

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 JOSEPH SAVINO,)
)
 Respondent.)

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Case No. 75,049

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Joseph Savino, was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal.

In this brief, the parties will be referred to by name and as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal

SR1 = Supplemental Record

SR2 = Second Supplemental Record

STATEMENT OF THE CASE

Respondent accepts the statement of the case in the state's brief except for the contention (page 3) that the question certified by the Fourth District Court of Appeal "does not accurately encompass the fact [sic] of this case."

STATEMENT OF THE FACTS

The following facts are ones about which Respondent disagrees with the state, or ones omitted by the state which are important:

At the first pretrial competency hearing, Dr. Virsida testified that Mr. Savino had used drugs since early adolescence, was psychotic, and was suffering from organic brain syndrome (R 19, 24, 28). Dr. Ryan testified that Mr. Savino was brain damaged from childhood beatings with a bat and from being hit by lightning, and that he had hallucinations and heard voices (R 48-53, 61). Dr. Appel also testified that Mr. Savino was brain damaged (R 119). His mother had started giving him drugs years before, he had used 1.5 to 2 grams of cocaine a day for at least two years, and he drank a fifth of alcohol every other day. He had used marijuana at the rate of an ounce a day for at least ten years, and had also used large amounts of quaaludes and codeine for several years (R 117). His verbal I.Q. was 78, his full scale I.Q. placed him in the lowest 6.6 percent of the population, and he was retarded (R 126-127). He was functioning at the bottom one percent of the population and was mentally ill due to organic brain syndrome (R 144). Dr. Stillman's pretrial findings agreed with Drs. Appel and Ryan (R 182-183). Mr. Savino was functionally retarded (R 185). Both Dr. Appel and Dr. Stillman concluded that Mr. Savino was insane at the time of the offense and incompetent to stand trial (R 137, 143, 190).

At the second competency hearing, although Drs. Schwartz, Zager, and Krieger all testified that Mr. Savino was not psychotic or not insane (R 221, 256, 259, 268, 272), Drs. Schwartz and

Krieger admitted that brain damage was a possibility (R 224, 272), and Dr. Zager testified that Mr. Savino did suffer from chronic drug abuse (R 234).

Mr. Savino's relatives testified at the third and fourth competency hearings. His mother testified about the childhood beatings and drug use, beginning at age 10 (R 327-335). Mr. Savino became constantly involved with drugs when he was between 12 and 13. In the past several years before trial he used cocaine and marijuana several times a day (R 335-337). He had been under care with the rest of the family at the Henderson Clinic (R 338). Mr. Savino's brother-in-law testified that he used drugs with him frequently (R 364-366). Mr. Savino was high every time he saw him and he never saw him sober (R 368). Mr. Savino looked crazy the morning he was arrested (R 369). He was using cocaine **that** morning (R 373). Mr. Savino's sisters testified to the abuse by the stepfathers, to Mr. Savino's drug use, and to the lightning incident (R 390-405, 417-418). One testified that Mr. Savino was "crazy" when he was arrested; he was higher than usual, out of control (R 398, 402).

At later hearings on the motion to suppress, police officers, a jail nurse, another doctor, and Mr. Savino all testified about Mr. Savino's mental condition.

Deputy Sparrow arrived at the Savino's trailer on the morning of the death (R 434). Mr. Savino's sister told her that he had just free-based (R 438). His behavior was consistent with someone wired on cocaine (R 439). He did not appear to be functioning normally (R 433). Deputy Birt arrived about the same time (R 465). Mr. Savino was visibly upset and very nervous. He just couldn't

sit down (R 472). Mr. Savino told Birt that he was free-basing cocaine (R 493). He got out marijuana and cocaine and implements. He was crying and hysterical and emotional (R 494). He demeanor was irrational and he appeared to be possibly wired on cocaine (R 498).

The jail nurse, Mary Araya, testified that she came in contact with Mr. Savino at the jail on the evening of December 26 (R 628). He was shaking and complained of being cold and said he had stomach cramps. He said that he had been free-basing cocaine. His condition was consistent with someone going through withdrawal. She gave him a tranquilizer (R 629-630). He was put on suicide watch (R 631). The nurse felt that Mr. Savino needed the medication immediately and noted that he seemed to be getting worse rather than better (R 632-633). He was put on psychotropic medication, Melaril and Trilaphon (R 647-650). Dr. O'Brien testified that the nurse's testimony was consistent with Mr. Savino having used a lot of cocaine (R 736).

Mr. Savino in his own testimony on the motion also detailed his years of drug abuse, the beatings and physical abuse he received as a child, and being struck by lightning (R 833-838). He testified that he had been using marijuana since age 12 or 13 and cocaine since age 16 (R 839). During the past year he had smoked 10 to 20 marijuana cigarettes a day, used two or three cocaine rocks once or twice a week, and snorted cocaine almost every day (R 841-842). During the three days preceding the death he had used large amounts of marijuana, cocaine, and alcohol (R 843-850).

The issue of Carolyn Savino's killing of her daughter by a previous marriage in 1978 was first raised at the beginning of trial when the state moved in limine to prevent the defense from bringing out any of Carolyn's statements about the death (R 1176, 2633). The court granted the motion (R 1244). It was at this point that the court stated that Carolyn was welcome to testify herself that she murdered the child (R 1237, 1245).

During trial, Detective Birt testified that when Mr. Savino asked Carolyn at the trailer to forgive him, she said, "I can't believe this is happening again." At this point the defense moved the court to vacate its order on the state's motion in limine (R 1563-1564). The court instructed the jury that the statement had nothing to do with anyone on trial (R 1570). On cross examination by the defense, Detective Restivo testified that he had gone to Virginia to investigate and had found out that Carolyn had abused Johnny there (R 1664-1665). The court instructed Restivo at this point that any evidence about the daughter was excluded although evidence that Carolyn had kicked and punched Johnny in Virginia was allowed (R 1665-1667). Restivo testified that Carolyn had been arrested and charged in Johnny's death (R 1674).

The following excerpt from the trial transcript shows exactly what happened after Mr. Savino's absence from the courtroom for the testimony of Margaret Cress (R 1723):

MR. ROSENBLUM [Defense Counsel]: Your Honor, I want the record to reflect that the Defendant was not present in the courtroom during the prior testimony. He's just coming to the courtroom now. I am going to move to strike the prior testimony.

THE COURT: Well, if you want to waive his presence; otherwise, we'll just do it over again.

MR. MORTON [Prosecutor]: I'll ask the questions again, if Mr. Rosenblum wants me to do that. No problem.

MR. ROSENBLUM: I'll waive it.

THE COURT: Okay.

The defense in its case called Mr. Savino's sister and mother to testify to his childhood head injuries and drug use (R 1687-1693, 1703-1707). His mother testified that he started using drugs when he was about 13 years old, marijuana and possibly quaaludes. He used marijuana every day (R 1703-1704). The sister testified that at age 13 he began using marijuana and quaaludes given to him by his stepfather. When he was 14 or 15, Mr. Savino would abuse "every drug," marijuana, quaaludes, and alcohol (R 1689-1690).

The defense called Carolyn Savino, who invoked the Fifth Amendment and refused to testify (R 1743). The trial judge made a finding that she was unavailable (R 1744).

In his videotaped testimony Dr. Stillman testified to Mr. Savino's drug use, brain damage, insanity, and lack of specific intent (R 1747, SR1 7-31). A childhood friend testified to the beatings Mr. Savino received from one of his stepfathers (R 1765-1769). The jail nurse testified to Mr. Savino's condition the evening of his arrest: he was going through withdrawal, he was shaking, he said he had been using cocaine and marijuana, he appeared depressed, and he was given medication and put on suicide watch (R 1783-1787, 1791). The defense also called Drs. Ryan, Virsida, O'Brien and Appel as trial witnesses. They testified that

Mr. Savino was insane at the time of the offense (R 1830-1835, 1900-1906, 1963-1964, 2040, 2098-2105).

The defense sought to play during its case the videotape of the testimony of Dr. Beyer, the Virginia medical examiner. In his taped and transcribed testimony, Dr. Beyer testified that he conducted the autopsy of Ahna Griffin in 1978. The baby had been brought into the emergency room and there was a suspicion of death by accident or criminal agency (SR2 5-6). The autopsy revealed the cause of death to be a skull fracture from blunt trauma consistent with child abuse (SR2 6-8). Dr. Beyer ruled that it was a homicide (SR2 9). He testified that the deaths of Johnny and Ahna were similar because both had multiple injuries consistent with blunt force trauma; they were both abused children (SR2 10). The court ruled this testimony inadmissible (R 1994-1995).

Joseph Gomez testified for the defense that he was a neighbor of Mr. Savino's and saw him get high on a daily basis (R 1925-1927). On December 24 Gomez shared six cocaine rocks with Mr. Savino (R 1928). When Mr. Savino was home, lights and loud stereo music would be on until 3:00 or 4:00 in the morning (R 1929-1930). On the Monday before Christmas, Gomez drank beer and smoked marijuana with Mr. Savino. He went to bed at 10:00 but at approximately 2:30 a.m. was awakened by a child's scream from the direction of the Savino's trailer. Gomez looked out the windows but the trailer was dark. There were no music or lights on. He did not see Mr. Savino (R 1930-1932).

Bo Thurston was the defense's final witness. Prior to Thurston's testimony, the trial court renewed its ruling on the motion in limine concerning Carolyn and stated that the only

exception in Thurston's testimony would be direct testimony about observing blows to Johnny's abdomen (R 1997-1998). The court instructed Thurston that there was to be no testimony with regard to Carolyn and her treatment or mistreatment of other children (R 1999-2000). Thurston then testified that in Virginia he saw Carolyn beat Johnny and punch or kick him on the floor (R 2008). When Johnny was a baby she would kick or step on him and not worry about it if he got hurt (R 2011-2012). This occurred numerous times (R 2014). When Johnny got a little older, Carolyn would kick him down the porch steps (R 2015).

The court denied the defense's effort to call Cheri Dierringer to testify that Carolyn admitted to her that she killed Ahna in Virginia (R 2090-2095).

Mr. Savino's sentence reflects that he received credit for time served from the date of his arrest (R 2691) and was therefore in custody during his trial.

Respondent must directly dispute several statements made by the state in its statement of facts. First, Dr. Ryan did not "admi[t] to being part of the defense team" (page 12 of brief). Dr. Ryan stated, "Well, I don't join any team. [Defense Counsel] asked me, would I evaluate the man, and I formed my opinion" (R 1839). Second, Mr. Savino disputes the state's labeling of his statements upon which Dr. Virsida's and Dr. Stillman's opinions were based as "self serving" (pages 14 and 17 of brief). Finally, Bo Thurston was not the "only independent source" (page 18 of brief) who testified to Mr. Savino's use of drugs. As set forth above, there was direct testimony from witnesses who observed Mr.

Savino's drug use and intoxication both throughout his life and also in the days leading up to Johnny's death.

SUMMARY OF ARGUMENT

I.

Respondent did not personally waive his presence nor did he ratify defense counsel's waiver of his presence at two stages of his trial: (1) The entire testimony of a state witness. (2) Reinstruction of the jury on third degree murder, the crime of conviction. The Rules of Criminal Procedure and case law from this Court require the defendant's presence unless he knowingly and intelligently waives it personally or ratifies counsel's waiver. The error could only be harmless if harmless beyond a reasonable doubt, which it was not because of the importance of the two occurrences for which Respondent was absent.

II.

The trial court's denial of the defense's requested jury instruction on long-term intoxication was a correct statement of law drawn directly from this Court's case law and explicitly mandated by the Florida Standard Jury Instructions in Criminal Cases. Its omission was highly prejudicial because the defense established a substantial evidentiary foundation for it and because insanity through intoxication was a major theory of defense.

III.

The defense's proffered evidence showing that Respondent's wife killed another of her children in a previous marriage in a manner similar to the death of her son in the instant case was admissible under "Williams Rule" standards for admissibility of

prosecution evidence of other crimes in child abuse cases. The evidence was relevant as tending to show that the wife rather than Respondent killed the son. Although it is not necessary to apply it in the instant case, a broader standard of admissibility should be applied to defense "Reverse Williams Rule" evidence because the major limitation on prosecution Williams Rule evidence -- prejudice to the defendant -- is not a factor when the defendant himself offers such evidence.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN TAKING THE TESTIMONY OF A WITNESS AND IN ANSWERING A JURY QUESTION DURING DELIBERATIONS WHERE RESPONDENT WAS NOT PRESENT, DID NOT WAIVE HIS PRESENCE, AND DID NOT ACQUIESCE IN OR RATIFY HIS COUNSEL'S WAIVER OF HIS PRESENCE [RESTATED].

This issue is one of three upon which the Fourth District Court of Appeal reversed. It is not the issue certified to this Court by the District Court of Appeal. Although it is true that once an issue is certified, this Court then has jurisdiction over the entire case and authority to address all issues involved in it, see Reed v. State, 470 So.2d 1382 (Fla. 1985), nonetheless this Court's review of issues other than the one conferring jurisdiction remains discretionary. Savoie v. State, 422 So.2d 308, 310 (Fla. 1982). In the instant case, it is unnecessary for this Court to reach either this point on appeal or Point II on appeal unless it decides to overturn the District Court of Appeal's decision on Point 111, the certified question. Certainly no decision on this point on appeal is needed as a precedent, since the law on the issue has already been clearly stated by this Court in other cases. See, e.g., Turner v. State, 530 So.2d 45 (Fla. 1987). In any event, this Court will have to uphold the District Court of Appeal's grant of a new trial even if it decides that the District Court was correct on only one of the three issues upon which it reversed.

The District Court of Appeal reversed Mr. Savino's conviction on this point because Mr. Savino was not present at two separate points in his trial. The state now attempts to have this Court

overturn that decision by trying to minimize the importance of the two stages in *Mr. Savino's* trial when he was absent. The state's effort is futile, first because the two stages -- the entire testimony of a state witness, and reinstruction of the jury on a crucial element of the crime of conviction -- were in fact very important, and second because the law requires the defendant's presence without regard to the relative importance in appellate hindsight of a given occurrence at trial. The law recognizes that waivers of the defendant's presence by defense counsel, such as those in the instant case, are ineffective and not binding upon the defendant personally. The waivers of defense counsel in the instant case were ineffective because the record does not reflect that *Mr. Savino* himself was ever informed of what was going on in his absence, that he ever personally waived his presence, or that he ever ratified his counsel's waivers.

Rule 3.180(a)(5), Florida Rules of Criminal Procedure, provides that in all prosecutions for crime the defendant shall be present at all proceedings before the court when the jury is present. Rule 3.180(b) provides that trial may be proceed without the defendant if he voluntarily absents himself. Here, *Mr. Savino* did not voluntarily absent himself. He was in custody (R 2691) and was simply not brought into court.

In Turner v. State, *supra*, this Court held that a waiver by the defendant of his presence at an essential stage of his trial could not be found where the defendant's counsel did not advise the defendant of his right to be present and where the trial court did not inform the defendant of his right to be present or question him as to any ratification of counsel's actions (there, exercise of

jury challenges) in his absence. Id. at 49. A defendant's waiver of his right to be present at essential stages of trial must be knowing, intelligent, and voluntary. Id. Silence is insufficient to show acquiescence. Id.; Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982). Counsel may make the waiver on behalf of a client only where the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge or by acquiescence to the waiver with actual or constructive knowledge of the waiver. Amazon v. State, 487 So.2d 8, 11 (Fla. 1986).

Here, there was neither ratification of counsel's waiver nor knowing, intelligent, or voluntary acquiescence to it. Regarding the reinstruction of the jury, the record is completely silent as to whether Mr. Savino was ever at any point informed that the jury was going to be or had been reinstructed; all that is shown in the record is that his counsel waived Mr. Savino's presence when the jury was brought into court and reinstructed (R 2415-2417).

Regarding the testimony of Margaret Cress, Mr. Savino was finally brought into court that morning just when his counsel retroactively waived his presence for the testimony which has just been given (R 1723). However, his mere presence at the time his counsel stated he was making a waiver is insufficient to constitute either ratification or acquiescence. The trial court made no inquiry of Mr. Savino (the "better procedure," Amazon v. State, supra). Silence is insufficient to show acquiescence. Turner v. State, supra; Francis v. State, supra. A defendant cannot knowingly and intelligently waive his right to presence if he is unaware of it, id., and the record here does not reflect that Mr. Savino was informed of or understood his right to be present for

Margaret Cress's testimony. Certainly, it cannot be "presumed," as contended by the state (page 25 of brief), that Mr. Savino ratified or acquiesced in his counsel's waiver of his presence.¹

A defendant's involuntary absence during a crucial stage of adversary proceedings contrary to Rule 3.180(a) can be harmless error, as claimed by the state here, only where the state meets its burden to show beyond a reasonable doubt that the absence was not prejudicial. Garcia v. State, 492 So.2d 360, 364 (Fla. 1986). A violation of a defendant's right to be present cannot be considered harmless error if there is any reasonable possibility of prejudice resulting from the defendant's absence. Mann v. Dugger, 817 F.2d 1471, 1476 (11th Cir. 1987).

¹ It would be especially erroneous in the instant case to presume a knowing and intelligent acquiescence or ratification from Mr. Savino's silence because his limited mental capacity was a prime issue in the case. His competency to stand trial was an issue, and the defense contended that he was insane at the time of the offense and incompetent to make a knowing and intelligent waiver of his Miranda rights (R 2460, 2521-2525, 2526). In lengthy pretrial motion hearings and at trial a total of seven doctors testified to Mr. Savino's mental condition in relation to these issues. Five of the seven gave opinions that Mr. Savino was incompetent, insane, and incapable of knowing and intelligent Miranda waiver (R 55, 58, 67, 129, 137, 143, 182-183, 190, 256, 259, 522, 526, 543, 568, 570, 663, 667, 669, 703-704, 743, 1830-1835, 1900-1906, 1963-64, 2230, 2040, 2098-2105, 2199-2204, 2230, SR1 7-31). The same five doctors testified that Mr. Savino was brain damaged as a result of years of extreme drug abuse and numerous blows to the head received in childhood and they and three other doctors as well as lay witnesses testified to the drug use and blows to the head (R 19, 24, 28, 48-53, 61, 117, 122, 140-143, 184-189, 234, 327-335, 335-338, 364-368, 390-405, 417-418, 519, 568, 583, 1687-1693, 1703-1707, 1747, 1765-1769, 1925-1928, SR1 7-31). Of particular relevance to any question of a knowing and intelligent waiver, Dr. Appel testified that Mr. Savino's verbal I.Q. was 78, his full scale I.Q. placed him in the lower 6.6% of the population, and he was retarded (R 126-127). Tests she gave Mr. Savino demonstrated a pervasive language disorder; Mr. Savino miscomprehended even simple spoken language (R 131). Mr. Savino was functioning at the bottom 1% of the population and was mentally ill due to organic brain syndrome, she testified (R 144).

Here, *Mr. Savino's* absence during the testimony of Margaret Cress was especially prejudicial because it amounted to a denial of his right to confront witnesses. The primary purpose of the requirement in Rule 3.180(a) that a defendant be present during trial is to allow him to confront witnesses and the evidence against him. Waters v. State, 486 So.2d 614, 615 (Fla. 5th DCA 1986). The right to confrontation of witnesses involves both the right to effective cross examination, see Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), and the right to a face-to-face meeting with witnesses appearing before the trier of fact, Coy v. Iowa, ___ U.S. ___, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). Mr. Savino was therefore denied both the right to confer with counsel concerning cross examination, and also the right to look upon the witness as she testified and to have her look upon him. Coy, supra. Although Margaret Cress' testimony was brief and was offered for the narrow issue of identification of the deceased victim, nonetheless the identification went to an essential element of the crime -- the fact that the victim was dead -- and Mr. Savino was absent for all of it.

It appears that no Florida case has found harmless error in the defendant's absence for the entire testimony of a witness. In Brito v. State, 454 So.2d 66 (Fla. 3d DCA 1984) the court reversed without discussing harmless error where the trial court excluded the defendants from the courtroom when it examined a court witness. In Burgess v. State, 369 So.2d 686 (Fla. 1st DCA 1979) the court found the error to be harmless where the trial court inadvertently commenced proceedings after a recess in the absence of the defendant and his attorney, but where the witness had testified

only to his name, employment, and experience before the defendant and his attorney entered the courtroom.

Harmless error is decided in other contexts with reference to the defendant's opportunity to consult with his lawyer and participate in the conduct of the defense. See, e.g., Francis v. State, supra (defendant not present to consult with counsel during exercise of peremptory jury challenges; error not harmless); and Turner v. State, supra (defense counsel actually conferred with defendant about selection of jurors, and defendant had an opportunity to participate in choosing which jurors would be stricken; error harmless). Here, defense counsel's waiver of the state's offer to have Margaret Cress testify again in Mr. Savino's presence (R 1723) denied him any opportunity to consult with counsel about her testimony or to have any input into cross examination of her. This was not a case like Lambrix v. Dusaer, 529 So.2d 1110 (Fla. 1988) where the defendant "knew what was going on" in this absence. Id. at 1112. The record here shows that Mr. Savino was completely in the dark concerning the witness' testimony and therefore had no opportunity to influence the course of the proceedings to whatever extent he might have been able.

The same is true of the reinstruction of the jury. The reinstruction was on a matter crucial to the defense: the state of mind required for third degree murder, the crime for which Mr. Savino was convicted. A major part of the defense was insanity and lack of specific intent (R 1229). Again, by his absence Mr. Savino was prevented from giving whatever input he might have been able. In Meek v. State, 487 So.2d 1058 (Fla. 1986), this Court held harmless the defendant's absence where, as here, the jury was

brought into court to have a question posed by them answered after the judge conferred with the prosecutor and defense counsel and all agreed upon the answer. The error was found harmless because trial counsel informed the defendant of the jury question and the answer before the jury finished its deliberations; the defendant's subsequent failure to object was held to be a ratification. Here, of course, there is no indication in the record that Mr. Savino ever even knew about the question or the answer or had any opportunity to object if he so desired.

Mr. Savino's absence at these two stages in his trial, without any waiver or acquiescence or ratification by him, was a denial of his rights to confrontation, due process, and a fair trial under the Florida and United States Constitutions. The District Court of Appeal correctly ordered a new trial.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY THAT INSANITY MAY RESULT FROM THE LONG AND CONTINUED USE OF INTOXICANTS [RESTATED].

The issue in this point on appeal is the second one upon which the District Court of Appeal reversed *Mr. Savino's* conviction, and is the second one raised by the state besides the one certified by the District Court. As with Point I, review of the issue in this point on appeal is discretionary with this Court. *Savoie v. State*, 422 So.2d 308, 310 (Fla. 1982). It is not necessary for this Court to decide this point unless it overturns the decision of the District Court of Appeal on the other two points. As with Point I, the law on this point is so clear that no further statement on it from this Court is needed as a precedent.

The instruction requested by the defense and denied by the trial court in the instant case is required by Instruction 3.04 (b), Florida Standard Jury Instructions In Criminal Cases. The standard instruction includes a Note to Judge stating, "If drugs or alcohol are involved, see *Cirack v. State*, 201 So.2d 706 (Fla. 1967)." The defense's requested instruction in the instant case was drawn directly from *Cirack* (R 2640):

DEFENDANT' REQUESTED JURY INSTRUCTION NO. 5

The law recognizes insanity super induced by the long and continued use of intoxicants so as to produce a fixed and settled frenzy or insanity either permanent or intermittent.

This exact language is found at page 709 of *Cirack*. In support, *Cirack* cites Florida cases going back to 1891. This line of cases

was most recently reaffirmed by this Court in Preston v. State, 444 So.2d 939 at 944 (Fla. 1984).

At trial in the instant case the defense established an evidentiary foundation for the instruction. One of Mr. Savino's main lines of defense was insanity (R 1229). At trial the defense presented the testimony of five doctors that he was insane at the time of the offense (R 1747, SR1 7-31, R 1830-1835, 1900-1906, 1963-1964, 2040, 2098-2105). The doctors testified that Mr. Savino suffered from brain damage as a result of many years of drug and alcohol abuse as well as from blows to the head and lightning (R 1747, SR1 7-31, R 1824-1835, 1895-1906, 1955-1967, 2034-2088, 2098-2112). There was also testimony from family members and other witnesses to Mr. Savino's long-term drug abuse throughout his life as well as immediately before the incident on trial.

The state claims that the defense of insanity through long and continued use of intoxicants was based only upon "hearsay and self-serving statements" of Mr. Savino (page 28 of brief), that Mr. Savino's statements were "fabrication" (pages 29-30), and that there was no "independent" evidence of long term substance abuse (page 33). On the contrary, however, the trial evidence supporting the defense's request for the jury instruction was direct and came from several independent witnesses. Mr. Savino's mother testified that Mr. Savino started using drugs when he was about 13 years old, marijuana and possibly quaaludes. He used marijuana every day (R 1703-1704). Mr. Savino's sister also testified that at age 13 he began using marijuana and quaaludes given to him by his stepfather. When Mr. Savino was 14 or 15, he would abuse "every drug," marijuana, quaaludes, and alcohol (R 1689-1690). Joseph Gomez was

a neighbor of Mr. Savino's at the time of the incident and saw him get high on a daily basis (R 1925-1927). On December 24 Gomez shared six cocaine rocks with Mr. Savino (R 1928). On the Monday before Christmas he drank beer and smoked marijuana with Mr. Savino (R 1930-1931). The jail nurse testified that Mr. Savino was going through drug withdrawal after his arrest: he was shaking, he said he had been using cocaine and marijuana, he appeared depressed, and he was given medication and put on suicide watch (R 1784-1787, 1791). Finally, even though the doctors who testified about Mr. Savino's drug and alcohol abuse may have relied in part upon Mr. Savino's **own** statements to them, nonetheless they were testifying from their direct observations of the effects of that abuse, which are necessarily effects upon the mind and which therefore are observable as defects in mental functioning, mainly revealed through speech.

In any event, a defendant has a right to a jury instruction on the law applicable to his theory of defense where there is **any** trial evidence supporting the theory. Gardner v. State, 480 So.2d 91, 92 (Fla. 1985); Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985). This is true no matter how disdainful the trial or appellate court may feel about the merits of the defense from a factual standpoint. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976). Regarding the defense of intoxication, a jury instruction is required even where the evidence of intoxication is conflicting, Randolph v. State, 526 So.2d 931, 933 (Fla. 1st DCA 1988), or "marginal," Eberhardt v. State, 14 F.L.W. 2272, 2273 (Fla. 4th DCA Sept. 26, 1989). In Smith v. State, 532 So.2d 78 (Fla. 3d DCA 1988), the defendant's **own** testimony of long term drug use and

extensive quantities of drugs and alcohol consumed prior to the incident on trial, and a psychiatrist's testimony that the defendant was significantly impaired although not insane, together were held sufficient to require an intoxication instruction. It is the jury's duty to weigh evidence of intoxication and not the trial court's. Gardner v. State, supra, 480 So.2d at 92. In Gardner, this Court reversed for denial of an intoxication instruction where the evidence had not convinced the trial court that the defendant was under the influence of alcohol or marijuana to the degree necessary for the instruction; this Court found the evidence sufficient to create a question of fact for the jury to decide. Id. In the instant case, there was more than enough evidence to create a jury question.

The state contends that denial of the instruction was harmless because "implicit" within the verdict for third degree murder was the jury's determination that *Mr. Savino* was mentally capable of forming the required intent (pages 32-33 of brief). However, the jury was never instructed that the intent could be negated by insanity induced by intoxicants. Had the jury been instructed as required, it cannot be assumed that the verdict would have been the same or that any such determination of intent could have been implied. Therefore the omission of the requested instruction, far from being harmless, struck at the heart of the intoxication defense and was highly prejudicial. The deprivation of jury consideration of a crucial aspect of the defense was a denial of due process and a fair trial under the Florida and United States Constitutions. The District Court of Appeal correctly ordered a new trial.

ARGUMENT

POINT III

MAY A DEFENDANT SHOW THAT SOMEONE OTHER THAN HIMSELF COMMITTED THE CRIME FOR WHICH HE IS CHARGED BY INTRODUCING EVIDENCE THAT ANOTHER PERSON WITH AN OPPORTUNITY TO COMMIT THE CRIME CHARGED, COMMITTED A SIMILAR CRIME BY SIMILAR METHODS? IF THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE, MAY THE TRIAL COURT APPLY A LESS STRICT STANDARD OF SIMILARITY TO THE ADMISSION OF SUCH EVIDENCE? [QUESTIONS CERTIFIED BY FOURTH DISTRICT COURT OF APPEAL]

The answer to both of the certified question must be yes. However, it is not necessary for this Court to reach the second question in the instant case. In the instant case, Mr. Savino's proffered evidence tending to show that his wife rather than he might have killed Johnny Griffin was relevant and admissible under existing Florida "Williams Rule" and relevancy standards. Even though existing law also mandates a broader standard of admissibility for defense evidence showing other similar crimes by another suspect than for prosecution evidence of other crimes by the defendant, it is not necessary to make this distinction in the instant case. Under any standard, the trial court improperly excluded Mr. Savino's evidence that his wife had killed another of her children in a previous marriage by means nearly identical to the cause of Johnny's death.

The two parts of the certified question will be discussed separately.

A. REVERSE WILLIAMS RULE.

It is well established in Florida law that one accused of a crime may show his innocence by proof of the guilt of another. Lindsav v. State, 69 Fla. 641, 68 So. 932, 934 (1915); Pahl v.

State, 415 So.2d 42 (Fla. 2d DCA 1982); Moreno v. State, 418 So.2d 1223, 1225-1226 (Fla. 3d DCA 1982). The defense as well as the state may offer evidence under Section 90.404(2), Florida Statutes (1987). Brown v. State, 513 So.2d 213, 215 (Fla. 1st DCA 1987). Section 90.404(2) codifies the "Williams Rule" regulating admission of evidence of collateral crimes. See Williams v. State, 110 So.2d 654 (Fla. 1959). Defensive use of Williams Rule evidence has been termed "Reverse Williams Rule." Diaz v. State, 409 So.2d 68, 69 (Fla. 3d DCA 1982).

In the instant case, the defense's proffered evidence was admissible under Williams Rule standards. The defense sought to show that Mr. Savino's wife Carolyn killed her daughter Ahna Griffin by beating her in a manner similar to the cause of Johnny's death. If it had been Mr. Savino who had previously killed another child by similar means, that evidence would have been admissible against him. Therefore the evidence that Carolyn had previously killed a child by similar means should have been admissible in Mr. Savino's defense in order to establish a reasonable doubt as to who killed Johnny.

The Williams Rule holds that evidence of similar facts is admissible for any purpose if relevant to any material issue, other than propensity or bad character, even though it points to the commission of another crime. Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). Under the Williams Rule, many cases have ruled admissible against defendants evidence of abuse of the same or different children, even many years before, in trials for child

abuse.² Although most of these cases are sexual abuse cases, they provide close parallels to the instant case, where there was a pattern of abuse by Carolyn and where the manners of death of Johnny and of Ahna were so similar. The excluded testimony of the medical examiner was that the deaths of Johnny and Ahna were similar because both had multiple injuries consistent with blunt force trauma; they were both abused children. Furthermore, the medical examiner ruled Ahna's death a homicide (SR2 5-10). The defense's other excluded witness, Cheri Dierringer, would have testified that Carolyn admitted to her that she killed Ahna (R 2090-2095). This evidence was quite similar to that in the cases cited above in footnote 2.

The Williams Rule is based upon the general theory of relevance. Section 90.404(2)(a) states that similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue. Section 90.401, Florida Statutes

² Heurina v. State, 513 So.2d 122 (Fla. 1987) (evidence that defendant charged with sexual battery of his stepdaughter had sexually battered his daughter 20 years earlier); Cotita v. State, 381 So.2d 1146 (Fla. 1st DCA 1980) (prior illicit sex acts with daughter and other neighborhood children relevant to establish pattern); Warren v. State, 475 So.2d 1027, fn. 6 (Fla. 1st DCA 1985) (evidence that defendant's son was injured four days before his daughter died would have been admissible at separate trials under the Williams Rule); Sampson v. State, 541 So.2d 733 (Fla. 1st DCA 1989); Potts v. State, 427 So.2d 822 (Fla. 2d DCA 1983) (evidence of defendant's similar sexual acts with victim's sister and defendant's two younger sisters occurring as long as 12 and 18 years before admissible to establish pattern); Hodae v. State, 419 So.2d 346 (Fla. 2d DCA 1982) (sexual battery upon a second young female member of defendant's family eight years before); Espey v. State, 407 So.2d 300 (Fla. 4th DCA 1981) (assaults occurring over a period of years against various members of defendant's family, both male and female, mostly between seven years of age and puberty); Woodfin v. State, 15 F.L.W. D13 (Fla. 4th DCA Dec. 20, 1989) (testimony by 20-year-old daughter of sexual abuse during very early childhood).

(1987) defines relevant evidence as evidence tending to prove or disprove a material fact. Section 90.402, Florida Statutes (1987) states a general rule of admissibility of relevant evidence. The defense's proffered evidence here was relevant to prove or disprove a material fact -- the identity of the killer, Mr. Savino or his wife. In order to be relevant and therefore admissible the evidence need not prove the fact in issue, but only tend to prove it. It is not a prerequisite to admissibility that the evidence standing by itself be sufficient to establish the fact in issue. Pearson, "Ungarbling Relevancy," 45 Florida Bar Journal 45, 47, February 1990.

The state, though, takes the position that the evidence in order to be admissible would have had to have been sufficient to convict Carolyn for the deaths of both Ahna and Johnny. The state argues that the defense's evidence "does not prove that she killed her son, Johnny Griffin" (page 34 of brief) and that "since Carolyn was not indicted it is safe to say she was innocent of any charges related to the death of Ahna" (page 37). The defense's evidence, however, need not have been sufficient to prove Carolyn guilty in order to have been admissible. It needed only to tend to prove or disprove who -- Carolyn or Mr. Savino -- killed Johnny, and it need not have been sufficient by itself to establish that fact.

Coupled with the evidence of Carolyn's abuse of Johnny, the excluded evidence of her abuse of Ahna tended to show that she rather than Mr. Savino might have killed Johnny. A detective testified that he went to Virginia to investigate Carolyn's abuse of her children there during a previous marriage and found out that she had abused Johnny there (R 1664-1665). A former neighbor from

Virginia testified that he saw Carolyn beat Johnny and punch or kick him numerous times (R 2008-2015). The fact that Carolyn is not conclusively proven guilty by the sum of this evidence and the excluded evidence does not make the excluded evidence inadmissible, any more than the fact that she was not charged in Ahna's death means that she was not responsible, or the fact that she was charged in Johnny's death (R 1674) but not tried means that she was innocent of it. The excluded evidence was relevant and admissible and therefore should have been allowed to go to the jury for them to determine its weight.

The state's characterization of Cheri Dierringer's testimony as hearsay is to no avail. Section 90.804(2)(c), Florida Statutes (1987) provides that a statement by an unavailable declarant, tending to expose the declarant to criminal liability and offered to exculpate the accused, is admissible if corroborating circumstances show the trustworthiness of the statement. See also Jackson v. State, 421 So.2d 15, fn. 7 (Fla. 3d DCA 1982). Here, Carolyn was found to be unavailable by the court. See Section 90.804(1)(a). As corroboration to Cheri Dierringer's tendered testimony there was the testimony of Dr. Beyer that Ahna was murdered, as well as the testimony of her previous abuse of Johnny.

B. STANDARD OF ADMISSIBILITY.

As touched on above in this point on appeal, the Williams Rule is based upon the general theory of relevance. In the case of prosecution evidence of other crimes by the defendant an important additional factor affecting admissibility comes into play: prejudice. It was because of concern with undue prejudice to the accused that the Williams Rule was originally formulated as a rule

of exclusion with certain exceptions. Straiht v. State, 397 So.2d 903, 909 (Fla. 1981). Evidence of a similar crime frequently predisposes the minds of the jurors to believe the defendant guilty. Id. Hearing about other crimes can damn a defendant in the jury's eyes. Keen v. State, 504 So.2d 396, 402 (Fla. 1987). Williams Rule evidence cannot be allowed to influence the jury to believe that because the defendant committed other crimes, he probably committed the crime charged. Craig v. State, 510 So.2d 857, 863 (Fla. 1987). Prosecution Williams Rule evidence is given special treatment because of the danger of prejudicing the jury against the accused. Id. The special treatment consists of the rule requiring close similarity between the other crimes and the crime on trial. See Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981) and Peek v. State, 488 So.2d 52, 55 (Fla. 1986). Additional special treatment is provided by the rule that prejudicial impact must not outweigh probative value even where the evidence of other crimes is otherwise relevant. Straiht v. State, supra, 397 So.2d at 909.

Where Williams Rule evidence is offered by the defense rather than the prosecution, however, concern for undue prejudice to the accused disappears. Therefore the restrictions applying to prosecution Williams Rule evidence are unnecessary. Rather, the guiding principle must be the general rule of admissibility of relevant evidence, discussed above. The answer is therefore yes to the second certified question, whether the trial court may apply a less strict standard of similarity to the admission of defensive Williams Rule evidence.

The following language, quoted from State v. Garfole, 388 A.2d 587 (N.J. 1978) by the District Court of Appeal in the opinion under review here, succinctly summarizes the reasoning and principles which must be applied:

It is well established that a defendant may use similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him.

Id. at 591.

It [the lower appellate court] required that "'the device used [in the prior crimes]**be so unusual and distinctive as to be like a signature'," citing authority applicable to efforts by the prosecutor to establish by other offenses by the defendant that all, including the charge being tried, were committed by the accused.

We are of the view, however, that a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State when such evidence is used incriminatorily.

* * *

{W}hen the defendant is offering that kind of proof exculpatory, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made.

Id. at 590-591. As noted by the District Court of Appeal in its opinion, other jurisdictions also have adopted this position. See People v. Flowers, 644 P.2d 916 (Col. 1982); Commonwealth v. Jewett, 467 N.E.2d 155 (Mass. 1984); and State v. Bock, 39 N.W.2d 887 (Minn. 1949).

This reasoning applying a standard of general relevance to defense evidence of other crimes by an alternative suspect, but a more restrictive standard of close similarity to evidence of the defendant's other crimes offered by the prosecution, is consistent with both Florida's rule of admissibility of relevant evidence and the Williams Rule statute and case law. It is equally consistent with an alternative view of the relevance and Williams Rule statutes: that the Williams Rule statute, Section 90.404(2)(a), applies only to prosecution evidence, while defense evidence is governed by Section 90.402, the relevance statute. This was the position of the Third District Court of Appeal in Moreno v. State, supra. 418 So.2d at 1225. Under either view, *Mr.* Savino's evidence pointing to the possibility that his wife Carolyn might have been the killer rather than him should have been admitted.

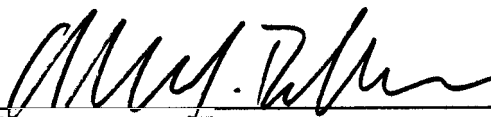
The defense has a constitutional right to present the testimony of witnesses. Chambers v. Mississippi, 410 U.S. 284, 295; 93 S.Ct. 1038, 1045; 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19; 87 S.Ct. 1920, 1923; 18 L.Ed.2d 1019 (1967). Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. Holt v. United States, 342 F.2d 163, 166 (5th Cir. 1965). In the instant case, the trial court denied *Mr.* Savino due process and a fair trial when it excluded his proffered evidence. The District Court of Appeal correctly ordered a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

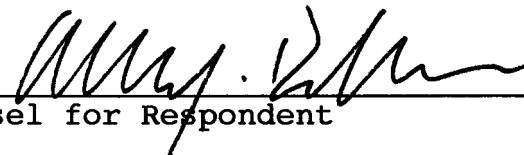
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Carol Cobourn Asbury, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 8th day of February, 1990.



Counsel for Respondent