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IN THE SUPREME COURT OF FLORIDA',..'

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 69,976

RONNIE S. LAW,

Respondent.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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STATE OF FLORIDA,

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PRELIMINARY STATEMENT

Ronnie S. Law, the criminal defendant and appellant below, will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to Petitioner's initial brief will be indicated parenthetically as "PB" with the appropriate page number(s). Citations to Respondent's brief on the merits will be indicated parenthetically as "RB" with the appropriate page number(s).

For purposes of resolving the issue raised herein Petitioner will rely upon its Statement of the Case and Facts (PB 2-15).

ARGUMENT

ISSUE

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL HEREIN MUST BE REVERSED BECAUSE THE COURT APPLIED AN INCORRECT STANDARD OF REVIEW IN REVERSING THE TRIAL JUDGE'S DENIAL OF RESPONDENT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Predictably, Respondent, with some embellishment, adheres to and reiterates the reasoning advanced in the lower court's decision in Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), rev. denied, 503 So.2d 328 (Fla. 1987), which the panel below relied upon to produce the result challenged here. Consequently, Respondent's position, which necessarily encompasses the flaws residing in the lower court's decision herein and in Fowler, is not viable in the least and should be rejected.

First, of all, the lower court, employing the Fowler rationale, concluded that "the trial court erred in failing to grant appellant's motion for judgment of acquittal as to the crime charged, as well as to any lesser included offenses." [Emphasis added]. Law v. State, 502 So.2d 471, 473 (Fla. 1st DCA 1987). In hanging their hat on the Fowler rationale, both Respondent and the lower court have failed to recognize that review of a trial judge's denial of a motion for judgment of acquittal presents an entirely different issue on appeal than a claim challenging the sufficiency of the evidence to support a conviction. The former involves a threshold inquiry into the

propriety of the trial judge's conclusion that the cause should go to the jury, while the latter dictates a determination of whether there is adequate record support for the jury's verdict.

For example, in Holland v. State, 129 Fla. 363, 176 So. 169 (Fla. 1937), the appellant asserted as error for reversal the lower court's order overruling a motion for new trial. This Court pointed out that the motion raised two grounds, to-wit: the legal sufficiency of the evidence to sustain the verdict of the jury and the lower court's error in denying the defendant's motion for a directed verdict at the close of the State's case.

Id. at 176 So. 170. Regarding the first ground, this Court, after a recitation of the facts, concluded that "[t]here is evidence to support the verdict, and, as there is nothing in the record to indicate that the jury were not governed by the evidence, the verdict will not be set aside as being against the evidence." Id. Turning next to the directed verdict question, this Court held:

"In directing a verdict, the court is governed practically by the same rules that are applicable in demurrers to evidence. Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 22 L.Ed. 780.

"A party in moving for a directed verdict admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Gunn v. City of Jacksonville, 67 Fla. 40, 64 So. 435.

"When the facts are not in dispute, and

the evidence, with all the inferences that a jury may lawfully deduce from it, does not, as matter of law, have a tendency to establish the cause of action alleged, the judge may direct a verdict for the defendant. But the court should never direct a verdict for one party unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail, and not primarily the views of the judge. In an action for negligence, where there is any substantial testimony from which the jury could find the issues in favor of the plaintiff, a peremptory charge for the defendant should not be given. A case should not be taken from the jury by directing a verdict for the defendant on the evidence, unless the conclusion follows as a matter of law that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish. The credibility and probative force of conflicting testimony should not be determined on a motion for a directed verdict. The duty devolving upon the court in reference to directing a verdict on the evidence may become, in many cases, one of delicacy, and it should be cautiously exercised. Gunn v. City of Jacksonville, supra; Logan Coal & Supply Co. v. Hasty, 68 Fla. 539, 67 So. 72; Davis v. Drummond, 68 Fla. 471, 67 So. 99; Poore v. Starr Piano Co., 68 Fla. 425, 67 So. 99; King v. Cooney-Eckstein Co., 66 Fla. 246, 63 So. 659, Ann.Cas. 1916C, 163; Hammond v. Jacksonville Electric Co., 66 Fla. 145, 63 So. 709; Starks v. Sawyer, 56 Fla. 596, 47 So. 513."

Id. Similarly, in Leath v. State, 333 So.2d 122 (Fla. 1st DCA 1976), the defendant appealed the denial of his motion for judgment of acquittal made at the close of the State's case and also urged reversal because of the insufficiency of the evidence to support the judgment of guilt of child torture. Regarding the denial of the motion for judgment of acquittal the court held:

The trial court's denial of the motion for a judgment of acquittal reaches this court with a presumption of correctness and the appellant has not demonstrated to us any error in the ruling. As the trier of fact it was the duty of the trial judge to observe the demeanor of all the witnesses, weigh their testimony, reconcile it if he could, and, if he could not, to reject what was unworthy of belief and to accept and rely upon that which he found worthy of belief. The 21 pictures in evidence of a badly burned 3 year old child, the testimony of 2 doctors that such burns would be obviously severe injuries to an average lay person and would have caused discomfort to a person so injured to the extent of not being able to sleep and eat was ample to permit the judge to conclude that the mother's testimony to the effect that the child was fed and put to bed and spent a night without fretfulness was unbelievable, particularly when considered in the light of the witness, Martin's testimony that the child, 24 hours later obviously needed a doctor's attention. Also, the defendant, having acquiesced in allowing introduction of the statement of Ricky Clark is not now in position to complain about any harmful effect of that evidence. It is axiomatic that a motion for judgment of acquittal made pursuant to RCrP 3.380 admits all facts in evidence and every reasonable conclusion inferable therefrom. Brown v. State, 294 So.2d 128 (3 DCA 1974); Weldon v. State, 287 So.2d 133 (3 DCA 1974); Lynch v. State, 293 So.2d 44 (Fla. 1974); Dancy v. State, 284 So.2d 452 (3 DCA 1973); and Victor v. State, 141 Fla. 508, 193 So. 762 (1940).

Id. at 124. Then with respect to the sufficiency of the evidence issue the court stated:

Neither can we agree with appellant's other contention that the evidence is insufficient to support the judgment of guilt. The defense was that appellant had begun to bathe the child and was interrupted by persistent knocking at the door. His testimony was that he told the six year old Ricky to start the water and answered the knock. He heard no crying or other alarm and returned in perhaps fifteen minutes to find "smoking" water coming out of the tub faucet and Michelle standing in the tub with her hand on the shower knob trying to get out of the tub. He said that she was crying but not hollering or screaming loudly. The trial judge announced his rejection of this testimony and we may not substitute our judgment for his.

Finding as we do that the judgment of guilt is supported by sufficient evidence in the record, it is accordingly AFFIRMED.

Id. Along this line, the court in Garmise v. State, 311 So.2d 747 (Fla. 3d DCA 1975), U.S. cert. denied, 429 U.S. 998 (1976), opined:

The defendant presents several points on appeal for our consideration. First, he contends that the court erred in denying his motion for a directed verdict of acquittal at the conclusion of all of the evidence. We note at the outset that the defendant is not challenging the weight and sufficiency of the evidence as to the jury verdict. When a defendant moves for a directed verdict of acquittal, he admits all facts in evidence adduced and every conclusion favorable to the State fairly and reasonably inferable therefrom. Lett v. State, Fla.App.1965, 174 So.2d 568, 569; Devlin v. State, Fla.App.1965, 1975 So.2d 82. A motion for judgment of acquittal should not

be granted unless it is apparent that no legally sufficient evidence has been submitted upon which the jury could legally find a verdict of guilty. Shifrin v. State, Fla.App.1968, 210 So.2d 18. See also, Holland v. State, 1937, 129 Fla. 363, 176 So. 169; Adams v. State, 1939, 138 Fla. 206, 189 So. 392. We find that there was substantial and sufficient competent evidence presented to support the denial by the trial court of the defendant's motion for acquittal.

Id. at 748, 749. See also Munoz v. State, 488 So.2d 927 (Fla. 3d DCA 1986).

So, in light of the foregoing authority, it is quite clear, as submitted above, that alleged error in the denial of a motion for judgment of acquittal presents an appellate issue distinct from a challenge to the sufficiency of the evidence to support the verdict. The failure to recognize this point set the stage for the fundamental flaw in the reasoning utilized by Respondent and the lower court. Put simply, said lack of recognition permitted the lower court to ignore the fact that the Lynch<sup>1</sup> standard of review for denial of a motion for judgment of acquittal applies to circumstantial as well as direct evidence cases (See PB 19, 20). Interestingly enough, the Third and Fifth District Courts of Appeal have not hesitated to apply the Lynch test to circumstantial evidence cases. See Fletcher v. State,

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<sup>1</sup> Lynch v. State, 293 So.2d 44 (Fla. 1974).

472 So.2d 537 (Fla. 5th DCA 1985); Herman v. State, 472 So.2d 770 (Fla. 5th DCA 1985), pet. for rev. denied, 482 So.2d 348 (Fla. 1986); Bush v. State, 466 So.2d 1075 (Fla. 3d DCA 1984); Brewer v. State, 413 So.2d 1217 (Fla. 5th DCA 1982), pet. for rev. denied, 426 So.2d 25 (Fla. 1983); Roth v. State, 359 So.2d 881 (Fla. 3d DCA 1978), cert. denied, 367 So.2d 1126 (Fla. 1979).

This error in turn led the court to impose the standard of review for the sufficiency of circumstantial evidence to support a verdict/conviction as the standard of review for the denial of a motion for judgment of acquittal when the case involves circumstantial evidence. That this is accurate is established by the fact that in the overwhelming majority of the cases relied upon by Respondent, and by the lower court in its Fowler opinion and the decision herein, the courts were speaking to the sufficiency of the circumstantial evidence to support a conviction or jury verdict and not to alleged error arising from a trial court's denial of a motion for judgment of acquittal. See for example Jaramillo v. State, 417 So.2d 257 (Fla. 1982); McArthur v. State, 351 So.2d 972 (Fla. 1977); Davis v. State, 90 So.2d 629 (Fla. 1956); Mayo v. State, 71 So.2d 899 (Fla. 1954). This confusing state of affairs is neither novel nor is it solely attributable to Respondent and the lower court. Other courts, in disposing of claims of error based on the denial of a motion for judgment of acquittal or claims going to the sufficiency of the evidence to support the verdict have intermingled and/or misapplied the

respective standards of review properly associated with the particular claim. See Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); Bradford v. State, 460 So.2d 926 (Fla. 2d DCA 1984). Consequently, Petitioner submits that this court now has the opportunity to eliminate all confusion and hold, in no uncertain terms, that the Lynch test is, and always has been, the standard of review to be applied to a claim of error predicated upon the denial of a motion for judgment of acquittal irrespective of whether the cause is characterized as a direct evidence or circumstantial evidence case.

At this point Petitioner notes that Respondent, relying upon Peek v. State, 395 So.2d 942 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), vacated and remanded on other grounds, 488 So.2d 52 (Fla. 1986), McArthur v. State, supra, Mayo v. State, supra, Holton v. State, 87 Fla. 65, 99 So. 244 (Fla. 1924), Fowler v. State, supra, and Bradford v. State, supra, for the proposition that the version of the events related by the defense must be believed if circumstances do not show that version to be false (RB 18, 19). While this may be true in regards to review of the sufficiency of the evidence to sustain the verdict, it has no proper application to review of a denial of a motion for judgment of acquittal. Indeed, utilization of that rubric in review of a denial of a motion for judgment of acquittal would run afoul of well-established authority and enable the trial judge to impermissibly pretermitt th jury's role in determining questions

of evidentiary weight and credibility. See Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981).

Early on this Court, in speaking to the account given by a defendant as to how he came **into** possession of stolen property, held:

The account given may be reasonable and highly plausible, and yet the jury may not believe a word of it to be true. In the latter case they would have the right to convict upon the evidence furnished by the possession of the stolen goods alone, even though the state had not put in any proof directly to prove the falsity of the account given. The account given by the possessor of goods recently stolen as to how he acquired such possessions must not only be reasonable, but it must be credible, or enough so to raise a reasonable doubt in the minds of the jury, before it casts upon the state the burden of proving its falsity; and the jury are the sole judges of its reasonableness and credibility. [Citations omitted].

Leslie v. State, 35 Fla. 171, 17 So. 555, 557 (Fla. 1895). See also State v. Young, 217 So.2d 567, 570 (Fla. 1968), cert. denied, 395 U.S. 915. Similarly, this Court, in Songer v. State, 322 So.2d 481 (Fla. 1975), vacated on other grounds,<sup>2</sup> 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977), held:

Recognizing the established principle that, where a jury's verdict is supported by

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<sup>2</sup> Judgment vacated for further consideration in light of Gardner v. Florida, 430 U.S. 349 (1977).

competent substantial evidence, an appellate court should not substitute itself as the trier of fact, we accept the jury's evaluation of the evidence; in doing so, we specifically reject Appellant's contention that a defendant's interpretation of circumstantial evidence should be accepted completely unless it is specifically contradicted. [Emphasis added; footnote omitted].

Id. at 483. See also Knight v. State, 392 So.2d 337, 339 (Fla. 3d DCA 1981), pet. for rev. denied, 399 So.2d 1143 (Fla. 1981), where the court held that:

. . . the jury is not required to accept the testimony of a defendant even when he is the sole eyewitness to the shooting, Darty v. State, supra; rather, the jury's function is to determine the credibility of the witnesses and weigh the evidence. Appellant's testimony is subject to the same standard as that of any other witness: the jury is free to believe or disbelieve it in whole or in part. Teague v. State, supra.

In closing, Petitioner parenthetically notes that Respondent has seen fit to lace his brief on the merits with rather acerbic commentary concerning Petitioner's rendition of facts in support of its position. For example, Respondent, at page 41 of his brief states:

Thirdly, the Petitioner, at Pages 9 and 10, would have this Court believe that Ronnie intimidated and threatened Robert Hornbrook while the children were waiting at Mary Roundy's house after death. The State infers this by Ronnie whispering to him and Robert becoming upset as a result. This inference, however, is unreasonable because of the ready availability of direct evidence on this point. Had Ronnie actually said

something incriminating to Robert then it would have been very easy for the prosecutor to just ask Robert on the stand what Ronnie had said to him and it is inconceivable that the prosecutor did not ask him on the day before trial when he was alone with the prosecutor in his office (R 225, 226). To infer that Ronnie said something threatening when the actual words, if threatening, could have easily been produced from the witness stand, would be absurd.

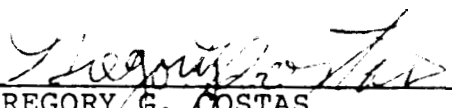
Examination of Petitioner's initial brief at pages 9 and 10 (part of the Statement of the Case and Facts) reveals that only the substance of Mary Roundy's testimony was set out, unaccompanied by any gratuitous inferences. It would appear that Respondent, and evidently the jury, drew the inferences complained of from the testimony. Enough said.

CONCLUSION

Based upon the arguments advanced and the authority cited herein and in Petitioner's initial brief, the decision of the First District Court of Appeal should be quashed and the cause remanded for disposition of the remaining issues on appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

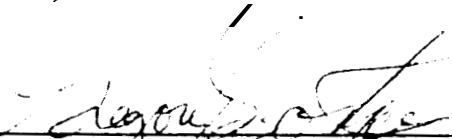
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. mail to Mr. Paul Shimek, Jr., 311 North Spring Street, Pensacola, Florida 32501, this 5<sup>th</sup> day of July, 1987.

  
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