by Decedent Davis's parents. (V31-12). Appellant noted that the rally took place at the time that potential jurors were arriving at the courthouse and that protesters were using megaphones and chanting. (V31-13). Appellant's counsel stated that she was able to hear the chanting in her fourth-floor office, adding that the jurors were on the second floor. (V31-13). The State responded that it had done "everything humanly possible" to ensure the "integrity of the process...." (V31-14). The judge noted that the previous trial had forced judges "to move out of their offices" in order to work. (V31-16). The judge noted that he had heard that the rally was being moved to the same side of the building as where the potential jurors were sitting. (V31-16). The judge added that it was "not helpful to us getting a jury here in Jacksonville." (V31-16). The judge stated that potential jurors could be examined as to the effect of the protests on their mindset. (V31-16-17).

Potential jurors were brought into court for *voir dire* through an unusual door because "they were worried about people seeing them out in public." (V31-22). The judge noted, "Well, they're going to get seen in public when they go to lunch." (V31-22). Most or all of the prospective jurors stated that they had seen

media reports of the case and the first trial. (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). During a bench conference, the judge noted that he expected that Appellant would move to exclude jurors for cause if they said that they had developed a strong opinion about the case based on media reports, but the judge noted that such jurors need not be removed for cause if they testified that they could set that opinion aside unless the parties agreed that that should be done. (V31-130-31). The judge opined that *voir dire* would be pointless if the attorneys asked whether potential jurors had formed a strong opinion about the case because he suspected that, "**regardless of what they say, 90 percent of these**" jurors would hold an opinion about the case. (V31-134-35)(emphasis supplied). Appellant suggested removing any potential jurors who stated that they already had a strong opinion about the case. (V31-135-36). The State disagreed, arguing that even potential jurors with strong opinions as to guilt might be able to set those opinions aside. (V31-136). The judge declined to make a premature decision as to what to do with jurors who had already formed an opinion in the case. (V31-137).

Prospective Juror 32, who was eventually selected as a juror, testified that he knew about the case and he had formed a fixed opinion about the case, but he could set his opinion aside. (V32-207). He admitted that he had followed the case on several news sites and that he had had discussions about the case with his colleagues and students concerning "the nature of trial and bad choices and decisions." (V32-209). He watched highlights of the first trial on CNN after work. (V32-211). He spent "a couple hours a day" watching the first trial. (V32-212). He stated that his opinion of guilt was a proverbial six out of 10, but that could be set aside in favor of impartiality. (V32-214-15).

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). She did not recall any testimony. (V4-244). She did not know specifics about the trial. (V4-244).

Prospective Juror 58, who was eventually selected for the jury, knew about the prior case but did not know details about the charges or verdicts from the prior trial. (V32-255). Prospective Juror 71, who was eventually selected for the jury, had seen local and national news regarding the first trial and the case. (V32-301). He watched some of the actual trial. (V32-

302). He had "a general idea of the whole case." (V32-303). He claimed that such knowledge would not impact his ability to act as a juror. (V32-303-05). Prospective Juror 71 was eventually placed on the jury, first as an alternate and then as a regular juror replacing Juror 4.

During a recess, Appellant's attorney showed the court photographs of protests outside the courthouse that occurred "along the central walkway that directly leads from the front door of the courthouse to the street, just around the time you were dismissing some of our jurors to come back today." (V32-289). The photos showed signs that said "Justice for Jordan" and "Michael Dunn is a murderer; we will get justice for Jordan." (V32-289-90). The photos and a new local news story about the trial and demonstrations were attached as Exhibits 2 and 3 to the motion for change of venue. (V32-291). During another recess, it was stated that protesters had used a bullhorn outside of the room where potential jurors were placed, and Decedent Davis's mother was one of the people speaking on the bullhorn. (V32-650-52). Appellant noted, at one recess, that only 11 of 140 prospective jurors had not heard of the case. (V35-891-92). Appellant renewed all objections, and the judge again denied them, mentioning the motion to change venue in particular. (V35-44). On September 26, 2014, the trial court denied Appellant's motion for a change of venue. (V7-1336-40).

The jury was sworn. (V35-923). During the trial, Juror 4 was removed from the jury due to media coverage of his comments during *voir dire*. (V38-1588, 1591-95, 1589-90, V38-1596, 1605, 1615; V39-1606-07, V39-1607-12, 1626, 1627, 1634-39, 1644-45, 1648). Such facts are sufficient to establish an abuse of discretion in denying the motion for change of venue. Again, the judge himself opined that *voir dire* would be pointless if the attorneys asked whether potential jurors had formed a strong opinion about the case because he suspected that, "**regardless of what they say, 90 percent of these**" jurors would hold an opinion about the case. (V31-134-35)(emphasis supplied). That fact alone should be sufficient for reversal. The instant case is distinguishable even from other publicized cases in Florida in that this was Appellant's *second* trial in this matter due to the hung jury. Media attention and community awareness of the case pervaded the trial, protestors and reporters filled the courtroom and an overflow room. It was impossible to receive a fair trial. Count I should be reversed and remanded for new trial.

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. Duval County was inundated with information about this case. The case was covered in local, national, and international media, and a documentary film about the case appeared at the Sundance Festival[4]. The film has a Rotten Tomatoes rating[5], and it is airing on the cable channel HBO[6] in the autumn of 2015. Demonstrations outside the courthouse prompted Appellant to file a Motion to Prohibit Spectators From Wearing Items that Depict Support for the victims. (V2-229). The jury had to be sequestered in a hotel. (V3-552; V4-657; V10-26). During jury selection, protesters shouted specific information about the case at potential jurors. (V11-279-80). The trial judge noted that there was nothing that could be done to address the situation because there was only one way into the building. (V11-280-82). The protesters used loudspeakers. (V11-282). The judge asked prospective jurors to ignore the protesters. (V12-559). During *voir dire*, the media was present. A juror noted that the media was filming *voir dire*, she saw media passes on people, and the media pass actually "said Dunn trial media overflow," which was visible to the juror. (V13-664-65). Another

[4] http://www.candescentfilms.com/awards/ (last visited 8/11/2015).
[5] http://www.rottentomatoes.com/m/3 and 12 minutes 10 bullets/ (link last visited 8/11/2015).
[6] http://deadline.com/2015/01/hbo-acquires-3-and-a-half-minutes-documentary-sundance-1201363676/ (last visited 8/11/2015).

prospective juror told the judge that she had had her husband check her email, and the husband told her that a friend had emailed and asked if she had been picked "for that big trial...." (V13-666). Another juror used the phone to ask a landlord not to send roofers while he or she was sequestered, and the landlord asked whether the juror was "going to be on that really big trial and I hung up." (V13-666). Another prospective juror reported that he or she had gone to work after court and had been asked whether he or she "might be on that big Dunn case and I didn't answer. I just said, yeah, I heard about that and let it end like that." (V13-668). Another prospective juror indicated that he or she had a family member who was sensitive to media coverage, that his family was trying to protect that family member, that he or she "was not comfortable with my name being released or any media coverage and all and I was filmed on the way out of the courthouse yesterday." (V13-673). The prosecutor told the prospective jurors that ignoring media reports about the case and coming in with a mental "clean slate [is] a difficult thing to do...." (V13-800). It took three days to select a jury, something that the judge had only seen "in a couple of cases...." (V15-1034). The trial was broadcast live on the internet. Even Victim Stornes watched the opening statements on his computer prior to testifying in the case. (V19-1773-74).

Amidst all of this attention, the State, in its closing argument, told the jurors, "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)(emphasis supplied). It is well-settled that a "'send the community a message'" argument is inappropriate in a court of law. Harris v. State, 619 So.2d 340, 343 (Fla. 1st DCA 1993)(citing Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984)). There are no magic words required to meet the definition of a send-a-message error; any words that convey a community expectation of guilt will do. In June 2015, the Supreme Court of Florida reaffirmed this prohibition even where the prosecutor told the jury to send the defendant, not the community, a message, stating:

> We have clearly stated that prosecutors may not ask the jury to send a message through its verdict. See, e.g., Campbell v. State, 679 So.2d 720, 724 (Fla. 1996); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Prosecutors are not permitted to make statements that inject fear and emotion into jury deliberations. See Urbin v. State, 714 So.2d 411, 419 (Fla. 1998).

Fletcher v. State, 2015 Fla. LEXIS 1387 (Fla. June 25, 2015). In Fletcher, the Supreme Court of Florida analyzed the comment in terms of fundamental error and found that the comment did not rise to fundamental error in that case, but in the instant case, it surely must. Unbelievable pressure was placed on the jurors to deliver a guilty verdict, and the prosecutor's comment was an unsubtle reminder of that fact. When the jurors delivered a partial verdict—guilty on counts II-V, but a hung jury on count I—national media erupted. Nationally-famous CNN news anchor, Don Lemon, made headlines discussing how he was "pissed" that the jury had not reached a verdict on count I, adding, "If this

turns out to be a hung jury or a mistrial, there will be outrage, I'm just saying, around the country, and I will be one of those people."[7] In the context of such emotional pressure and scrutiny—knowing that news outlets would want to interview jurors before audiences of millions of viewers—a reminder that the jury's verdict would forever define the past in Jacksonville constituted fundamental error. Counts II-V should be reversed and remanded for new trial.

[7] http://www.mediaite.com/tv/%E2%80%98yes-i-am-pissed%E2%80%99-don-lemon-goes-off-on-dunn-trial-there-should-be-%E2%80%98mind-your-business%E2%80%99-law/ (link last visited on 8/11/2015)

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.

Standard of Review and Preservation

Appellant believes that this issue was preserved, but if the issue was not preserved, this Court should either find fundamental error or ineffective assistance on the face of the record.

Appellant objected at least in part to the trial judge's decision to craft for himself and read answers to the jury question at issue, three times asking that if the judge was going to answer the question, he should also re-read the first paragraph of the self defense instruction because the answer in isolation would result in "bolstering the state's evidence..." (V30-3576, 3578, 3581). When the State offered a different suggestion, the judge simply opted to "answer these questions point-blank" without re-reading any of the standard instructions. (V30-3579). While the judge spoke with State Attorney Corey, Appellant's attorney repeatedly requested that the jury question be read by the court reporter again, but that request was ignored. (V30-3580). Toward the end of the discussion, Attorney Strolla, Appellant's attorney, again requested that the answer include an instruction to re-read the self defense instruction, but the State opposed that, and the trial judge denied the request. (V30-3586). Attorney Strolla confirmed that he had no additional objections to the answer to the question. (V30-3586-87, 3590).

Rule 3.600(b)(7), Fla. R. Crim. P. (2012), the rule regarding motions for new trial, states that a defendant is entitled to a new trial if he can show prejudice resulting from the fact that the "court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant." In paragraph #9 of the motion for new trial, Attorney Strolla argued, without benefit of the transcript, that the trial court answered the question of "if there was self-defense as to one, is there self-defense to all?" in the negative, which caused the verdicts of guilt on Counts II, III, and IV. (V6-1063). On March 10, 2014, the trial court held a hearing on Appellant's motion for new trial. (VSupp1-8). In regard to the issue of the jury questions, the judge reviewed the written argument and then stated that the jury

> posed three separate, if I remember correctly. All three basically referenced the same concept and that was if they were hung on one count, if they had reached the verdict on the others, did the verdict on the others still count? The way I just posed that, the answer is yes. The way they posed some of those questions, the first two, I think, in essence the answer was yes. The last, quote, part of the question, they kind of reversed it and said would the whole case be a mistrial if they were hung on one count? The simple answer was no.

(VSupp1-15-16). The judge then lauded the jury for its efforts and denied the motion for new trial. (V6-1067; VSupp1-16-17).

If this Court determines that the argument and rulings below were insufficient to preserve this issue for appeal, this Court should still review *de novo* for fundamental error. Davis v. State, 704 So.2d 681, 684 (Fla. 1st DCA 1997). For an error to

be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994)(citing State v. Johnson, 616 So.2d 1, 3 (Fla. 1993)). In determining whether fundamental error has occurred, a totality-of-the-circumstances approach applies. Card v. State, 803 So.2d 613, 622 (Fla. 2001). Fundamental error occurs when the error goes "to the heart of a trial and vitiate[s] its fairness...." Weiser v. Weiser, 137 So. 3d 545, 547 (Fla. 4th DCA 2014)(quoting Grau v. Branham, 761 So.2d 375, 378 (Fla. 4th DCA 2000); Vowels v. State, 32 So.3d 720, 721 (Fla. 5th DCA 2010)(finding that improper jury instruction that negated self-defense argument, Vowel's only defense, vitiated his trial and resulted in fundamental error); Shepard v. Crosby, 916 So.2d 861, 864 (Fla. 4th DCA 2005)(same). As the error in the instant case guaranteed a verdict of guilt on Counts II, III, and IV, the incorrect answer to the jury question certainly meets the standard for fundamental error.

Merits

During deliberations in the first trial, the trial court incorrectly answered a jury question that vitiated the trial on Counts II-IV, the counts of attempted murder of the unharmed occupants of the Durango. Florida law is clear that if a person acting in self-defense against a first person but accidentally shoots or injures an innocent bystander, self-defense is also a defense to charges arising from the injury to the bystander.

State v. Williams, 127 So.3d 890, 893 (Fla. 1st DCA 2013); Brown v. State, 94 So. 874, 874 (Fla. 1922)("If the killing of the party intended to be killed would, under all the circumstances, have been excusable or justifiable homicide upon the theory of self-defense, then the unintended killing of a bystander, by a random shot fired in the proper and prudent exercise of such self-defense, is also excusable or justifiable."); Nelson v. State, 853 So.2d 563, 565 (Fla. 4th DCA 2003)(agreeing Nelson "should have been entitled to transfer his theory of self-defense to defend against the transferred intent crime"); V.M. v. State, 766 So.2d 280, 281 (Fla. 4th DCA 2000)("Where self-defense is a viable defense to the charge of battery on an intended victim, the defense also operates to excuse the battery on the unintended victim."); McCray v. State, 89 Fla. 65, 67 (Fla. 1925); Mordica v. State, 618 So.2d 301, 304 (Fla. 1st DCA 1993)(citing Pinder v. State, 8 So. 837, 841 (1891)). This principle would certainly apply to cases like this one wherein the bystanders—Victims Brunson, Thompson, and Stornes—were not actually injured. In the instant case, at the first trial, the jury struggled with this concept. They wondered if Appellant could raise a defense of self-defense in regard to charges of attempted murder of the three Durango passengers when Appellant was only attempting to defend himself against attack from Decedent Davis, not the other three passengers. It was, of course, accepted by all parties that none of the victims named in Counts II, III, or IV did anything that would cause Appellant

to fear for his life. The jurors' confusion prompted them to ask the following question:

> **Is the defense of self-defense separate for each person in each count?** For example, self-defense against person A, [self-defense against person] B, [self-defense against person] C, [self-defense against person] D[?]
>
> **Are we determining if deadly force is justified against <u>each person</u> in each count**? For example, deadly force against person A, [deadly force against person] B, [deadly force against person] C, [deadly force against person] D....
>
> **<u>Or if we determine deadly force is justified against one person is it justified against the others</u>**[?]

(V6-1020; V30-3574-75)(emphasis supplied). The judge stated that his way of looking at the question was whether "the defense of self-defense [was] separate for each person in each count **and the answer to that is yes**." (V30-3575)(emphasis supplied). The State agreed. (V30-3575). The State argued that because Appellant knew there were multiple people the car and multiple shots, "self-defense would have to apply to each individual victim." (V30-3584). The trial judge agreed, and instructed the jury to that effect. (V30-3584). The jury deadlocked on Count I, murder of Decedent Davis. (V30-3603). In regard to counts II, III, and IV, the jury acquitted Appellant of attempted first degree murder, but did find him guilty of attempted second degree murder. (V5-942-47; V30-3604-05). In instructing the jury that it had to find that deadly force was justified **against Victims Brunson, Thompson, and Stornes** before they could apply

self-defense as a defense to attempted murder under Counts II, III, and IV and Count V of shooting into an occupied vehicle, the trial judge vitiated the entire trial on those counts. Victims Brunson, Thompson, and Stornes took no violent action against Appellant. Deadly force could never have been justified against them individually, and Appellant never claimed that deadly force was justifiable against them. Appellant was not shooting at them; he was shooting at Decedent Davis. Victims Brunson, Thompson, and Stornes were unharmed bystanders, not victims, and self-defense against Decedent Davis was a valid defense to Counts II-V. The proper instruction would have been either to tell the jury to re-read the standard instructions as Appellant's attorney suggested or to instruct the jury on the law of application of self-defense to unintended victims or bystanders as explained by the well-established line of cases above. Instead, the judge essentially told the jury that Appellant's sole defense to Counts II-V was barred as a matter of law.

Ineffective Assistance of Counsel

If this Court rejects argument that this issue was preserved and rejects the argument that the error was fundamental, this Court could also approach the question as one of ineffective assistance of trial counsel on the face of the record. An ineffective assistance of counsel claim reviewed on direct appeal is a mixed question of law and fact that is subject to *de novo* review. Agatheas v. State, 28 So. 3d 204, 207 (Fla. 4th DCA

2010)(citing Bowman v. State, 748 So.2d 1082, 1083-84 (Fla. 4th DCA 2000)).

Strickland v. Washington, 466 U.S. 668 (1984) is the

> 'controlling legal authority' to be applied to ineffective assistance of counsel claims." Marquard v. Sec'y for the Dep't of Corr., 429 F.3d 1278, 1304 (11th Cir. 2005).... Under this standard, in order to show deficient performance, the petitioner must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. See Strickland, 466 U.S. at [690.] The court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate, but only [on] what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000)(en banc)(internal quotations omitted). The court's review of counsel's performance must be highly deferential, and the court must avoid second-guessing counsel's performance. Strickland, 466 U.S. at [689]. Further, the courts must make an objective inquiry into the reasonableness of counsel's performance. Chandler, 218 F.3d at 1315.

Williams v. Allen, 458 F.3d 1233 (11th Cir. 2006); Dufour v. State, 905 So.2d 42, 50-51 (Fla. 2005)(applying Strickland in Florida). Stated more succinctly, a Florida appellate court may find trial counsel ineffective on direct appeal where "counsel's performance does not meet the standard of reasonable professional assistance and there is a reasonable probability that the outcome of the trial would have been different but for the unsatisfactory assistance." Forget v. State, 782 So.2d 410, 413 (Fla. 2d DCA 2001)(citing Strickland, 466 U.S. at 687).

This claim can and should be addressed on direct appeal. Appellant is mindful that the

> general rule is that the adequacy of a lawyer's representation may not be raised for the first time on

> direct appeal. Bruno v. State, 807 So.2d 55, 63 (Fla. 2001). The proper method of raising such an issue is by way of a post-conviction relief motion in the trial court, which "allows full development of the issues of counsel's incompetence and the effect of counsel's performance on the proceedings." Grant v. State, 864 So.2d 503, 505 (Fla. 4th DCA 2004). "An exception to the general rule exists where both counsel's deficient performance and the prejudice to the defendant are apparent on the face of the record." Id. at 505; see also Forget v. State, 782 So.2d 410, 413 (Fla. 2d DCA 2001)(finding ineffective assistance of counsel on direct appeal when trial counsel failed to request jury instruction regarding the mens rea element of the crime charged); Johnson v. State, 796 So.2d 1227, 1228-29 (Fla. 4th DCA 2001)(finding ineffective assistance of counsel on direct appeal due to trial counsel's failure to file a motion to dismiss, where an appellate decision published four months earlier mandated dismissal).

Baker v. State, 937 So.2d 297, 299 (Fla. 4th DCA 2006); Johnson v. State, 796 So.2d 1227 (Fla. 4th DCA 2001). In Corzo v. State, 806 So.2d 642 (Fla. 2d DCA 2002), the Second District held that

> [o]n rare occasions, the appellate courts make an exception to th[e general rule barring consideration of claims of ineffective assistance on direct appeal] when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable."

Corzo, 806 So.2d at 645 (citations omitted). If this Court declines to find the matter preserved or apply fundamental error analysis, this Court should find that counsel was ineffective in failing to fully and properly object to the incorrect answer to the juror question and offer the correct answer: that if the jury found that Appellant was only defending himself against Decedent Davis and that self defense was justifiable, that self-

defense applied to the remaining counts. There could be no tactical basis for instructing the jury that it had to reject Appellant's only defense—a claim of self-defense against Decedent Davis—as a viable defense to Counts II-V. Attorney Strolla's comment in paragraph #9 of the motion for new trial directly illustrates that there was no tactical basis for failing to adequately object to the instruction, and Attorney Strolla appeared to agree, in that post-trial motion, that the judge's answer to the question guaranteed the guilty verdicts on Counts II-V due to the complete absence of evidence of hostile action by Victims Brunson, Thompson, and Stornes. 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 Counts I-V or reverse and remand for new trial on all counts based on the separate arguments raised.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Trisha Pate, criminalappealsintake@myfloridalegal.com by U.S. mail on August 11, 2015.

Respectfully submitted and served,

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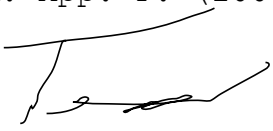
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210, Fla. R. App. P. (2008).



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