IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT OF FLORIDA

APPEAL NUMBER 4D05-866

DEAN JAMES DELGUIDICE
Appellant-Petitioner

v.

STATE OF FLORIDA
Appellee-Respondent.

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE
CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

BRIEF OF APPELLANT
(ORIGINAL)

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STATEMENT OF THE CASE AND OF THE FACTS

Dean James Delguidice (hereinafter referred to as the "Defendant" or "Delguidice") was charged in a two count information filed on December 6, 2002. [R1-2] Count one charged aggravated battery in violation of Florida Statutes, § 784.045, that is, that on September 21, 2002 Delguidice had intentionally touched or struck Charles *** against his will and "intentionally or knowingly caused the said Charles *** great bodily harm, permanent disability or permanent disfigurement by striking Charles *** about the head and facial area . . . " Count one was a second degree felony punishable by up to fifteen years imprisonment.

Count two charged felony battery based on the same facts as count one but predicated on an allegation that Delguidice had a prior battery and or aggravated battery conviction from 1987 or 1988. This was a third degree felony. Florida Statutes, §§ 784.041 or 784.043.

Delguidice filed a motion for severance April 19, 2004 [R1-169], which was granted by order dated June 25, 2004. [R2-200] The case went to trial on count one, the aggravated battery only. [R4-8-9]

The State filed a notice of intent to have the court declare Delguidice an habitual felony offender, habitual violent felony offender, three time violent felony offender and/or a violent career criminal. [R1-7] The State also filed a notice of intent

to seek to have Delguidice sentenced as a prison releasee reoffender. [R1-9]

On February 25, 2004 Delguidice's public defender filed a motion in limine and motion to compel answers to certified questions by which Delguidice put the court on notice that Charles ***, the alleged victim in this case, was under investigation for the rape of Christina ***, who was a person present with Delguidice when the incident between Delguidice and *** took place. The defense argued in this motion that *** initiated the physical contact with Delguidice when *** was confronted with the allegations of sexual battery made by Christina ***. [R1-20-55] Delguidice's public defender also filed voluminous records from the Collier County investigation of the rape allegation against *** showing the good faith basis for the claim. [R1-56-166] *** had refused to answer questions in deposition about the alleged rape. Delguidice moved to have him compelled to answer the certified questions. [R1-22]

At the hearing on the motion in limine the public defender argued that evidence of the rape was admissible as reverse 404 evidence, evidence of the "victim," ***'s motive and intent as the aggressor in this case against Delguidice [who threw the first punch was in dispute], and admissible under 90.608 for impeachment for his reputation for being an aggressor. [SR; 3-9-04 hearing, p. 4] The public defender further proffered that the rape victim, Christina ***, had told Delguidice what ***

had done to her before the confrontation at the bowling alley took place. [SR; 3-9-04 hearing, p. 9]

*** had refused in deposition to answer questions relating to the rape of Christina ***. *** had *not* invoked his Fifth Amendment privilege in the deposition. However, the trial court denied the public defender's motion to compel *** to answer, stating "I can't compel him to violate his Fifth Amendment privilege at all." [SR; 3-9-04 hearing, p. 11] The court denied the motion in limine and denied the motion to compel the witness to answer the questions about the rape of Christina ***. [SR; 3-9-04 hearing, p. 14]

Retained counsel, Michael B. Cohen, who is a board certified criminal trial lawyer, appeared for Delguidice on March 25, 2004. [R1-167; The Florida Bar Directory]

Delguidice's newly retained trial counsel filed a trial brief April 23, 2004 [R1-181] setting forth a statement of facts of the case and advised the court of Delguidice's intent to introduce evidence concerning the alleged rape of Christina *** to demonstrate that the defendant, Delguidice, was aware of the aggressive nature of Charles *** [the alleged "victim" in this case] prior to the time Delguidice punched *** in self-defense.

Delguidice's trial brief statement of facts [as amended in a subsequent filing

R2-206-208] proffered that the state alleged that Delguidice had committed aggravated battery on Charles *** on September 21, 2002. The altercation took place outside of a bowling alley in the Fort Lauderdale area. At the time, Delguidice was accompanying a woman named Christina ***. Christina *** was the victim of a rape committed by Charles *** and another individual that had taken place prior to September 21, 2002. [The rape was reported to the police to have taken place on the night between September 13-14, 2002, just one week before the altercation between Delguidice and ***; R1-58] Before the confrontation between Delguidice and ***, Christina *** had informed Delguidice that she was in fear for her safety due to the fact that *** had intimidated her while she was at work at the bowling alley, concerning the rape in Collier County, therefore she had asked Delguidice to accompany her outside the bowling alley. Christina *** and others had informed Delguidice of the rape and the circumstances of the threat made by ***. As Delguidice and Christina *** exited the bowling alley, they came in contact with ***, ***'s brother, and another female. Delguidice told *** to stay away from Christina ***, at which point *** punched Delguidice in the shoulder. Delguidice then punched *** in the jaw, one time. *** fell to the ground. As a result of the single punch, *** suffered a broken jaw. Delguidice was raising self-defense as his defense. *** was claiming that Delguidice in an unprovoked fashion punched ***

and thereafter kicked him when he fell to the ground. Christina ***, however, would corroborate Delguidice's testimony, that Delguidice struck *** just once, and in self-defense. [R2-206-208]

Delguidice argued in his written trial brief that the specific act of sexual battery committed by *** against Christina *** was admissible as a separate [*sic specific*] incident of conduct of the aggressive character of Charles ***. [R1-183] Delguidice's argument for admission of the allegation that Delguidice knew of the alleged rape of Christina *** by Charles *** prior to Delguidice's encounter with *** at the bowling alley parking lot the night of the incident, was supported by an extensive memorandum of law. Delguidice's memorandum of law argued that the evidence of the specific act of sexual battery committed by *** on Christina *** was admissible *to show Delguidice's state of mind* in acting reasonably in defending himself against ***. Delguidice recognized that although under Florida Statutes, § 90.405(2) only reputation evidence is admissible to establish that a "victim" acted aggressively when a defendant asserts a self-defense claim, in this case, Delguidice intended to introduce evidence of the specific act of rape (sexual battery) *to prove Delguidice's state of mind*, that is, that he was acting reasonably in apprehension of the "victim" because of Delguidice's knowledge of ***'s prior actions. The evidence was not being introduced to prove the character of the victim, therefore Florida

Statutes, § 90.404(1) was not applicable. Delguidice cited *Smith v. State*, 573 So.2d 306, 318 (Fla. 1990) (Defendant's testimony that he knew about specific acts of violence committed by the victim is relevant to show . . . the reasonableness of the defendant's apprehension to support his self-defense claim). Delguidice argued in the trial brief that specific act testimony of third parties may also be admissible as corroborative evidence if it is shown that the defendant knew about the very same acts of violence. Delguidice alleged that he knew about the very same act of violence - the rape of Christina *** by *** - that *** would testify about, before his confrontation with ***. Specifically Delguidice alleged that *** herself informed Delguidice of the rapes and threats by *** before the confrontation between Delguidice and ***. Delguidice further cited as authority for the above propositions C. Ehrhardt, *Florida Evidence,* pp. 173-176 (2001 Edition).

Delguidice filed an amended trial brief August 16, 2004. [R2-206] Delguidice reiterated his argument in favor of the admissibility of evidence that *** had raped Christina *** and that Delguidice had been told about this before the confrontation between Delguidice and ***, at which Delguidice asserted that he acted in reasonable self-defense. [R2-206]

Delguidice filed a proposed self-defense jury instruction (Pattern Jury Instruction 3.06(G), Justifiable Use of Non-Deadly Force) based on his claim of self-

defense. [R2-246-247]

The morning of jury selection, the court heard argument on the admissibility of evidence relating to the alleged rape of Christina *** by Charles ***, but no decision was made other than that Delguidice agreed he would not raise the issue during voir dire. [R4-16-19]

After jury selection the trial court heard argument on the admissibility of Delguidice's knowledge that Christina *** said that Charles *** had raped her the week before the incident Delguidice-*** encounter. [R5-193 *ff*] Delguidice explained to the trial court that the purpose of the evidence was not to prove that *** had raped ***, but to establish Delguidice's state of mind as it related to his claim of self-defense:

194:16 We are not here to try that case, I will make
194:17 that part of the record right now. We are here to
194:18 try what Dean Delguidice's state of mind was as it
194:19 related to the doctrine of self-defense.
194:20 Prior to the time, about ten or eleven o'clock
194:21 on September of 2002, Mr. Delguidice was aware that
194:22 Christina *** had been raped from what she told
194:23 him and others told him by Charles ***.
194:24 What the evidence will show, is that he
194:25 essentially went up to ***, that ***
195:1 was the aggressor in this case, that he basically
195:2 said, stay away from Christina ***, do not rape
195:3 Christina *** again, and that after ***
195:4 pushed or punched Delguidice, Delguidice punched
195:5 Charles ***.

***

195:13 However, the fact remains that what happened
195:14 in the Everglades [the rape] occurred [is] not to whether
195:15 *** was charged or not charged, but what was
195:16 Mr. Delguidice's state of mind at that time as it
195:17 related to the aggressive character of Charles
195:18 *** and the doctrine of self-defense.

[R5-194-195]

The trial court did not seem to understand the evidentiary concept, suggesting that this would only be relevant if Delguidice had intervened on behalf of Christina *** during the rape:

195:20 THE COURT: The doctrine of self-defense would
195:21 be if Mr. *** hit him and he retaliated by
195:22 punching him or anything else, that's self-defense.
195:23 MR. COHEN [Delguidice's counsel]: Right.
195:24 THE COURT: Or if Mr. *** went and
195:25 attacked somebody else and he interceded on behalf
196:1 of that person, that's self-defense.
196:2 MR. COHEN: Correct.
196:3 THE COURT: Now, get me beyond that.

[R5-195-196]

Delguidice tried to explain how evidence of Delguidice's prior knowledge of an act of violence by ***, the "victim" in this case, was relevant to his claim of acting in reasonable self-defense:

196:4 MR. COHEN: Okay, beyond that.
196:5 If the Defendant was reasonably apprehensive
196:6 of the victim because of the knowledge of the

196:7 victim's prior actions, the evidence is not being
196:8 offered to prove the character of the victim and
196:9 the section 94.041, rule of exclusion, is not
196:10 applicable.
196:11 And I cited in my memorandum of law, *State*
196:12 *versus Smith*, 573 So2d 306 381, that a defendant's
196:13 testimony that he or she knew about specific acts
196:14 of violence committed by the victim is relevant to
196:15 show the reasonableness of the defendant's
196:16 apprehension to support his self-defense claim.
196:17 That is what I'm saying here, Judge.

[R5-196]

Then the trial court suggested that the prior act of violence would have to be similar to the act involved in the trial, a sort of *Williams* rule approach to self-defense:

197:9 THE COURT: So you're suggesting to me that
197:10 his knowledge that, for arguments sake, Mr.
197:11 *** had a propensity to rape females, that he
197:12 was concerned that he was going to get raped,
197:13 that's a violent act?
197:14 MR. COHEN: I don't think it has to be that
197:15 similar. If you're going to hold the standard to
197:16 that level of similarity, then if someone rapes
197:17 someone -- and that's not an assault but hitting
197:18 someone is. I mean, I think you're splitting
197:19 hairs, Judge, quite frankly.
197:20 An assault is an assault.
197:21 THE COURT: This is not the victim that came
197:22 up to Ms. *** and did something and she hauled
197:23 off and belted him. Now she has a legitimate fear
197:24 of violence at the hands of Mr. *** because
197:25 she was a victim based upon what's been proffered.
198:1 Where does that give a third party the right
198:2 to take what may be perceived as an aggressive

198:3 position which is based strictly on someone else's
198:4 hearsay?
198:5 Mr. Delguidice is making -- he's jumping into
198:6 a situation where one individual claimed she was
198:7 raped at the hands of another. There's no filing,
198:8 no conviction, the allegation that he did it to
198:9 other people. How is that supported?

[R5-197-198]

Delguidice patiently referred the court to his trial brief, filed eight months in advance of trial, which the trial judge acknowledged he had read:

198:10 MR. COHEN: I'll answer your question.
198:11 THE COURT: I read your trial brief --
198:12 MR. COHEN: Charles Earhart, page 173 to
198:13 176 --
198:14 THE COURT: I've heard of him.
198:15 MR. COHEN: I know you've heard of him.
198:16 THE COURT: He's a professor.
***
198:24 MR. COHEN: According to Mr. Earhart, specific
198:25 fact testimony of third parties may be admissible
199:1 as corroborative evidence if it's first shown that
199:2 the Defendant knew about the very same acts of
199:3 violence.
199:4 And in this case, when Delguidice was informed
199:5 in advance of the alleged battery committed by
199:6 *** and the rape committed by ***, it
199:7 falls within that category. Your Honor, it's
199:8 there, it's the law. It's what I'm offering it
199:9 for.
199:10 THE COURT: Okay.
199:11 MR. COHEN: So, I mean, it comes in. And I
199:12 think if you don't let it in, I think it's a very
199:13 large issue, that's one thing I'm going to say.

[R5-198-199]

Delguidice then argued an alternative basis for its admissibility, reverse *Williams* rule and *res gestae* so that the jury would understand the context of what happened and why, and reiterated his argument that it was admissible to prove Delguidice's state of mind relative to self-defense:

199:15 *** I
199:16 gave the State reverse *Williams* rule under 9[0.]404.
199:17 So if it doesn't come in that way, it should be
199:18 admitted to show ***'s intent as it related
199:19 to Delguidice in terms of the aggressive nature of
199:20 his character. So state of mind and intent in him
199:21 being the aggressor and in Delguidice acting in
199:22 self-defense, not for his bad character but for
199:23 intent and state of mind of ***.
199:24 So, it comes in under 9404 also and it can
199:25 come in reverse Williams rule as well. That's that
200:1 issue, those are the two basis, Judge, on which I'm
200:2 seeking to admit that evidence.
200:3 The third one is, it's *res gest[a]e*, which is
200:4 your general catch-all under the rules of evidence,
200:5 but it's true.
200:6 If you try this case in a vacuum, this jury
200:7 will never know why Delguidice was involved in this
200:8 altercation. It's too sanitized. It doesn't make
200:9 a bit of sense, okay. Nothing is explained to them
200:10 and they're going to hear is there was this fight.
200:11 You are going to have a bunch of witnesses on one
200:12 side, a brother, a sister, a girlfriend, for the
200:13 State and a father for the Defense who are going to
200:14 give you different versions, that's it. They're
200:15 not going to know really why Dean Delguidice was
200:16 involved in this to begin with.

200:17 He was concerned about the aggressive nature
200:18 of this guy who allegedly raped Christina ***.
200:19 Whether it's true or not really doesn't matter.
200:20 It's what he has in his mind that matters and did
200:21 he act reasonably in doing that, and I think it's
200:22 admissible clearly under those basis, Judge. I
200:23 mean, it's the law, as far as I can see.

[R5-199-200]

In response the state cited *Berrios v. State*, 781 So.2d 455 (Fla 4th DCA 2001) claiming that under *Berrios* Delguidice (1) would have to admit he was the aggressor, (2) Delguidice would have to testify first and establish by his own testimony that (a) he was aware of the rape allegation at the time of the *** incident, and (b) that was what was in his mind during the *** incident, and (3) there must be some overt act that it was reasonably logical for him to be in fear and defend himself. [R5-202] In fact, the *Berrios* case does not hold any of these propositions. *Berrios v. State*, 781 So.2d 455 (Fla. 4th DCA 2001).

Then the state took the position that this rape was not a crime of violence. [R5-205] Delguidice pointed out that there were many rape victims who would disagree with the state's position that rape was not a crime of violence. [R5-206]

206:2 MR. COHEN: Most respectfully, Judge, there's
206:3 a lot of rape victims in the United States who
206:4 would disagree with the analysis, that rape is not
206:5 a violent crime and an assault of crime. Let's
206:6 start there.

206:7 Secondly, let's go to *State versus Smith*,
206:8 cited at 573 So2d 306, says, specific act testimony
206:9 of third parties is admissible to corroborate
206:10 evidence if it's first shown that the defendant
206:11 knew of the very same or similar act of violence of
206:12 a actor.
206:13 Okay, now I'll hand the *Smith* case up to you
206:14 Judge, so you can see it.
206:15 It's not what Ms. *** did or did not do
206:16 with *** that's important here. Mr. Rossman
206:17 misses the point. It's what Mr. Delguidice knew
206:18 and what she said that counts. Delguidice only
206:19 knows that *** raped her.
206:20 My point is not that he raped her or didn't
206:21 rape her, or the facts Mr. Rossman said are
206:22 accurate or not, I think he may have misspoke
206:23 because on that very same deposition, what Ms.
206:24 *** says is, if I didn't have sex with him, he
206:25 told me they were going to dump me on the side of
207:1 the road in the Everglades. That is part of that
207:2 very same deposition. She said she wouldn't have
207:3 had sex with them but for that threat that they
207:4 would have dumped her on the side of the road or
207:5 into a canal in the Everglades.
207:6 So, you see, Judge, it just doesn't square
207:7 with all of the facts. But assuming that most of
207:8 what counsel says is correct. It's not what
207:9 happened or didn't happen. It's not whether
207:10 *** raped her or didn't rape her. It's a
207:11 question of what was communicated to Dean
207:12 Delguidice and corroborated by Christina ***.
207:13 Before Delguidice gets into this altercation
207:14 with ***, he is of the belief that Christina
207:15 *** has been raped.
207:16 *** is going to testify to the
207:17 following: Delguidice will say is what happened to
207:18 you in the Everglades true, and she is going to

207:19 say, yes, it was. That's going to be her
207:20 testimony, before Dean ever has this altercation
207:21 with *** at all, so there is this exception
207:22 and it's there for a reason, to show his state of
207:23 mind.
207:24 He doesn't have to take the stand and say
207:25 anything, I can establish -- cross examination of
208:1 the State's witnesses, black letter law –

[R5-206-208]

The trial judge then suggested that there could be no self-defense unless Delguidice himself testified, but Delguidice explained that that was not correct:

208:2 THE COURT: You think you can get self-defense
208:3 in without the Defendant getting up on the stand?
208:4 MR. COHEN: There's case law that supports
208:5 that.
208:6 THE COURT: Not under any of the facts so far
208:7 that I've heard proffered.
208:8 MR. COHEN: Well, there's going to be
208:9 testimony by his father, too, which will
208:10 corroborate the self-defense as well, which will
208:11 entitle me to an instruction regardless.
208:12 So, all I can say, Judge, I can establish it
208:13 through the State's witnesses on cross examination,
208:14 I can establish it through Christina *** on my
208:15 own case, and I'm allowed to do that.
208:16 I don't have to have the Defendant take the
208:17 stand and say this is my state of mind, I can do it
208:18 in different ways, and that's black letter law,
208:19 too. I can get those citations if the Court wants
208:20 to see them?

[R5-208]

The trial court prohibited Delguidice from discussing the Christina *** rape in opening statement:

211:15 THE COURT: Let me put it to you this way:
211:16 Right now, for purposes of opening, there's not
211:17 going to be any discussion of rape, there's not
211:18 going to be any discussion of any of those
211:19 situations until there is a predicate that can be
211:20 shown.

[R5-211]

The trial court went further and ruled that it was not coming in during the state's case, but that the court would readdress the matter once the state rested:

212:12 Right
212:13 now, I'm telling you that's not coming in. Not
212:14 right now. As to once the State rests, what the
212:15 Defense is going to do, we'll readdress it.

[R5-212]

The trial court stated that it would consider further objections and argument with regard to cross-examination of *** when he testified:

213:12 And with regard to Mr. ***, I'll wait and
213:13 hear the questions before I hear objections and
213:14 rules, and if we need to, I'll have a hearing
213:15 outside the presence of the jury.

[R5-213]

The trial court indicated that it would be the court's position to permit this

defense and admit this evidence only if Delguidice testified:

213:16 MR. COHEN: Judge, I'm going to alert the
213:17 Court, on cross I intend to ask some of the State's
213:18 witnesses what were the statements that Mr.
213:19 Delguidice made at the time that it all happened,
213:20 and if the State wants to object, I think I can
213:21 elicit those things on cross examination, that's
213:22 why I'm alerting the Court about.
213:23 THE COURT: It's hearsay and it's exculpatory.
213:24 Where's it come in?
213:25 MR. COHEN: That's true.
214:1 THE COURT: You're going to have a tough time
214:2 without Mr. Delguidice saying something in the
214:3 case. That again is a strategically and tactical
214:4 decision that the Defense has to make at the
214:5 appropriate time.

[R5-214]

Based on the trial court's rulings, Delguidice was unable to tell the jury in opening statement anything about the context of the confrontation between Delguidice and ***, nothing about what provoked the encounter or what was in Delguidice's mind when he encountered *** outside the bowling alley - the man he thought just one week earlier had raped the woman he was escorting from her place of work:

226:15 The evidence is going to show that Dean
226:16 Delguidice came to that bowling alley to find
226:17 Christina *** a lift, that he was attacked by
226:18 Chaz ***. The Defense's version of events is
226:19 going to be completely different than the version

226:20 of events offered by Mr. Rossman.
226:21 Many times we see a set of circumstances in
226:22 which the facts are completely at odds. We have to
226:23 ask ourselves, what's the motivation for this? Why
226:24 did this thing happen? We may not know the answer
226:25 to that in this particular case.

[R5-226]

The first state witness was the "victim," Charles "Chaz" ***. [R5-231] *** testified that sometime between 11:00 p.m. and 1:00 a.m. he was in the parking lot at the bowling alley, talking on a cellphone, when someone he had never met before approached him, and called out, "hey you, asshole," and got right up in front of his face saying "is your fucking name Chaz?" [R5-235-241] *** testified that he replied that his name was "John," which threw Delguidice off, he thought, and Delguidice asked again "your name ain't Chaz?" but as he said this, ***'s brother came walking toward them and called out "Chaz, what's going on?" [R5-242-244] *** testified that he turned to look at his brother and as he did so, he claimed that Delguidice punched him, one time, with his fist, on his right cheekbone. [R5-244-245] As *** backed up from this blow, he claimed that Delguidice kicked him, one time, in the groin. [R5-245-246] *** claimed that he did not hit back, but sat down on the curb and when he did, Delguidice struck him one more time, again on the right side of his face. Delguidice did not hit him again. [R5-246-248]

The jury was excused during the direct examination of *** for argument concerning various evidentiary matters, at which point Delguidice took the position that by questioning *** about what Delguidice had said to him, the state had opened the door to the statements Delguidice made to *** at the same time about *** raping ***.[1] [R5-255-258]

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[1] The state's questions that opened the door were:

239:20 Q He called out to you. Did he call out to you
239:21 by name?
239:22 A Not at first. He said, hey you. Then he
239:23 called me asshole, he said, asshole. I didn't know who
239:24 he was talking about at first.
***
240:15 Q Now, when this person is calling out, coming
240:16 towards you and calling out and saying, hey you, hey
240:17 asshole, do you respond to him?
240:18 A Not at first, no.
240:19 Q What happens?
240:20 A Well, I was using the phone at the time and
240:21 then when the gentleman was in front of my face, I
240:22 realized who he was speaking to.
240:23 Q How close -- how about if I demonstrate, I'll
240:24 approach, stop me when I get as close as he was.
240:25 A He was in my face about right here.
241:1 Q Okay.
***
241:10 Q Mr. ***, did you want to have a
241:11 conversation with this person?
241:12 A No, sir.
241:13 Q As he comes right up to your face what is he
241:14 saying?
241:15 A He's saying what is my name.

256:4 MR. COHEN: Mr. Rossman has opened the door as
256:5 infinitum to what Mr. Delguidice said to Mr.
256:6 *** at the time of the alleged attack. What
256:7 did he say to you? You F'ing asshole.
256:8 You can't be selective and on and on and on ad

241:16 Q Is that what he's saying, sir, what is your
241:17 name?
241:18 A No, he was saying, is your fucking name Chaz,
241:19 are you fucking Chaz.
241:20 Q That Chaz part, that was your name; correct?
241:21 A Yes, sir.
241:22 Q What did you tell him?
241:23 A At first I stumbled and told him no.
241:24 Q Did he then walk away?
241:25 A No, sir.
242:1 Q What did he say next when you said no? Did he
242:2 say anything further?
242:3 A What's your name.
242:4 Q What did you say?
242:5 A I replied, John.
242:6 Q Your name is not John; correct?
242:7 A No, sir.
242:8 Q Why didn't you want to tell him what your name
242:9 was?
242:10 A I didn't know the gentleman, and there was a
242:11 reason why he knew my name and I didn't know why, and he
242:12 was being violent.
242:13 Q Were you intimidated at all by how he was
242:14 approaching you?
242:15 A Yes.
242:16 Q When you say your name is John, now did he
242:17 walk away?
242:18 A No.
242:19 Q What happens next?

256:9 nauseam about all the testimony you just heard.
256:10 You can't be selective about that. You can't
256:11 elicit what you want the jury to hear on one point
256:12 and then the jury cannot hear that also said by
256:13 Delguidice to *** at the time, was what your
256:14 Honor quite correctly characterized originally as
256:15 hearsay. Don't rape Christina ***, okay, at
256:16 the same time.

[R5-256]

On voir dire of *** by Delguidice, outside the presence of the jury, *** confirmed that Delguidice was saying things about *** being a rapist:

259:16 Q Now, he also made some statements at that
259:17 time, did he not, about your allegedly raping Christina
259:18 ***? And the jury is not here now, so, I know that
259:19 you had a conversation with Counsel about not talking
259:20 about that, but that's why the jury was out. At that
259:21 time he also said something like, take another girl to
259:22 the Everglades and rape her, you F'ing asshole; right?
259:23 At about that time?
259:24 A I don't remember him saying that.
259:25 Q Okay. At that time, what statements did he
260:1 make to you, if any, about what you had allegedly done
260:2 to Christina *** in the Everglades?
260:3 A I couldn't really understand what he was
260:4 saying at first then I could understand more clearly
260:5 when the officer was present what he was saying.
260:6 Q What was he saying?
260:7 A He was saying things about I rape people and
260:8 I'm a rapist. I heard the word rapist a few times.
260:9 Q Had he said that to you -- when's the first
260:10 time you recall him saying that?
260:11 A When he was talking to the police officer.
260:12 Q How long after you had this altercation with

260:13 Mr. Delguidice when you claimed that he punched you did
260:14 the police officer arrive?
260:15 A Moments.
260:16 Q When he was asking you what your name was,
260:17 didn't he ask you at that time about what you had done
260:18 with Christina *** in the Everglades, when he was
260:19 asking you what your name was and you told him it was
260:20 John?
260:21 A When I told him John, he hadn't asked me any
260:22 questions about anything like that.
260:23 Q How many times had he alleged that you had
260:24 raped Christina *** in the Everglades?
260:25 A I would say about four or five.

[R5-260]

Delguidice argued to the trial court at the end of this proffer that the statements about rape should come in as part of the context of the incident, under the rule of completeness and *res gestae* and because the state had opened the door by its questions to *** as to what Delguidice had said. *Nota bene* that Delguidice did not, at this point, argue that the statements Delguidice made were admissible in support of his self-defense claim, instead, Delguidice was arguing that under general evidentiary principles, context, completeness, *res gestae* and opening the door, that the statements were admissible.

However, the trial court responded with a self-defense analysis, stating that there was no evidence yet that Delguidice was not the aggressor and that the statements were exculpatory hearsay. [R5-264-265]

The next state witness was Jennifer Stone, who was a long time friend of *** [R5-300-301] and who had previously dated ***'s brother, Michael. [R5-302] Stone was present with *** the night of the incident. [R5-303-305] She drove *** to the bowling alley then she went inside to use the bathroom. [R5-304-305] She did not previously know Delguidice and indeed, was unable to identify him in the courtroom at trial. [R5-307] As she came out of the bathroom and returned to the parking lot, she saw the back of a person approaching ***, who she said then punched *** and as he fell, kicked *** in the groin, then as *** went down, the person hit *** one more time. [R5-308-309] Stone claimed she never saw *** hit Delguidice. [R5-311]

Only after the kick did she then see ***'s brother Michael [whom she had previously dated], come from the side of the building toward them and yell at her to go inside and tell someone. [R5-310] She went in and came back outside and a policeman was there. [R5-310-311]

The next state witness was Davie Police Department Officer Robert Frailing. [R6-345-346] Officer Frailing was working off-duty as security at the bowling alley the night of the incident. [R5-346] A lady came to him and told him there was a fight outside. [R6-351] Officer Frailing went outside and saw fewer than a dozen people in the parking lot, and one person [***] was laying on the sidewalk. [R6-351] Officer Frailing saw Delguidice standing 20-25 feet from ***, yelling at him, saying that "he

was going to get him every time he saw him." [R6-352] The state then asked for a sidebar and advised that it was going to next ask Officer Frailing if he spoke to the defendant, and if so, what he said:

353:16 I was going to ask him if he
353:17 spoke to the Defendant and what he said, but I
353:18 don't want Mr. Cohen to think that I'm somehow
353:19 trying to open the door to the Defendant saying,
353:20 well, I thought he was a rapist, this, that and the
353:21 other.
353:22 Trying to determine, what he says. He says
353:23 he's trying to determine what happened, was there a
353:24 punch, was there not a punch. So that's what I
353:25 want to get into, but it still has nothing to do
354:1 with why he threw the punch.
354:2 MR. COHEN: Well, here's my response. First
354:3 of all, I think the door's been open again. This
354:4 witness has now testified on the stand that my
354:5 client said, hearsay, get him every time he saw
354:6 him, he's going to get him every time he saw him.
354:7 THE COURT: That goes towards an aggressive
354:8 act?
354:9 MR. COHEN: Towards -- well, this is in
354:10 response to Counsel's question.
354:11 THE COURT: Right, I don't have any issue with
354:12 that.
354:13 MR. COHEN: Okay.
354:14 THE COURT: But what do you think that opens
354:15 the door to?
354:16 MR. COHEN: Again, it's part of what he's
354:17 saying. He's also saying get him every time he saw
354:18 him because he raped Christina, maybe.
354:19 THE COURT: You're alleging self-defense, you
354:20 still have to show an affirmative act on behalf of
354:21 your client before any of that even becomes

354:22 remotely admissible.

[R6-353-354]

After the sidebar and in front of the jury the state asked Officer Frailing:

357:10 did you speak to anybody else to try and
357:11 determine what had happened?
357:12 A I spoke to the Defendant.
357:13 Q Okay.
357:14 A And Mr. ***'s brother.
357:15 Q Would that be Mr. Michael Williams?
357:16 A Yes, sir.
357:17 Q And limiting yourself to the Defendant, did
357:18 the Defendant ever claim that he did not strike Mr.
357:19 ***?
357:20 MR. COHEN: Objection. It calls for a hearsay
357:21 answer, Judge.
357:22 THE COURT: It's overruled.
357:23 BY MR. ROSSMAN:
357:24 Q Did the Defendant tell you that he did not
357:25 strike Mr. ***?
358:1 A No, sir.
358:2 Q What did he tell you in reference to whether
358:3 he struck him or not?
358:4 A He said he did in self-defense.
358:5 MR. COHEN: Same objection.
358:6 THE COURT: Overruled.
358:7 MR. COHEN: Withdrawn.
358:8 BY MR. ROSSMAN:
358:9 Q Now, when he said he did in self-defense, did
358:10 he ever claim to you that Mr. *** struck him
358:11 first?
358:12 A Yes, that he was pushed.

[R6-357-358][2]

By this testimony, the state had established at least a prima facie evidentiary basis for Delguidice's self-defense claim. Before Delguidice began his cross, he asked the court for a sidebar, at which he argued that under the state's view of *Berrios* he was now entitled to cross-examine Officer Frailing on Delguidice's statements about *** raping Christina ***, which indicated the Delguidice's need to act in self-defense. [R6-363-364]

> 363:20 *Berrios* now comes into play. On his direct
> 363:21 examination, the police officer stated that the
> 363:22 Defendant struck the victim in self-defense after
> 363:23 the victim pushed the Defendant. The door's now
> 363:24 been opened under *Berrios,* which says under the
> 363:25 last paragraph cited by the State, before the
> 364:1 Defendant may offer any type of character evidence,
> 364:2 he or she must lay proper predicate demonstrating
> 364:3 some act by the victim at or about the time of the
> 364:4 incident reasonably indicated to the Defendant a
> 364:5 need for action in self-defense.
> 364:6 It has now happened. This witness has now
> 364:7 testified that my client did not strike the victim
> 364:8 until the victim pushed him and that he acted in
> 364:9 self-defense.
> 364:10 I don't know what could be more on point. I
> 364:11 should be able to cross examine him about
> 364:12 everything my client said regarding the alleged
> 364:13 rape of Christina ***.

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[2] Officer Frailing's on scene determination was that it was a misdemeanor battery that had not taken place in his presence, and he did not know who had hit whom first, so he was not authorized to make an arrest. [R6-359]

[R6-363-364]

The state paradoxically responded that "That's the Defendant trying to open his door," and the trial court agreed, stating:

> 364:20 THE COURT: You can't open the door to that,
> 364:21 you can't create that, somebody has to -- either
> 364:22 your client has to get on the stand or somebody has
> 364:23 to say they actually saw it. You can't have it
> 364:24 based on hearsay. If I'm wrong, you will have a
> 364:25 new case.
> 365:1 MR. COHEN: I'm just making a record, Judge.
> 365:2 THE COURT: No problem.

[R6-365]

The state next called Michael Williams, the brother of the "victim," Charles ***. [R6-374-375] Williams basically corroborated ***'s testimony. [R6-382-387]

The state rested upon this evidence. [R6-398]

Delguidice called as his first witness the emergency room physician who treated ***, Dr. Joseph Araiza. [R6-404] The defense used Dr. Araiza to show that *** had also complained of pain in the right elbow. [R6-409], as to which Dr. Araiza testified that such pain could be consistent with a punch *thrown by* ***. [R6-412] On cross-examination Dr. Araiza somewhat contradicted this opinion or weakened it. [R6-422; R6-428] But he swung back around when reminded of his deposition testimony in which he had testified that ***'s complaint being consistent with a

punch that *** delivered against someone else. [R6-427; R6-430-431]

The next defense witness was Delguidice's father, Vincent Delguidice. [R6-440] The father testified that he overheard a telephone call from Christina *** to his son and as a result followed his son to the bowling alley. [R6-441-443] From his vantage point in the parking lot of the bowling alley he saw his son, Dean Delguidice, get out of his truck and another man approach him. He saw them exchange words, then the father saw the other man strike Dean Delguidice in the face. The other man struck Dean Delguidice first. [R6-444] Then he saw his son hit the man back, the man stumbled backward and hit the curb and fell. That was it. At that point the father left. [R6-444-445]

Following the court's instructions limiting the admissibility of evidence about the rape, on direct examination Delguidice had carefully examined the father about the fact he overheard a telephone conversation between Christina *** and his son, Dean Delguidice, which resulted in his following his son when he drove to the bowling alley the night of the incident. [R6-441-442] However, the state on cross-examination opened the door to the topic as follows:

> 465:23 Q You, without telling us the contents of that
> 465:24 the conversation because that's hearsay, you listened in
> 465:25 on a phone conversation that he had with somebody else
> 466:1 that night, did you not?
> 466:2 A We picked it up simultaneously is what

466:3 happened.
466:4 Q And you listened. You never spoke; correct?
466:5 A That's correct.
466:6 Q You listened until your son said, hang up the
466:7 phone, get off the phone, it's my business?
***
467:1 Q He tells you, hang up the phone, it's my
467:2 business, and you hang up?
467:3 A That's correct.
467:4 Q And after that phone conversation, you follow
467:5 your thirty-six year old son -- initially you follow
467:6 him; correct?
467:7 A I followed him when he left, yes.
467:8 Q But you lost sight of him?
467:9 A That's correct.
467:10 Q Yet, you knew where he was going and you went
467:11 there?
467:12 A That's correct.
***
467:24 Q You weren't following your son because you
467:25 were concerned that your son was going to confront
468:1 somebody, were you?
468:2 A I was concerned because I had heard from
468:3 Christina --
468:4 Q Don't tell us what somebody else said, sir.
468:5 MR. COHEN: Counsel asked the question and now
468:6 he's opened the door. Maybe he doesn't want to
468:7 hear the answer, Judge. He's asked a question.
468:8 MR. ROSSMAN: I've asked the question not for
468:9 hearsay.
468:10 THE COURT: Continue.

[R6-465-468]

Before calling Christina *** as a defense witness, Delguidice asked the court for a ruling on what he could and could not asked *** regarding the specific acts by

*** to show Delguidice's state of mind, because Delguidice intended to present this aspect of the defense through ***, and not put Delguidice on the stand. [R6-474] Delguidice's counsel proffered that Christina *** would testify that she was raped by Charles *** and that she informed Delguidice of it or Delguidice knew; that Delguidice had asked her about what had happened in the Everglades with *** and she had told Delguidice that it was true, that *** had raped her, and that this conversation with Delguidice took place before the incident at the bowling alley. [R6-475-476]

However, the trial court ruled that without Delguidice taking the stand, none of this evidence would be allowed in. [R6-476]

Delguidice then proffered the testimony of Christina *** outside the presence of the jury. [R6-477 *ff*] Christina *** confirmed that she had been raped by Charles *** and another man, named Ed, in a stilt house in the Everglades. [R6-478-485] Afterwards Dean Delguidice learned about what happened to her from neighbors and asked her if it was true and she told Delguidice that it was true, they had raped her. This conversation with Delguidice took place before the incident at the bowling alley. [R6-488] The night of the bowling alley incident Delguidice had dropped her off for work at the bowling alley and had come to pick her up when she got off. They were walking together to the car when she sees *** walking their way. She sees it is ***,

and someone behind them yelled out to ***, "Chaz," then Delguidice asks her, "is that him?" and she said "yes." [R6-489] So Delguidice went over to *** and said, "I want to talk to you about something," and she saw *** shove Delguidice, and she turned and kept walking and did not see the rest of the confrontation. [R6-490-491]

The court inquired of Delguidice if he understood his right to testify, that he could be cross-examined on prior felony convictions and crimes of dishonesty, etc. [R7-514-516] In response, Delguidice told the court that he wanted more time to talk to his counsel about the decision. After two recesses the court told Delguidice it was "put up or shut up time." [R7-517] The court said it had been waiting for "just short of an hour." [R7-517] Delguidice's counsel said to Delguidice on the record, "It's your call. If that's what you want, it's your call. It can only be your call, Dean." [R7-517] Whereupon the defendant personally addressed the trial court and asked the judge:

> 517:18 DEFENDANT DELGUIDICE: Your Honor, the only
> 517:19 way for me to have the problem with the man [testify about the rape] is for
> 517:20 me to get up there and say it?
> 517:21 THE COURT: I cannot give any legal advice.

[R7-517]

The judge was being inexplicably unresponsive, given his ruling the day before:

364:20 THE COURT: You can't open the door to that,
364:21 you can't create that, somebody has to -- *either*
364:22 *your client has to get on the stand or somebody has*
364:23 *to say they actually saw it.* You can't have it
364:24 based on hearsay. If I'm wrong, you will have a
364:25 new case.[3]

Delguidice could not make up his mind at that point whether to testify or not. [R7-519]

The defense proceeded with its next witness, Christina ***, the rape victim. [R7-520] She repeated her proffer testimony, but without any reference to the rape being permitted. Specifically, she testified that she saw *** hit Delguidice first. [R7-523]

After Christina *** testified, Delguidice told the court he wanted to testify. [R7-544] However, the state interrupted to request that the court advise Delguidice that he could not testify as to anything Christina *** may have said to him about the rape, because it would be hearsay.[4] [R7-545]

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[3] But this was no more inexplicable than the judge stating that evidence of the rape could come in if it was not by hearsay, but when presented with Christina ***'s proffer, in which she provided direct, non-hearsay testimony that *** had raped her and that she had told Delguidice about it before the incident at the bowling alley, ignoring its prior ruling and prohibiting the introduction of the evidence.

[4] Obviously it would not be hearsay because it would not be admitted for the truth of the statement, but for Delguidice's state of mind.

The trial judge then reversed his prior rulings and stated that based on ***'s proffer of the day before, Delguidice could not testify that she was raped because she did not tell Delguidice. [R7-545] This was not correct. *** had clearly testified that she told Delguidice that *** had raped her.

488:14 Q And what did Dean say to that night about what
488:15 had happened in the Everglades?
488:16 A He just asked me if it was true.
488:17 Q What did you tell him?
488:18 A Yes. I mean, you talk a difference between
488:19 rape or sexual assault, I mean, what they said is what
488:20 happened in the Everglades true and I said, yes.

[R6-488]

Despite this testimony just the day before, the trial judge ruled that Delguidice could not testify about the rape if he took the stand:

545:19 THE COURT: So he can't testify that she was
545:20 raped because he didn't get that from her.

[R7-545]

This was so obviously wrong that the defendant himself was moved to speak out:

545:21 DEFENDANT DELGUIDICE: She told me that, Mike,
545:22 before this happened. Chaz *** raped her and
545:23 that's the bottom line.
545:24 THE COURT: So you were there; right?
545:25 DEFENDANT DELGUIDICE: No, sir, I was not
546:1 there but she did come to my house with bruises all

546:2 over her, I know that much.

[R7-545-546]

Even confronted with Delguidice personally proffering that he was prepared to testify that he had been told about the rape by Christina ***, the trial judge would not change his mind.

548:9 THE COURT: And here's the thing --
548:10 DEFENDANT DELGUIDICE: Well --
548:11 THE COURT: You just keep your mouth closed.
548:12 You're not a lawyer, you're going to be witness.
548:13 DEFENDANT DELGUIDICE: What if I decide not to
548:14 be a witness?
548:15 THE COURT: Then go back over there.
548:16 DEFENDANT DELGUIDICE: I just want to know how
548:17 this is going to work before I do.
548:18 THE COURT: No, no, no. You're being called
548:19 as a witness because you now want to testify.
548:20 You're going to be asked questions and you're going
548:21 to be cross examined. However, if he testifies, he
548:22 cannot testify as to what Christina *** told
548:23 him, that's hearsay. That's hearsay, plain and
548:24 simple, whether he got it from her, whether he got
548:25 it from the man in the moon, it's hearsay. He has
549:1 to be able to testify that he had a well-founded
549:2 fear that this person, Mr. ***, was going to
549:3 do something to him, that's his defense, not that
549:4 she was raped.

[R7-548-549]

The argument continued with the trial court stating:

553:21 I will rule
553:22 based upon my understanding of the law and the
553:23 rules of criminal procedure. If I'm wrong, I'm
553:24 wrong. I call them as I see them and do the best
553:25 that I can.
554:1 MR. COHEN: I appreciate that, Judge, and I
554:2 respect what you do.
554:3 THE COURT: I have an appellate record that
554:4 supports everything that I've ever done.[5]

[R7-553-554]

After this colloquy, Delguidice decided not to testify and the defense rested. [R7-565-566] Closing arguments were given and the jury deliberated for an hour and nine minutes before reaching a guilty verdict on the charged offense of aggravated battery. [R7-252]

Sentencing was scheduled for February 15, 2005. [R8-1] The state had initially served a "shotgun" notice combining notice of potential enhancement under both the habitual felony offender statute ("HFO"), Florida Statutes, § 775.084(4)(a), and the habitual violent felony offender statute ("HVFO"), Florida Statutes, § 775.084(4)(b) [R1-7], but the day of jury selection, January 5, 2005, the state expressly advised the Defendant, his counsel, and the court that the state was withdrawing the notice as to the HVFO enhancement and going forward solely on the basis of the HFO

[5] The cold record does not indicate if the judge intended this as irony. A Westlaw search indicates that Judge Backman has been reversed 73 times.

enhancement.

182:2 MR. ROSSMAN: Your Honor, the only other
182:3 thing, since we're talking about this issue, is
182:4 that there is not confusion about the notice that I
182:5 filed on Mr. Delguidice and Mr. Cohen in reference
182:6 to his designation.
182:7 It is only as a habitual offender, and the
182:8 other is a separate notice as a prison releasee
182:9 reoffender. It is the old notice that we used to
182:10 file. *But so there is not confusion at any later*
182:11 *time,* ***we are not seeking habitual violent offender****,*
182:12 *he has not been designated that nor a violent*
182:13 *career criminal.* It is only as Mr. Cohen has just
182:14 explained to him, as a habitual offender and a
182:15 prison releasee reoffender.
182:16 MR. COHEN: You understand that?
182:17 DEFENDANT DELGUIDICE: Yes.
182:18 THE COURT: Which was also explained to Mr.
182:19 Delguidice by the Court at arraignment.
182:20 DEFENDANT DELGUIDICE: Yes.

[R5-182; emphasis supplied]

The state never modified that position before sentencing February 15, 2005 and did not file a any further written notice of intent to seek HVFO after advising the Defendant, his counsel and the court that it was no longer relying upon the HVFO notice. Nevertheless, Delguidice was sentenced to thirty years imprisonment as an HVFO [R2-258] with a fifteen year mandatory minimum as a prison releasee reoffender pursuant to Florida Statutes, § 775.082(8)(a)(2). [R2-259]

Delguidice filed a motion under Rule 3.800(b)(2), Florida Rules of Criminal

Procedure, immediately prior to filing this brief, challenging the imposition of the HVFO sentence and that motion is pending at this time. This appeal followed in a timely manner after imposition of sentence.

STANDARDS OF REVIEW

Both issues raised in this appeal were preserved by timely objection at the trial court, therefore, the burden is on the state to show that the error complained of is harmless beyond a reasonable doubt. This point is illustrated by the supreme court's decision in *Goodwin v. State,* 751 So.2d 537 (Fla. 2000), a case involving the harmless error standard in criminal appeals. Section 924.051(7), Florida Statutes, states that "the party challenging the judgment or order of the trial court has the burden of demonstrating that prejudicial error occurred in the trial court," but the rule applied in appellate courts is just the opposite. In *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986), the court held that if the defendant demonstrates that an error occurred at trial, the burden is on the state to show beyond a reasonable doubt that the error was harmless. *Crow v. State,* 866 So.2d 1257, 1261 (Fla. 1st DCA 2004). The evidentiary ruling is subject to an abuse of discretion standard. *Globe v. State,* 877 So.2d 663, 672 (Fla. 2004) ("A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion.").

Failure to provide a defendant with the statutorily required notice of

habitualization is *per se* reversible. *See e.g., State v. Wilson*, 658 So.2d 521 (Fla. 1995).

SUMMARY OF ARGUMENTS

I. The Trial Court Erred in Excluding Evidence That Was Essential to the Defendant's Defense of Self-defense, Delguidice's Prior Knowledge of a Recent, Specific Violent Act by the "Victim," Thereby Violating the Defendant's Right to Present a Defense, as Guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 9 and 16 of the Constitution of the State of Florida, When (a) Delguidice Sought Admission of the Evidence to Show Delguidice's State of Mind, (b) the Evidence Was Admissible as *Res Gestae*, and (c) the State Opened the Door to Admission of the Evidence by its Examination of the Witnesses.

Evidence that Delguidice knew of a specific act of violence by the victim - - that *** had raped Christina *** just one week earlier - - was admissible to show Delguidice's state of mind and the reasonableness of his conduct when confronted by *** outside the bowling alley while he was escorting *** to his vehicle. Additionally, the evidence was admissible as *res gestae* so that they jury could understand the context and what was said and done the night of the fight. The evidence was in any event admissible when the state repeatedly opened the door to the evidence by its questions to various witnesses asking what was said at the scene or what led Delguidice's father to follow his son to the bowling alley. Finally, the court erred based on all of the above grounds in ruling that if Delguidice took the stand, he could not testify about the rape, wrongfully causing Delguidice to be

deprived of his right to testify in his own defense.

II. The Court Erred in Imposing a Habitual Violent Felony Offender Sentence When the State Had Advised the Defendant, His Counsel and the Court Immediately Prior to Trial That the State Would Not Seek the Imposition of an Habitual Violent Felony Offender Sentence Upon Conviction and Thereafter Filed No Notice of a Changed Intent to Do So.

The court had no authority to impose a habitual violent felony offender sentence after the state expressly advised the Defendant, his counsel and the court that the state was not seeking a habitual violent felony offender enhancement.

ARGUMENTS

I. The Trial Court Erred in Excluding Evidence That Was Essential to the Defendant's Defense of Self-defense, Delguidice's Prior Knowledge of a Recent, Specific Violent Act by the "Victim," Thereby Violating the Defendant's Right to Present a Defense, as Guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 9 and 16 of the Constitution of the State of Florida, When (a) Delguidice Sought Admission of the Evidence to Show Delguidice's State of Mind, (b) the Evidence Was Admissible as *Res Gestae*, and (c) the State Opened the Door to Admission of the Evidence by its Examination of the Witnesses.

State of Mind

Evidence that Delguidice had prior knowledge of a specific act of violence by the victim - - that *** had raped Christina *** just one week earlier - - was admissible to show Delguidice's state of mind and the reasonableness of his conduct when confronted by *** outside the bowling alley while he was escorting *** to his vehicle.

Few questions of law are more well settled than this - that a defendant presenting a defense of self-defense is entitled to present his knowledge of specific prior acts of violence by the victim. The law is well settled that evidence of the specific violent acts of the victim is admissible, when offered in support of a defense of self defense, for the limited purpose of illustrating the defendant's state of mind at the time of the incident.

Every district court of appeal to consider the question as well as the Florida Supreme Court, has agreed that the defendant is entitled to introduce knowledge of the victim's prior specific acts of violence when presenting a defense of self-defense. *Hager v. State*, 439 So.2d 996 (Fla. 4th DCA 1983) (reversible error to exclude evidence of defendant's knowledge of victim's specific prior acts of violence), *Smith v. State*, 410 So.2d 579 (Fla. 4th DCA 1982) (reversible error to instruct jury to disregard defendant's testimony of his knowledge of prior specific acts of violence by the victim, because such testimony was based on hearsay), *Williams v. State*, 252 So.2d 243 (Fla. 4th DCA 1971) (reversible error to exclude evidence of prior knowledge of specific violent acts by victim), *Smith v. State*, 661 So.2d 358 (Fla. 1st DCA 1995) (reversible error to exclude testimony concerning victim's prior specific acts of violence), *Smith v. State*, 606 So.2d 641 (Fla. 1st DCA 1992) (reversible error in excluding proferred testimony of specific instances of violence by victim), *Reddick*

v. State, 443 So.2d 482 (Fla. 2nd DCA 1984) (reversible error to exclude testimony of third parties that they had been threatened by victim and that defendant knew of these specific threats), *Sanchez v. State*, 445 So.2d 1 (Fla. 3rd DCA 1984) (reversible error to exclude evidence of prior specific acts of violence by victim known to defendant at time of offense), *E.B. v. State*, 531 So.2d 1053 (Fla. 3rd DCA 1988) (reversible error to exclude evidence of prior specific threats), *Campos v. State*, 366 So.2d 782 (Fla. 3rd DCA 1979) (reversible error to exclude testimony of third party that she had seen specific act of violence by victim against another person and had told defendant about the incident prior to the offense in question), *E.C. v. State*, 426 So.2d 1292 (Fla. 3rd DCA 1983) (reversible error to exclude defendant's knowledge of prior acts of violence by victim), *** *v. State*, 718 So.2d 848 (Fla. 5th DCA 1998) (predicate for admission of testimony of third party about prior act of violence by victim in case of self-defense is evidence that defendant knew of such prior act of violence).

The Florida Supreme Court has the last word on the subject, and this is its teaching, found in *State v. Smith*, 573 So.2d 306 (Fla. 1991):

> Finally, Smith argues that the trial court erred when it barred defense witnesses other than Smith from testifying about specific acts of violence allegedly committed by Cascio. Smith was allowed to testify to specific acts of violence that he knew about, but the trial court did not allow other witnesses to testify as to specific acts of violence allegedly committed by Cascio and known to those witnesses. We agree with Smith and find error.

The exclusion of this evidence was clearly error, was timely objected to at trial, and was not harmless. The fact that Delguidice himself was not allowed to introduce this evidence and even if he had been allowed to testify about it, that he was not allowed to corroborate the claim by the testimony of Christina ***, establishes that the error contributed to the verdict. *See Smith v. State,* 606 So.2d 641, at 643-44 (Fla. 1st DCA 1992) (holding that the exclusion of a witness who would have testified regarding the character of the victim was harmful because the testimony went to the defendant's only defense of self-defense); *Baker v. States,* 522 So.2d 591, 493 (Fla. 1st DCA 1988) (holding that the exclusion of a witness whose testimony supported the defendant's theory of self-defense was not harmless error "since it may have created a reasonable doubt in the minds of the jurors"), *Grace v. State*, 832 So.2d 224, 227 (Fla. 2nd DCA 2002) (same).

Res Gestae

Additionally, the evidence that Delguidice thought that *** had raped Christina *** a week prior to the confrontation in this case, was admissible as *res gestae* so that they jury could understand the context and what was said and done the night of the fight.

The jury was never told why Delguidice was there that evening, what he had been told in the telephone call that took him from his home at almost 2:00 a.m. to the

bowling alley to escort a woman who was only a friend, not a girlfriend, home. The jury was never told why his father decided to follow him to the bowling alley when the father overheard the phone call. The jury was never told why Christina *** was afraid of ***. The jury was never told why two men who did not know each other before this confrontation had this confrontation. The jury was never told what words were exchanged between Delguidice and *** about the rape. The jury was never told that Delguidice explained himself and offered a consistent defense when questioned moments after the fight by the off-duty police officer. All of these evidentiary matters centered on Delguidice's having been told by Christina *** that just one week earlier *** and another man had raped her. This evidence was inextricably intertwined with the fight itself, was part of the whole, and to exclude it misled the jury and placed the entire event in a false light.

The *res gestae* rule has been codified in part in Florida under Florida Statutes, § 90.803(1), (2) and (3). Statements that are made at or about the time of an event, or if made after an event, are made too shortly after the event to support an inference that they were fabricated, are admissible to show the then existing mental and emotional condition of the declarant. *Alexander v. State*, 627 So.2d 35 (Fla. 1st DCA 1993). As *Alexander* explained, the mere fact that statements are self-serving is not, in and of itself, a sufficient evidentiary basis for their exclusion from evidence. No

legal principle excludes statements or conduct of a party solely on the ground that such statements or conduct is self-serving. *State v. ***,* 671 P.2d 215 (Utah 1983); *State v. Wallace*, 97 Ariz. 296, 399 P.2d 909 (1965); *Commonwealth v. Fatalo,* 345 Mass. 85, 185 N.E.2d 754 (1962). *See also United States v. Dellinger,* 472 F.2d 340, 381 (7th Cir.1972), *cert. denied,* 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). While exculpatory statements of the accused generally are excluded from criminal cases because of their hearsay character, 29 Am.Jur.2d *Evidence* §§ 621 (1967), the courts of this state have long recognized an exception to this general rule where the statements form a part of the *res gestae* of the alleged offense. *Jenkins v. State,* 58 Fla. 62, 50 So. 582 (1909); *Lowery v. State,* 402 So.2d 1287 (Fla. 5th DCA 1981); *Watkins v. State,* 342 So.2d 1057 (Fla. 1st DCA 1977). Furthermore, Florida has followed a liberal rule concerning the admittance of *res gestae* statements. *See Appell v. State,* 250 So.2d 318 (Fla. 4th DCA 1971).

There was no basis on this record for concluding that this testimony was lacking in apparent trustworthiness and probative value. The exclusion of the proffered testimony of *res gestae* statements in this case was an abuse of discretion and, under the circumstances of this case, cannot be treated as harmless error.

Opening the Door

The evidence was in any event admissible when the state repeatedly opened the

door to the evidence by its questions to various witnesses asking what was said at the scene or what led Delguidice's father to follow his son to the bowling alley.

The "opening the door" concept is based on considerations of fairness, and as a general rule, testimony is admissible on redirect which tends to "qualify, explain, or limit testimony given on cross-examination." *Wright v. State,* 582 So.2d 774, 775 (Fla. 2d DCA 1991), quoted in *Cartwright v. State,* 885 So.2d 1010, 1013 (Fla. 4th DCA 2004). The "opening the door" concept permits the admission of otherwise inadmissible evidence to qualify, explain or limit previously admitted evidence. *Barone v. State*, 841 So.2d 653 (Fla. 3rd DCA 2003); *Lawrence v. State*, 846 So.2d 440 (Fla. 2003). Further, when a lawyer questions a witness, if the lawyer's questions falsely suggest a lack of evidence that the lawyer knows exists, but which was subject to pretrial suppression, the door might well be opened for introduction of the evidence. *Rogers v. State*, 844 So.2d 728 (Fla. 5th DCA 2003).

The state repeatedly opened the door by selectively questioning its own and the defense witnesses about the surrounding circumstances and statements made at the time of the confrontation between Delguidice and ***, which resulted in the entire confrontation and events leading up to it being presented in a false light to the jury. The defense was entitled on cross-examination or redirect, as the case may be, to go into the areas the state excluded to clear up the mis-impressions, and to qualify and

explain in context the answers elicited by the state.

Deprivation of Defendant's Right to Testify in His Own Defense

Finally, the court erred based on all of the above grounds in ruling that if Delguidice took the stand, he could not testify about the rape, wrongfully causing Delguidice to be deprived of his right to testify in his own defense in violation of Delguidice's right to present his defense as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 9 and 16 of the Constitution of the State of Florida.

A criminal trial with a thirty year sentence in the balance is no place for a court to show disrespect for the right of the defendant to present his defense and to testify in his own defense. The trial court consistently suggested and finally ruled that the only way the defense would be permitted to introduce evidence of Delguidice's state of mind, his prior knowledge that Christina *** claimed she had been raped by Charles ***, would be if Delguidice himself took the witness stand. Apparently against the advice of experienced trial counsel who was worried no doubt about the impact on the jury Delguidice's prior record would have, Delguidice decided to testify in his own behalf in order to present his defense, if that were the only way the court would permit it.

After much struggle and being told by the judge that it was "put-up or shut-up

time" [R7-517], Delguidice took the witness stand. However once he took the court's dare, and "put-up" in the trial judge's words, the trial judge then backed off of his ruling that he would be allowed to testify about the rape, mistakenly claiming -- as if it mattered, because we showed by the cases in the first part of this argument that it did not matter -- that because Delguidice had not been told by ***, but by others about the rape, it was hearsay, and he would not be allowed to testify about it.

Of course this was not what the record showed in the first place -- *** had proffered just the day before that she in fact had personally confirmed the rape in a conversation with Delguidice before the bowling alley confrontation -- but even if she had not, that was not the predicate the cases required in any event, only that Delguidice have known, not how he knew. The trial judge, when confronted by a defendant who took him at his dare to take the stand, then changed course and decided that even Delguidice could not testify about the rape, because it was hearsay. Of course it was not hearsay, because it was not being offered for the truth of the statement but offered only to show Delguidice's state of mind.

Whatever the reasoning or legal errors that led to the trial judge changing his mind and deciding that Delguidice could not testify about the rape, it was error, and it deprived Delguidice of his right to present his defense in violation of the Fifth, Sixth and Fourteenth Amendments and Article I, §§ 9 and 16 of the Florida

Constitution.

II. The Court Erred in Imposing a Habitual Violent Felony Offender Sentence When the State Had Advised the Defendant, His Counsel and the Court Immediately Prior to Trial That the State Would Not Seek the Imposition of an Habitual Violent Felony Offender Sentence Upon Conviction and Thereafter Filed No Notice of a Changed Intent to Do So.

The habitual violent felony offender statute, Florida Statutes, § 775.084(4)(b) requires that written notice be served on the defendant and his attorney prior to the imposition of sentence.

> Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.

The statutory notice requirement is mandatory, not precatory, and the failure to abide by the notice requirement requires an habitual offender sentence to be vacated. *State v. Wilson*, 658 So.2d 521 (Fla. 1995). In this case the state initially served a "shotgun" notice[6] combining notice of potential enhancement under both the habitual felony offender statute ("HFO"), Florida Statutes, § 775.084(4)(a), and the habitual violent felony offender statute ("HVFO") [R1-7], but the day of jury selection, January 5, 2005, the state expressly advised the Defendant, his counsel,

[6] *See Washington v. State*, 895 So.2d 1141 (Fla. 4th DCA 2005).

and this Court that the State was withdrawing the notice as to the HVFO enhancement and going forward solely on the basis of the HFO enhancement.

182:2 MR. ROSSMAN: Your Honor, the only other
182:3 thing, since we're talking about this issue, is
182:4 that there is not confusion about the notice that I
182:5 filed on Mr. Delguidice and Mr. Cohen in reference
182:6 to his designation.
182:7 It is only as a habitual offender, and the
182:8 other is a separate notice as a prison releasee
182:9 reoffender. It is the old notice that we used to
182:10 file. *But so there is not confusion at any later*
182:11 *time,* ***we are not seeking habitual violent offender,***
182:12 *he has not been designated that nor a violent*
182:13 *career criminal.* It is only as Mr. Cohen has just
182:14 explained to him, as a habitual offender and a
182:15 prison releasee reoffender.
182:16 MR. COHEN: You understand that?
182:17 DEFENDANT DELGUIDICE: Yes.
182:18 THE COURT: Which was also explained to Mr.
182:19 Delguidice by the Court at arraignment.
182:20 DEFENDANT DELGUIDICE: Yes.

[R5-182]

The state never modified that position before sentencing February 15, 2005 and did not file a any further written notice of intent to seek HVFO after advising the Defendant, his counsel and the Court that it was no longer relying upon the HVFO notice.

Therefore, the state was not permitted to go forward under the HVFO statute and the trial court was not authorized to sentence Delguidice as an HVFO.

Accordingly, the thirty (30) year HVFO sentence must be vacated leaving Delguidice with the fifteen year minimum mandatory prison releasee reoffender sentence under Florida Statutes, § 775.082(9)(a)(3)(c).[7]

[7] Immediately prior to serving this brief, Delguidice filed a motion to correct sentence pursuant to Rule 3.800(b)(2), Florida Rules of Criminal Procedure, with the trial court based on the same argument presented above. That motion is pending as of the date of the filing of this brief. This argument is presented herein in the event the trial court denies the 3.800(b)(2) motion.

CONCLUSION

Appellant Dean James Delguidice requests this Honorable Court as to issue one, to reverse and vacate his conviction and sentence and remand the case to the circuit court for a new trial, or alternatively, as to issue two, to simply vacate the HVFO sentence and not remand the case for any further proceedings, rather allow the remaining fifteen year prison releasee reoffender sentence to stand.

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, Attention Georgina Jimenez-Orosa, Esq., 1515 North Flagler Avenue, Suite 900, West Palm Beach, Florida 33401, by United States Mail, first class postage prepaid, this 19th day of September, 2005.

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William Mallory Kent