Chapter 11: Homicide

Note: All statutes were retrieved from Florida Statutes Annotated. Only relevant portions thereof were placed in the text. All cases were retrieved from Westlaw. Cases were edited for relevance, clarity and readability. See original cases for complete text. Information in chapter overviews is obtained from the original text by Matthew Lippman.

Chapter Overview:

Chapter eleven discusses the fourth category of crime against the person, criminal homicide. This is considered to be the most serious of all criminal offenses. There are four different types of homicide: justifiable homicide, excusable homicide, murder, and manslaughter. Criminal homicide is divided into murder and manslaughter, with the distinction being the presence or lack of malice. Murder can include a broad group of crimes, such as depraved heart murders, which is a killing caused by an extreme level of negligence on the part of perpetrator, and felony murder, which is killing that takes place during the course of another felony crime.

There are also separate distinctions within the terms murder and manslaughter that serve to identify different levels of crime. Manslaughter is divided into voluntary and involuntary manslaughter. Voluntary manslaughter involved a heat-of-the-moment decision made without malice. Involuntary manslaughter results from a criminal degree of negligence and in some states, like Florida, can also include categories like vehicular manslaughter. Murder is also divided into two categories: first-degree murder and second-degree murder. The distinction between the two that makes first-degree murder the most serious is that it includes premeditation and deliberation. This means that the perpetrator took time to consider his or her decision to commit the act for some length of time prior to the murder.

This chapter also addresses important questions such as when human life begins and ends. Due the limits of medical science, common law utilized the rule that a person could not be criminally responsible for the murder of a fetus unless the child is born alive. At this time doctors could not determine whether a fetus was alive inside the womb immediately prior to being attacked. As this is no longer the case, however, this rule has largely been abandoned in favor of a rule which sites the viability of a fetus as the point at which life begins for the purposes of homicide. The answer to the question of when life ends has also changed due to advances in science. Whereas previous definitions of death required a complete stop of circulation and other bodily functions such as respiration, medical advances came to allow some brain dead individuals to maintain these functions through the use of machines. To simplify things, most states now use a brain death test to determine the end of life.

Corporations can also be held responsible for the death of an individual by a crime called corporate murder. A car company, for example, may be held liable for the death of a person riding in a car which the company can be shown to have known was unsafe. In

this chapter of the supplement you will see how Florida's laws are unique in these various areas and how Florida defines and applies the different elements of these crimes.

I. Murder

Section Introduction: Murder is the most serious form of criminal homicide and it is typically divided into first and second degree. In Florida, however, courts utilize three degrees of murder. Below you will find the statutes on all three, along with case law exhibiting how these statutes are applied.

Florida Statutes, sec. 782.04 - Murder (First Degree)

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to affect the death of the person killed or any human being;
2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
   a. Trafficking offense prohibited by sec 893.135(1),
   b. Arson,
   c. Sexual battery,
   d. Robbery,
   e. Burglary,
   f. Kidnapping,
   g. Escape,
   h. Aggravated child abuse,
   i. Aggravated abuse of an elderly person or disabled adult,
   j. Aircraft piracy,
   k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
   l. Carjacking,
   m. Home-invasion robbery,
   n. Aggravated stalking,
   o. Murder of another human being,
   p. Resisting an officer with violence to his or her person,
   q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
3. Which resulted from the unlawful distribution of any substance controlled under sec. 893.03(1), cocaine as described in sec. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony, punishable as provided in sec. 775.082.

(b) In all cases under this section, the procedure set forth in sec. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

Rivers v. State, 75 Fla. 401, 78 So. 343 (1918)

Procedural History: The plaintiff in error was tried in the circuit court of Duval county upon an indictment charging him with murder in the first degree, resulting in a conviction of murder in the second degree, and seeks reversal of the judgment on writ of error.

Issue(s): There are two assignments of error, one of which questions the sufficiency of the evidence to support a conviction for any offense on the ground that accused acted in self-defense, the other on the ground that the evidence does not support a conviction for any offense greater than manslaughter.

Facts: As the sole question relates to the weight and legal effect of the evidence, it will be proper to set out and discuss the evidence, but no attempt will be made to set it out in detail. There is some slight conflict in the testimony. Two witnesses testify that at the time of the fatal blow the deceased was making no attempt to assault or injure the accused - one witness besides the accused testified that deceased was the first to open his knife, one witness other than accused testified that accused was retreating at the time the fatal blow was struck - but the great weight of the testimony shows conclusively the following state of facts.

That accused and deceased were gambling with dice on the porch of an unoccupied house in Jacksonville, the porch being about six feet from the sidewalk; that some one notified them that a policeman was approaching, and that they ceased gambling and walked down the steps, quarreling, to the sidewalk; it is not shown what was said by either while they were on the porch or while they were going down the steps. When they reached the sidewalk the accused had a pocketknife open in his left hand. There he demanded of the deceased a return of his money; 80 cents was the amount claimed. Thereupon, deceased replied, “I ain't going to give it back to you.” The accused, who is lefthanded, then placed his knife in his right hand, and struck the deceased with his left hand a violent blow in the face, almost knocking him down. The accused then transferred the knife back to his left hand and stood his ground. The deceased, upon recovering from the blow and securing his hat, which had been knocked off, opened his knife, and they rushed towards each other. After parrying each others' strokes for a distance of 20 or 25 feet along the sidewalk, during which time there were two or three strokes made, the accused succeeded in driving his knife into the heart of deceased, who staggered backward and fell into the arms of a policeman, who had run up in time to catch deceased as he fell. The deceased died immediately, and accused fled down the street with the policeman in pursuit, where he was shortly thereafter arrested.

Opinion: JONES, Circuit Judge.

Unlawful homicides in this state are either murder or manslaughter. Murder is divided into first, second, and third degrees. Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of, or in the

attempt to perpetrate, any arson, rape, robbery, or burglary. When the unlawful killing is perpetrated by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it is murder in the second degree. It is unnecessary to define murder in the third degree, as it has no bearing upon this case. Manslaughter is the killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder.

An indictment charging murder in the first degree includes the lower degrees of murder as well as manslaughter, and the accused may be convicted under such indictment of either degree of murder or manslaughter of which the evidence may show him to be guilty. If the defendant be found guilty of an offense lesser in degree, but included within the higher offense charged in the indictment, such verdict shall not be set aside by the court upon the ground that such verdict is contrary to the evidence, if the evidence produced in such case would have supported a verdict of guilty of the greater offense. [*Potsdamer v. State*, 17 Fla. 895; *Reynolds v. State*, 34 Fla. 175, 16 South. 78; *McCoy v. State*, 40 Fla. 494, 24 South. 485]

The contention that the accused is not guilty of any offense because he had withdrawn from the combat, and that he struck the fatal blow in his lawful self-defense, is not sustained by the evidence. There is no evidence to show that he in good faith declined the combat which he had begun, nothing to show that he used any means or made any effort whatsoever to further avoid the difficulty or avert the necessity of taking life, as will appear from a further discussion of the evidence in this opinion, and the fact that deceased resented the assault and battery upon him by advancing upon accused with an open knife under the circumstances as shown by the evidence would not justify accused in taking the life of deceased, because a necessity brought about by a party who acts under its compulsion cannot be relied upon to justify his conduct. The aggressor in a personal difficulty, and not reasonably free from fault, cannot acquit himself of liability for its consequences on the ground of self-defense, unless after having begun the difficulty he in good faith declines the combat and his adversary has become the aggressor. [*King v. State*, 54 Fla. 47, 44 South. 941]

Counsel for plaintiff in error contends earnestly in a well-prepared brief that the evidence does not show murder in any degree, and at best nothing more than manslaughter, and cites in support of his argument *Whidden v. State*, [64 Fla. 165, 59 South. 561], where the court said:

> A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design may not excuse or justify a homicide, but may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason.

Also cited is the case of *Olds v. State*, [44 Fla. 452, 33 South. 296], where it is said:

> An intentional killing, may not be murder in the first degree when done in the heat of passion or anger and following a sufficient provocation so close in time as to raise the presumption that it was the result of sudden impulse and without premeditation or when committed under such circumstances as to show that the mind was not fully conscious of its own intention.

Does the evidence in this case show that the killing was the result of a sudden transport of passion caused by an adequate provocation such as to suspend the exercise of judgment and dominate volition so as to exclude premeditation, or does it show that the killing was done in the heat of passion or anger following a sufficient provocation so close in time as to raise the presumption that it was the result of sudden impulse and without premeditation?

There must be an adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude premeditation and a previously formed design. A man is not permitted to act upon any provocation which he may think sufficient to excuse him from murder in the first degree in taking human life, merely because it is sufficient to excite his anger and impulse to kill and thereby reduce his crime to manslaughter. It is a well-known fact that a person who has never been accustomed to restrain his passions, and who has a depraved mind regardless of the rights of others and of human life, of a cruel, vindictive, and aggressive disposition, will seize upon the slightest provocation to satisfy his uncontrolled passions by forming a design to kill and executing the design immediately after its formation; therefore the law lays it down as a rule that an adequate provocation is one that would be calculated to excite such anger as might obscure the reason or dominate the volition of an ordinary reasonable man. Was there any such adequate provocation in this case?

The accused and deceased were not special friends. Accused testified that he only knew deceased by name; that he had never visited him and never associated with him. It is shown as stated that they were gambling for money; each must have known that he was liable to lose. The accused did lose a trivial sum, less than a dollar, which he says deceased wrongfully took from him. When notified that a policeman was approaching the game was broken up, and they walked down the steps quarreling. The evidence does not show who was doing the talking, except that they were quarreling, and does not show what was said by either, although one of the witnesses, who was sitting on the steps, says they were 'squabbling' as they came down the steps. When the sidewalk was reached the accused had already armed himself with an open knife which he held in his left hand. He then demanded a return of his money, to which deceased replied, 'I ain't going to give it back to you.' Accused must have opened his knife with the design of assaulting deceased with it, but there was no provocation yet to use the knife. One must be created. The deceased had no weapon in his hand; he was making no effort to injure accused; he had the use of only one arm, being disabled in the other for all practical purposes - so accused shifts his knife to his right hand and strikes deceased a blow in the face with his left hand, returns the knife to his left hand, stands in his place, and awaits results.

Upon recovering from the blow which staggered him backwards deceased got his knife and opened it, and they simultaneously rushed upon each other, and after striking at each other for a few feet along the sidewalk without injury to himself, the accused killed deceased by stabbing him in the heart. After a careful consideration of the evidence we are of the opinion there was no excuse or justification for the killing of Henry Rollins by accused, that there was no sudden transport of passion on the part of accused caused by an adequate provocation, but that the killing was prompted by a cruel, vindictive, and domineering disposition on the part of accused, and that it was committed by an act imminently dangerous to another, and evincing a depraved mind regardless of human life. The jury heard the evidence and had the defendant before them, and by their verdict said he was guilty of murder in the second degree. We think the evidence ample to support the verdict, and the judgment is therefore affirmed.

Critical Thinking Question(s): Reflect on the justification as a defense chapter in your textbook. Did the accused adequately retreat from the fray before resorting to using his knife? Would the ruling be different according to the new "stand your ground" rule implemented in Florida in 2005?

***Steverson* v. *Florida*, 787 So.2d 165 (2001)**

Procedural History: After reversal of his convictions and death sentence by the Supreme Court, 695 So.2d 687, defendant was convicted in the Circuit Court, Polk County, Dennis P. Maloney, J., of first-degree murder, armed burglary with an assault, and armed robbery. Defendant appealed. The District Court of Appeal, Campbell, Monterey, (Senior) Judge, held that: (1) defendant's first-degree murder conviction was valid; (2) admission of evidence of shooting of police officer during apprehension of defendant did not require reversal; and (3) defendant's statement to deputy while in jail that he killed victim was admissible.

Issue(s): Whether Steverson's conviction for first-degree murder must be reversed on the basis of Mackerley v. State, [777 So.2d 969 (Fla.2001)], and *Delgado v. State*, [776 So.2d 233 (Fla.2000)]. Whether the trial court again erred in allowing excessive testimony regarding the shooting of Detective Rall. Whether the trial court erred in denying Steverson's motion to suppress his admissions against interest made to a detention deputy sheriff in a temporary holding cell immediately following Steverson's convictions in his first trial.

Facts: In 1994, Steverson was indicted for the first-degree premeditated murder and armed robbery of Bobby Lucas, and armed burglary with an assault. The State proceeded to trial on the murder charge based on the dual theories of premeditated murder and felony murder. In 1995, a jury found Steverson guilty of each of the offenses as charged and Steverson received a sentence of death. The Florida supreme court in *Steverson v. State*, [695 So.2d 687 (Fla.1997)], reversed Steverson's convictions and sentence and ordered a new trial on the basis that the trial court erred in allowing the State to present excessive evidence of a collateral crime, i.e., Steverson's shooting of Detective Brian Rall (an issue Steverson again raises in this appeal). As a result of Steverson's retrial as

ordered by our supreme court, Steverson was again found guilty of each charge and the jury again recommended a death sentence. On proportionality grounds, however, the trial judge imposed concurrent life sentences. Appellant, Bobby L. Steverson, challenges his convictions and sentence for first-degree murder, armed burglary with an assault, and armed robbery.

Holding: Affirmed in part and reversed in part.

Opinion: CAMPBELL, MONTEREY, (Senior) Judge.

On his appeal to this court of, Steverson raises the following issues:

> 1. Whether Steverson's conviction for first-degree murder must be reversed on the basis of Mackerley v. State, 777 So.2d 969 (Fla.2001), and Delgado v. State, 776 So.2d 233 (Fla.2000).
> 2. Whether the trial court again erred in allowing excessive testimony regarding the shooting of Detective Rall.
> 3. Whether the trial court erred in denying Steverson's motion to suppress his admissions against interest made to a detention deputy sheriff in a temporary holding cell immediately following Steverson's convictions in his first trial.

We find Steverson's first issue relating to his conviction for first-degree murder to be without merit because *Mackerley* and *Delgado* are inapplicable. Both of those cases hold that where a defendant is convicted (as was Steverson) by a general verdict for first-degree murder on dual theories of premeditation and felony murder, the conviction must be reversed regardless of the sufficiency of the evidence of premeditation where the felony murder charge is legally, as opposed to factually, unsupported.

In *Delgado*, the court construed the burglary statute, Florida Statutes, section 810.02(1) (1989), and held that a burglary based on the "remaining in a structure" provision was limited to factual situations where the defendant enters a structure lawfully and subsequently secretes himself or herself from the host. [776 So.2d at 240] Under that limitation, Steverson's burglary conviction rested upon a legally inadequate theory. Nevertheless, Steverson's first-degree murder conviction is valid. In bringing a charge of first-degree murder, the State does not have to charge felony murder separately in the indictment but may prosecute the charge of first-degree murder under alternative theories of premeditated and felony murder when the indictment charges premeditated murder. [*Kearse v. State*, 662 So.2d 677, 682 (Fla.1995); *O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983)]

A general verdict of guilt of first-degree murder arising from an alternative theory of premeditation or felony murder is valid where there is evidentiary support for one theory and the alternative theory is not legally inadequate. [*San Martin v. State*, 717 So.2d 462, 469-70 (Fla.1998)] On the other hand, such a general verdict must be set aside where one theory lacks evidentiary support and the alternative theory is legally inadequate, or where it is impossible to determine which alternative was relied upon where there is evidentiary support for one theory but the other is legally inadequate. Mr. Steverson was charged

with first-degree murder on the dual theories of premeditated murder and felony murder. The State relied on both armed burglary and/or armed robbery to support its felony murder theory. While it was not necessary that the State charge Mr. Steverson separately with the felonies upon which its felony murder theory was based, it did, in fact, do so. Mr. Steverson was found guilty by reason of a special verdict of each of the separately charged offenses of first-degree murder, armed burglary with an assault, and armed robbery. Therefore, even though Mr. Steverson's conviction for the burglary offense is legally insupportable pursuant to *Delgado*, his general verdict for first-degree murder is valid because we know by reason of the special verdicts that the jury found evidentiary support for both premeditated murder and felony murder based on the legally adequate charge of armed robbery.

We, likewise, find without merit Steverson's second issue relating to the evidence admitted at trial regarding the shooting of Detective Rall. At Steverson's first trial, there was extensive evidence of the shooting and its resulting circumstances to the extent our supreme court held it became a feature of the trial. On retrial, the supreme court admonished that if such evidence was to be admitted, it should be severely limited. After examining the record, we conclude that the trial judge followed the admonition of our supreme court. The relevant evidence of the shooting was appropriately limited solely to Detective Rall's testimony of the bare facts of the shooting that occurred during the apprehension of Steverson.

Steverson's final issue relates to the statements and admissions made to Detention Deputy Gainer while Steverson was in his holding cell after his convictions in his first trial. We also find this issue to be without merit. Gainer worked at the temporary courthouse in Bartow in May 1995, at the time of Steverson's first two-week trial. Gainer was responsible for feeding the inmates. After the verdict in the 1995 trial, Gainer saw Steverson standing at the door of his holding cell. Gainer testified that he did not know who Steverson was, had no prior conversations with Steverson, and although Gainer knew there was a murder trial going on, he had no knowledge that Steverson was the person charged with murder.

Steverson was alone in the cell and standing at the glass window of the door of the cell, just staring. Gainer thought Steverson may not have eaten so he approached and asked if he had been fed. Steverson responded affirmatively. Gainer then said, "Well, what's the matter?" or "Well, what's wrong? I mean you seem like you want something." Steverson responded, "I did what they said I did." Gainer asked, "What did you do?" Referring to his later written report, Gainer testified as to the details of what Steverson told him. He stated that he had a conversation with Steverson about a killing incident and that Steverson stated that he stabbed someone after drinking and getting high. The victim asked Steverson to pawn his TV and VCR for drugs, which he did. When he returned, the victim demanded the pawn ticket or the money, but Steverson told him he had spent the money on more drugs. The victim said he wanted the TV back or he was going to call the police. Steverson said he panicked and stabbed the victim because he did not want to go to jail. He did not say what type of weapon he used. Steverson told Gainer that he tied the victim up in a chair and put a bag or something over his head. The man

kept moving so he kept stabbing him. He was so high he did not know what he was doing. Gainer thought Steverson seemed remorseful. Gainer said it was possible he discussed God and salvation with Steverson.

Gainer did not read Steverson Miranda rights. He was fairly new at the time, and commonly talked to inmates in the holding cells. Gainer testified that he did not encourage Steverson to speak about the details of the crime. However, he watched and observed for the security of inmates and whether they might be suicidal. Deputy Gainer testified that he preaches the "Word of the Lord" any opportunity he has to inmates or others, and he did so here. If Steverson said something that Gainer did not know anything about, Gainer would ask "What do you mean?" Gainer did not attempt to stop Steverson from speaking, and Steverson seemed to speak freely. The conversation lasted roughly ten to fifteen minutes.

The court denied the motion to suppress. The judge ruled there was no improper interrogation by law enforcement and that the statements made by Steverson to Deputy Gainer were freely and voluntarily given. We agree. We affirm Steverson's convictions and sentence for first-degree murder and armed robbery. On the basis of *Delgado,* we reverse Steverson's conviction and sentence for armed burglary with an assault. Affirmed in part; reversed in part.

Critical Thinking Question(s): Was Gainer acting as an agent of the state when he speaks with the defendant? Should the guard have read Steverson his Miranda rights? How does the Court justify the finding of felony murder when the alleged robbery occurred before the incident leading to the stabbing of the victim?

***Smalley v. State*, 889 So.2d 100 (App. 5 Dist., 2004)**

Procedural History: Defendant was convicted in the Circuit Court, Brevard County, John M. Griesbaum, J., of second degree murder. Defendant appealed.

Issue(s): Appellant contends that the trial court should have granted his motion for judgment of acquittal because there was insufficient evidence to provide a basis for the jury's determination that the shooting of the victim was done with ill will, hatred, spite or an evil intent.

Facts: Although the witnesses' testimony presented at trial concerning the shooting of the victim were in conflict, those presented by the state were sufficient to create a jury issue regarding Smalley's state of mind at that time. [See *Brewer v. State*, 413 So.2d 1217 (Fla. 5th DCA 1982)] Smalley testified he was being threatened by the victim and another man, that he was hit in the face, and the gun "went off". Other witnesses testified the victim and another man were not threatening Smalley, that he went to his bedroom and got a gun, shot it into a wall, and then followed the victim to his car, holding the gun behind his back.

The defendant's girlfriend was in the process of hitting the victim's car with a hammer, and the victim told Smalley to stop her, and that he wanted to leave. The victim was upset and yelling at Smalley, but did not threaten him. This continued a few moments. Then Smalley raised the gun from behind his back, and shot the victim at close range, in the chest. These facts are similar to those in *Turner v. State*, [298 So.2d 559 (Fla. 3d DCA 1974)], where the evidence established that the defendant held a gun behind his back for five seconds before shooting the victim, with whom he had been quarreling. The court held sufficient evidence of malice had been established to support a second degree murder conviction.

Holding: Affirmed.

Opinion: SHARP, W., J.

Smalley appeals from his conviction for second degree murder following a jury trial. He raises three points on appeal: the trial court should have granted his motion for judgment of acquittal because there was insufficient evidence to provide a basis for the jury's determination that the shooting of the victim was done with ill will, hatred, spite or an evil intent; the trial court should have granted his motion for mistrial because the prosecutor violated a pre-trial ruling barring testimony that Smalley had possessed and or discharged the firearm involved in this case, on a prior occasion; and that the trial court erred in requiring Smalley, at sentencing, to submit biological specimens for DNA analysis pursuant to section 943.325.

A conviction for second degree murder requires proof that the defendant killed the victim with a depraved mind regardless of human life. [See § 782.04(2); *Roberts v. State*, 425 So.2d 70, 71 (Fla. 2d DCA 1982)] In turn, proof of a depraved mind may be established by proof the shooting was done with "ill will, hatred, spite, or an evil intent." [See *Sigler v. State*, 805 So.2d 32, 34 (Fla. 4th DCA 2001); *Rayl v. State*, 765 So.2d 917, 919 (Fla. 2d DCA 2000)]

Smalley also argues that his conviction should be reduced to manslaughter because the jury specifically found that he possessed a firearm rather than that he intentionally discharged a firearm. He argues these are inconsistent verdicts. The problem is how to determine whether a jury verdict is "truly inconsistent," or whether the jury merely granted the defendant a jury pardon. [*State v. Connelly*, 748 So.2d 248 (Fla.1999)] "True inconsistent verdicts" are not permitted. [*Fayson v. State*, 698 So.2d 825 (Fla.1997)] This occurs when one count negates a necessary element for a conviction on another count. [*Gonzalez v. State*, 440 So.2d 514, 515 (Fla. 4th DCA 1983)] In this case, the jury's rejection of "intentional discharge of a firearm" is not truly inconsistent with its conviction of Smalley for second degree murder. Second degree murder does not require the finding of an intentional discharge of a firearm. The facts in this case were sufficient for a jury to conclude Smalley shot the victim with a depraved mind regardless of human life.

Smalley's second point, that the trial court should have granted his motion for mistrial comes to us on an abuse of discretion standard of review. [See *Goodwin v. State*, 751 So.2d 537, 546 (Fla.1999); *Thomas v. State*, 748 So.2d 970, 980 (Fla.1999); *Power v. State*, 605 So.2d 856, 861 (Fla.1992); *Wolcott v. State*, 774 So.2d 954, 957 (Fla. 5th DCA 2001)] We find no abuse of discretion here. Pre-trial, the court granted the defense's motion in limine to bar testimony that Smalley had shot, possessed or displayed the gun used in the killing, on any occasion prior to the night of the murder. During the cross examination of Smalley, the prosecutor elicited the fact that Smalley had fired a practice round in the house and knew the revolver was functional. The prosecutor also elicited the fact that someone else had been practicing shooting with the gun in Smalley's house. The defense objected and the court sustained the objection. Later the defense made a motion for mistrial, but the court denied the motion.

With regard to eliciting the fact that Smalley fired one practice round in the house, immediately before taking the gun outside to confront the victim, it is not clear that this fact was prohibited by the ruling in limine. The ruling appears only to prohibit a showing that Smalley had shot, possessed or displayed the gun on occasions prior to the events culminating in the victim's death. Indeed, the fact that Smalley went to his bedroom, got the gun, shot it, brought it outside and hid it behind his back prior to shooting the victim, are all part and parcel of the actual criminal episode. These facts should not have been barred by a rule in limine. The additional fact elicited, that someone else had been practicing shooting with the gun in Smalley's residence, if error, appears to be harmless in this case. In Smalley's video taped statement which was played to the jury, he said his nephew had previously shot a couple of holes in the wall with the gun, a few months earlier. Smalley also had previously admitted at trial, that he knew the gun was in working order. We fail to see how the admission of this testimony contributed to the verdict against Smalley. [*State v. DiGuilio*, 491 So.2d 1129 (Fla.1986)]

With regard to Smalley's third point on appeal, his primary argument is that Florida Statutes, section 943.325 (2002) is unconstitutional because the taking of DNA samples violates his 4th amendment rights. In this case, at sentencing, the trial court ordered that Smalley be required to submit blood specimens, pursuant to section 943.325. Like administrative searches, in which the warrant and probable cause showing are replaced by the requirement of showing a neutral plan for execution, a compelling governmental need, the absence of less restrictive alternatives and reduced privacy rights, special needs searches adopt a balancing of interests approach. Special needs searches have been held to include drug testing....

In determining the reasonableness of these searches, the Supreme Court has considered the governmental interest involved, the nature of the intrusion, the privacy expectations of the object of the search and, to some extent, the manner in which the search is carried out.... Although the state's DNA testing of inmates is ultimately for a law enforcement goal, it seems to fit within the special needs analysis the Court has developed for drug testing and searches of probationers' homes, since it is not undertaken for the investigation of a specific crime. Other state courts have approved a DNA collection statute similar to Florida's, on the ground it serves an important state interest ("special

needs doctrine"), and because inmates subject to the testing are in custody, and are already "seized". [*State v. Martin*, 686 N.W.2d 456 (Wis.App.2004)] Persons convicted of crimes, or ones who have been arrested on probable cause, lose many rights to personal privacy under the 4th Amendment, as well as probationers.

Our sister courts in this state have found this statute to be constitutional. [See *Gonzalez v. State*, 869 So.2d 1231 (Fla. 2d DCA 2004); *L.S. v. State*, 805 So.2d 1004 (Fla. 1st DCA 2001)] The basis for these rulings is that a convicted person has no reasonable expectation of privacy with respect to blood samples for DNA testing which outweighs the state's interest in identifying convicted felons in a manner that cannot be circumvented, in apprehending criminals, in preventing recidivism and in absolving innocent persons charged with crimes. We continue to agree with these holdings, and their rationale. [*Springer v. State*, 874 So.2d 719 (Fla. 5th DCA 2004)] AFFIRMED.

Critical Thinking Question(s): Why was this not a case of first degree murder based on the premeditation involved? What is it that the defendant did to exhibit the element of malice" necessary for a second degree murder conviction? Was the shooting not in the heat of passion?

Florida Statutes, sec. 782.04 – Murder (Second Degree)

> (2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in sec. 775.082, sec. 775.083, or sec. 775.084.
>
> (3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any:
>
> (a) Trafficking offense prohibited by sec. 893.135(1),
> (b) Arson,
> (c) Sexual battery,
> (d) Robbery,
> (e) Burglary,
> (f) Kidnapping,
> (g) Escape,
> (h) Aggravated child abuse,
> (i) Aggravated abuse of an elderly person or disabled adult,
> (j) Aircraft piracy,
> (k) Unlawful throwing, placing, or discharging of a destructive device or bomb,
> (l) Carjacking,
> (m) Home-invasion robbery,
> (n) Aggravated stalking,
> (o) Murder of another human being,

(p) Resisting an officer with violence to his or her person, or
(q) Felony that is an act of terrorism or is in furtherance of an act of terrorism,

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

***Tillman v. State*, 842 So.2d 922 (App. 2 Dist., 2003)**

Procedural History: Defendant was convicted in the Circuit Court, Hillsborough County, Daniel Lee Perry, J., of first-degree murder, robbery with a firearm, dealing in stolen property, and grand theft of a motor vehicle. Defendant appealed. The District Court of Appeal, Silberman, J., held that: (1) evidence was insufficient to support convictions for first-degree murder and robbery with a firearm, and (2) evidence supported convictions for manslaughter with a firearm and petit theft.

Issue(s): Was there sufficient evidence to convict the defendant of armed robbery and first degree murder?

Facts: Tillman and the victim, Gerald Gordy, Jr., were best friends. There was no evidence of animosity between them. Tillman testified that he had spent the night at Gordy's home, and the following day they were talking and watching television. The talk turned to fireworks and gunpowder. Gordy brought out his antique rifle and showed it to Tillman. Later, Gordy talked about wanting to make his own gun. He left the room and returned with his handgun to demonstrate and explain his plan to make a gun. Gordy handed the gun to Tillman. Tillman stated that he was "messing with the gun," playing with its switches. Gordy was reclining on one couch, and Tillman was sitting close by on a second couch. Tillman did not believe that the gun had a round in the chamber because Gordy always preached gun safety and would never have left a round in the chamber. But when Tillman pulled the hammer back and released it, the gun fired. The bullet struck Gordy and killed him.

Tillman testified that he panicked. He was scared to stay around and decided to leave town. He saw Gordy's keys and jewelry on a bookcase and grabbed them. He fled in Gordy's truck because his own truck had been repossessed a few days before the shooting, and he took the jewelry because he needed money to leave town. He went to a shop to pawn the jewelry, then later that evening he spent time with a friend. He did not tell anyone about the shooting. The next day, he left Florida. He was arrested eight days later at his grandparents' home in Tennessee.

There were no signs of a struggle at Gordy's home. The home had not been ransacked or disturbed, and valuables remained in the home. Gordy owned several guns, including the

one that caused his death. Testimony was presented that he was safety conscious and generally did not keep a round in the firing chamber. However, there was evidence that Gordy had recently broken up with a girlfriend, was upset about it, and had written a letter that could be characterized as a suicide note.

Concerning the shooting, expert testimony was equivocal as to the exact distance from which the shot was fired and the exact positioning of Gordy and Tillman. It was undisputed that Tillman did not bring a weapon to Gordy's house, and there was no evidence that Tillman planned to kill Gordy. Although the State suggested that the circumstantial evidence established an intentional shooting, the record reflects that the evidence was not inconsistent with Tillman's testimony as to how the event occurred. Following the State's presentation of evidence, and again at the close of all evidence, Tillman sought judgments of acquittal. He argued that the State failed to establish premeditation or that he had committed a crime such as robbery that would support a felony murder conviction. [See Fla. Stat. § 782.04(1) (1997). He also asserted that the State failed to prove various lesser crimes.

Holding: Affirmed in part, reversed in part, and remanded with directions.

Opinion: SILBERMAN, Judge.

Jeremiah Wade Tillman appeals his convictions for first-degree murder, robbery with a firearm, dealing in stolen property, and grand theft of a motor vehicle. We agree that the evidence was insufficient to support the convictions for murder and robbery, although it was sufficient to support the lesser offenses of manslaughter with a firearm and petit theft, as well as the charged offenses of dealing in stolen property and grand theft of a motor vehicle. We affirm without comment the other issues raised by Tillman. Although the State called numerous witnesses to testify at trial, much of its evidence was circumstantial. None of the State's witnesses observed the shooting that occurred on June 9, 1998. Tillman testified and also called several witnesses as part of his defense. The evidence as to the sequence of events immediately prior to and after the shooting was provided through Tillman's testimony.

A judgment of acquittal is appropriate if the State fails to present sufficient evidence to establish a prima facie case of the crime charged. [See *Olsen v. State*, 751 So.2d 108, 110 (Fla. 2d DCA 2000)] In this case, one of the key questions is whether the State presented sufficient evidence of premeditation in order to establish the charge of first-degree murder. Premeditation may be established by circumstantial evidence, but "the evidence must be inconsistent with any reasonable hypothesis of innocence." [*Holton v. State*, 573 So.2d 284, 289 (Fla.1990)] If the evidence is sufficient to allow the jury to infer premeditation "to the exclusion of all other possible inferences, including accidental death," then the jury's verdict will be upheld. [Id.] If the State fails to exclude a reasonable hypothesis that the homicide occurred by something other than a premeditated design, a conviction for first-degree murder cannot be sustained. [*Norton v. State*, 709 So.2d 87, 92 (Fla.1997)]

Premeditation may be inferred from various factors such as the type of weapon used, previous difficulties between the parties, the presence or absence of adequate provocation, the manner in which the homicide was committed, and the nature and manner of the wounds that were inflicted. [*Spencer v. State*, 645 So.2d 377, 381 (Fla.1994)] The evidence must be sufficient to show that the accused was conscious of the act that was about to be committed and the probable result of that act. [Id.] Here, the State did not present sufficient evidence of premeditation to sustain the conviction for first-degree murder. The evidence demonstrated that a shooting resulted in Gordy's death, but the evidence was not inconsistent with Tillman's claim that the shooting was unintentional. This is particularly true due to the absence of evidence of any prior differences between Gordy and Tillman, provocation, a struggle, multiple wounds, or any plan or design by Tillman to shoot Gordy. Because the circumstantial evidence was not inconsistent with Tillman's hypothesis of innocence, his motion for judgment of acquittal as to premeditated first-degree murder should have been granted. [See *Burttram v. State*, 780 So.2d 224, 227 (Fla. 2d DCA), review denied, 792 So.2d 1215 (Fla.2001); *Fowler v. State*, 492 So.2d 1344, 1347-48 (Fla. 1st DCA 1986)]

The second theory that the State pursued to support a conviction for first-degree murder was that the shooting occurred when Tillman robbed Gordy. In order to sustain the conviction, the State was required to establish that Tillman took property from Gordy by force, violence, or assault, and killed him during the process. [See *Fowler*, 492 So.2d at 1345] Here, as in *Fowler*, the State failed to present competent testimony or physical evidence to impeach or contradict Tillman's explanation of what happened; to believe the State's version would amount to pure speculation. [*Fowler*, 492 So.2d at 1345; see *Mahn v. State*, 714 So.2d 391, 396-97 (Fla.1998) (concluding that the evidence did not overcome a reasonable hypothesis that the defendant did not intend to steal the victim's money and keys prior to the murders, but the evidence reasonably led to the conclusion that the property was taken as an afterthought to the murders)] Accordingly, judgments of acquittal should have been entered as to first-degree felony murder and robbery. [See *Mahn*, 714 So.2d at 397; *Fowler*, 492 So.2d at 1352]

Pursuant to Florida Statutes, section 924.34 (1997), we must next determine whether the evidence supports convictions for lesser statutory degrees or necessarily included lesser offenses other than first-degree murder and robbery. The verdict form that the jury used reflected various alternatives to the charge of murder in the first degree including murder in the second or third degrees, with or without a firearm, and manslaughter with or without a firearm.

The key distinction between first and second-degree murder is that second-degree murder lacks the element of premeditation. [*Hines v. State*, 227 So.2d 334, 335 (Fla. 1st DCA 1969)] Second-degree murder is the unlawful killing of a person "when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." [Fla. Stat. § 782.04(2) (1997)] The act must be one that a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another; is done from ill will, hatred, spite or an evil intent; and is of such a nature that it indicates

an indifference to human life. [*Duckett v. State*, 686 So.2d 662, 663 (Fla. 2d DCA 1996)] The evidence simply did not establish the necessary elements to support a conviction of second-degree murder. Third-degree murder is an unlawful killing that occurs during the perpetration of, or the attempt to perpetrate, a felony other than those felonies listed in Florida Statutes, section 782.04(4) (1997). Because there was no evidence that Tillman perpetrated a qualifying felony, except perhaps as an afterthought to the shooting, the evidence was insufficient to sustain a conviction for third-degree murder.

Florida Statutes, section 782.07(1) (1997), defines manslaughter as the killing of a person "by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder." Culpable negligence is more than a failure to use ordinary care; it is a course of conduct showing reckless disregard of human life or the safety of others. [See *Manuel v. State*, 344 So.2d 1317, 1320 (Fla. 2d DCA 1977)] The evidence presented at trial and the reasonable inferences that may be drawn from that evidence were sufficient to prove manslaughter with a firearm. Tillman had served in the army and was trained in the use of various firearms. He knew that a basic rule of gun safety required that all guns be treated as if they are loaded. He never checked to see whether Gordy's gun was loaded, but he trusted Gordy to not have a round in the chamber. He was seated very close to Gordy while he was playing with the gun. He admitted that he pulled back and released the hammer and acknowledged that he must have pulled the trigger. Expert testimony established that the gun did not have a "hair-trigger." Under these circumstances, remand is required for entry of a conviction for manslaughter with a firearm.

The verdict form also listed lesser offenses as alternatives to robbery with a firearm including robbery with a deadly weapon, robbery, and petit theft. While the State failed to establish that Tillman robbed Gordy, the evidence was sufficient to support a conviction for petit theft as a result of Tillman taking some of Gordy's belongings after the shooting. [See Fla. Stat. § 812.014(3)(a) (1997)] Accordingly, we reverse the convictions and sentences for first-degree murder and armed robbery and remand with directions that the trial court enter judgments and sentences for manslaughter with a firearm and petit theft. We affirm the convictions for dealing in stolen property and grand theft of a motor vehicle, but because of scoresheet changes necessitated by this opinion, we remand for resentencing.

Critical Thinking Question(s): Should the court have ordered that convictions of the lesser crimes be entered despite the fact that the jury found otherwise? The basic rule is to look at the circumstances in the light most favorable to the State in cases claiming insufficiency of the evidence. Should the Court have limited its ruling to simply determine whether or not the first degree murder conviction should stand and remand the case for a new trial based on the insufficiency of evidence rather than take on the role of triers of fact? Explain the Court’s role in such cases.

***Alpern v. State*, 605 So.2d 1291 (App. 3 Dist., 1992)**

Procedural History: Defendant was convicted in the Circuit Court, Dade County, Michael Salmon, J., of first-degree felony murder and related offenses, and he appealed. The District Court of Appeal, Barkdull, J., held that defendant was not entitled to instruction on third-degree murder.

Issue(s): The defendant alleges that it was error for the trial court to refuse to charge the jury on third degree felony murder as requested because in failing to give the requested charge, the jury was not charged on the defendant's theory of the case.

Facts: Some time prior to the incident giving rise to the instant case, the deceased, Gary Cuozzo and the defendant, Charles Alpern, had participated in at least one drug transaction. Three days before coming to Miami on this occasion, Cuozzo called Alpern about purchasing a kilo of cocaine. After Alpern checked about availability and price, Cuozzo agreed to come to Miami the following Friday. Cuozzo expressed concern about a delay in getting the cocaine after he arrived, as he did not want to wait around for several days. Alpern and Luis Beltran met Cuozzo at the airport on Friday. They did not have the cocaine with them because they could not get it. Cuozzo stayed overnight as they promised the cocaine would be available the next morning. Beltran still could not get the cocaine so he and Alpern decided to try to sell Cuozzo fake cocaine. When they produced the fake cocaine, Cuozzo refused to buy it, but he remained in the Miami area upon the promise that the cocaine was forthcoming. When Beltran and Alpern could not obtain any real or false cocaine, they discussed the possibility of robbing Cuozzo. Alpern insisted that they could not just rough up Cuozzo and rob him, but rather, they would have to kill him. Alpern kept putting Cuozzo off until Monday when Cuozzo decided to return home.

At Alpern's insistence he and Beltran picked Cuozzo up Monday morning to take him to the airport. Once again they prevailed upon Cuozzo that they would try to get the cocaine. They drove to Brickell Avenue, in downtown Miami, where they said they could get the cocaine. While they were driving, Cuozzo became more upset. They stopped for Beltran to make a phone call about the cocaine. While he was making the call, Cuozzo allegedly threatened to kill Alpern if he was not at the airport on time. A short time later, Cuozzo reached into a knapsack where he had the money and a gun. He pulled out a gun. Alpern picked up a 45 lying on the floor of the car and shot Cuozzo 7 times in the back of the head. After the killing, Beltran and Alpern drove around. They went to Alice Wainwright Park in Miami, where they dropped Cuozzo's body. They then went to a motel on S.W. 8th Street. They split the money Cuozzo had with him, separated, and Alpern finally took a taxi home to Broward County where he was arrested. He was ultimately charged, as previously stated, and tried.

At trial, the state proceeded on the theory that Alpern was guilty of first degree murder and that the murder was committed while the defendant was committing the felonies of conspiracy to traffic in cocaine and robbery. The defendant's theory of defense was that the shooting was in self-defense or in the alternative, if he was guilty of murder, it was only third degree felony murder since the only felony he was attempting to commit was the sale of a fake drug which is not an enumerated felony of first degree murder pursuant

to Florida Statutes, section 782.04(4). To that end the defendant requested the jury be instructed on the lesser included offense of third degree felony murder. The request was denied, the jury found the defendant guilty of first degree felony murder.

Holding: Affirmed.

Opinion: BARKDULL, Judge.

The defendant, appellant, Charles Alpern, along with two others; was charged in a six count indictment with Count I, first degree murder, Count II, robbery with a firearm; Count III, conspiracy to commit robbery; Count IV, conspiracy to traffic in cocaine; Count V, shooting or throwing a deadly missile into an occupied vehicle; Count VI, unlawful possession of a firearm while engaged in a criminal offense. He was convicted of first degree felony murder; robbery with a firearm; conspiracy to commit robbery; conspiracy to traffic in cocaine; shooting within or into a vehicle or conveyance; and possession of a firearm while engaged in a felony. He was sentenced to life with a mandatory twenty-five year term as to Count I; a twelve year term as to Counts II, III, V and VI, and fifteen years as to Count IV. Counts I, II, III, V and VI are to run concurrent with each other. Count IV was to run concurrent to all other counts. This appeal follows.

On appeal the defendant alleges that it was error for the trial court to refuse to charge the jury on third degree felony murder as requested because in failing to give the requested charge, the jury was not charged on the defendant's theory of the case. We disagree for two reasons. First, the defendant was not charged with the selling of fraudulent cocaine. Under the schedule of lesser included offenses found in the Florida Standard Jury Instructions, West Florida Criminal Laws and Rules (1992), pamphlet, p. 1055-1057, third degree felony murder is not a necessary lesser included offense of first degree felony murder, but is a permissive (category 2) offense which may be given depending on the pleadings and proof. [See *Brown v. State*, 206 So.2d 377 p. 384 (Fla.1968)] Further, as stated by Judge Walden in *Johnson v. State*:

> The requested instructions which were denied are for crimes for which appellant was not indicted nor are they the lesser included offenses of those charged. The defense's theory was that the defendant may be guilty of other crimes but not those charged nor their lesser included offenses. Thus, if this were established beyond a reasonable doubt, the defendant would have to be found not guilty. The defendant is entitled to have the jury instructed on the law applicable to his theory of the defense if there is evidence introduced to support the instruction. [*Hudson v. State*, 408 So.2d 224 (Fla. 4th DCA 1981)] However, there is no basis in law that entitles a defendant to have the jury instructed on the elements of crimes for which he is not charged, of which he is guilty, and thus must be found not guilty. The reason is clear: such an instruction would only confuse a jury and essentially try a defendant for crimes not charged. [484 So.2d 1347 (Fla. 4th DCA 1986)]

Secondly, the record clearly shows that the trial judge did instruct the jury on all facets of murder, including third degree murder as it pertained to the underlying felonies of the

robbery charge, all of which were rejected by the jury in finding the defendant guilty of first degree felony murder.

As the record contains substantial competent evidence to show the murder herein was committed during the course of a robbery, any error would at most constitute harmless error. [See *State v. Abreau*, 363 So.2d 1063 (Fla.1978)] Therefore, we find no reversible error in the actions of the trial court and the convictions and sentence appealed herein are hereby affirmed.

Critical Thinking Question(s): Should the fact that the victim was getting increasing agitated and pulled a gun out of his bag have lessened the degree of murder in this case? Perhaps the defendant would not have gone through with the alleged murder plot had he not seen the victim pull out a gun. What are the circumstances that the Court considered as evidence substantiating the first degree murder conviction?

Florida Statutes, sec. 782.04 - Murder (Third Degree)

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by sec. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aggravated child abuse,
(i) Aggravated abuse of an elderly person or disabled adult,
(j) Aircraft piracy,
(k) Unlawful throwing, placing, or discharging of a destructive device or bomb,
(l) Unlawful distribution of any substance controlled under sec. 893.03(1), cocaine as described in sec. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,
(m) Carjacking,
(n) Home-invasion robbery,
(o) Aggravated stalking,
(p) Murder of another human being,
(q) Resisting an officer with violence to his or her person, or
(r) Felony that is an act of terrorism or is in furtherance of an act of terrorism,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

(5) As used in this section, the term "terrorism" means an activity that:

(a) 1. Involves a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States; or

2. Involves a violation of sec. 815.06; and

(b) Is intended to:

1. Intimidate, injure, or coerce a civilian population;

2. Influence the policy of a government by intimidation or coercion; or

3. Affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy.

***Santiago v. State*, 874 So.2d 617 (App. 5 Dist., 2004)**

Procedural History: Defendant was convicted in a jury trial in the Circuit Court, Orange County, Frank Kaney, Senior Judge, of third-degree felony murder. Defendant appealed.

Issue(s): Santiago contends that the trial court erred in denying his motion for a new trial because the evidence was insufficient to support a conviction for third degree murder.

Facts: The trial began with the State setting the background of the murder of the victim, Paul Johnson, a heroin user who used stolen property to purchase his drugs from a man named Johnny Polanco. The night of the murder, Paul's girlfriend was spending the evening with Paul. The girlfriend testified that a knock on the door prompted Paul to ask who was there, look through the peep hole, and eventually open the door and step out. After conversing with a person or persons for several minutes, Paul reentered the apartment, retrieved a cordless phone and went back out the door. Within a second or two, the girlfriend heard a gunshot and heard Paul exclaim that he had been shot. Unfortunately, because the girlfriend did not know who shot Paul, the State presented as its key witness Polanco, who had been given immunity in exchange for his testimony. The truth according to Polanco was that on the night of the murder, he, Santiago, and two other men discussed the possibility of robbing Paul. After providing them with two guns, Polanco escorted the three men to the apartment complex where Paul lived. Because he was scared, Polanco lagged behind as his minions made their way to Paul's apartment. Polanco heard a shot and ran back to the car where the others joined him.

Polanco further testified that once he and the others were reunited in the car, one of the men exclaimed that Santiago had shot Paul, whereupon Santiago told him to "shut up." The guns were discarded in a lake, and one of them was subsequently recovered where Polanco told the police to look. Polanco also testified that after he agreed to cooperate, the police wired him and sent him to confront Santiago. This attempt at obtaining

evidence of Santiago's guilt was unsuccessful, however, because Santiago denied shooting Paul.

Santiago's testimony at trial differed from Polanco's. According to Santiago, he was at Polanco's apartment the night of the shooting, but he denied that he and the others planned to commit a robbery. Instead, he testified, their purpose in driving to the apartment complex where Paul lived was to buy marijuana from someone Polanco knew who lived there. That someone, however, was not Paul. While he was at the complex, Polanco decided to check on a customer who owed him money. That customer turned out to be Paul. Santiago also explained that he did not know Paul. All four men went to Paul's apartment, but Paul would not let them inside. Polanco was talking to Paul at the doorway when Santiago heard a gunshot. The men then ran to the car.

Santiago was arrested and charged with first-degree murder and attempted robbery with a firearm. The jury returned its verdict finding Santiago not guilty of those offenses and not guilty of the following lesser included offenses: second-degree murder with a firearm; second-degree murder; manslaughter with a firearm; manslaughter; and third-degree murder with a firearm. However, the jury did find Santiago guilty of third-degree felony murder, but specifically found that he did not actually possess a firearm during the commission of the crime. We will determine whether the conviction for third-degree murder should be reversed based on insufficiency of the evidence, as Santiago argues in his motion for a new trial.

Holding: Reversed and remanded.

Opinion: SAWAYA, C.J.

Jonathan Santiago appeals his conviction for the offense of third-degree murder. We will first discuss the factual background of the instant case, explain why the evidence presented was insufficient to prove the crime of third-degree murder, and determine whether a new trial is the appropriate relief for Santiago.

Third-degree murder is "[t]he unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any" enumerated felony in Florida Statutes, section 782.04(4)(a)-(r) (2002). [*Tillman v. State*, 842 So.2d 922, 926 (Fla. 2d DCA 2003) ("Third-degree murder is an unlawful killing that occurs during the perpetration of, or the attempt to perpetrate, a felony other than those felonies listed in Florida Statutes, section 782.04(4), (1997)"); *State v. Williams*, 776 So.2d 1066 (Fla. 4th DCA 2001); *Sims v. State*, 712 So.2d 786, 786 (Fla. 2d DCA 1998) ("Third-degree murder is the unpremeditated, unlawful killing of another by a person engaged in the commission of a felony other than certain specifically enumerated felonies.")] Section 782.04 is referred to as the felony murder statute, see *Williams*, and third-degree murder under the statute is often referred to as third-degree felony murder. [See *Pope v. State*, 679 So.2d 710, 715 n. 6 (Fla.1996), cert. denied, 519 U.S. 1123, 117 S.Ct. 975, 136 L.Ed.2d 858 (1997); *Baker v. State*, 793 So.2d 69 (Fla. 4th DCA 2001); *Williams*]

The primary purpose of the felony murder statute is to protect the public from the dangers associated with the commission of felony offenses. [*Parker v. State*, 641 So.2d 369 (Fla.1994), cert. denied, 513 U.S. 1131, 115 S.Ct. 944, 130 L.Ed.2d 888 (1995)] This purpose is accomplished by imposing appropriate punishment on those who commit felony offenses that cause the death of another, thus deterring the commission of serious crimes in the future. We note, parenthetically, the suggestion that has been made that placing too much emphasis on the deterrent aspect may present an overly generous view of the ability or willingness of felons to actually engage in deliberative thought, to any meaningful degree, regarding the consequences of their actions. [*Williams*] The punitive aspect of the statute is found in the provision that a person may be held responsible for the death of another even though he did not form the intent to kill if he was "engaged in the perpetration of ... any felony...." [Fla. Stat. § 782.04(4) (2002)]

The courts have interpreted this statutory provision in light of the purpose of the felony murder statute to protect society by imposing just punishment and, perhaps to some degree, deter future crime by requiring that there be a causal connection between the felony that was committed and the killing of the victim. [*House v. State*, 831 So.2d 1230 (Fla. 2d DCA 2002); *Allen v. State*, 690 So.2d 1332, 1334 (Fla. 2d DCA 1997)] As the court explained in *Allen*, "In any felony murder conviction the element of causation, i.e., that the homicide was committed in the perpetration of the felony, must be established." [690 So.2d at 1334 (citing *Mahaun v. State*, 377 So.2d 1158 (Fla.1979)] "Stated another way, the State must prove that there was no break in the chain of circumstances beginning with the felony and ending with the murder." [*House*, 831 So.2d at 1232 (citing *Parker*)] If there is a break in the chain of events between the felony and the killing, the felony murder rule does not apply. [See *House*; *Lester v. State*, 737 So.2d 1149, 1151 (Fla. 2d DCA 1999); *Allen*

Santiago contends that the verdict rendered by the jury clearly shows that the jury rejected Polanco's testimony and accepted Santiago's testimony that the men were buying cannabis from a third party. Santiago argues that he could not be guilty of third-degree murder because the State failed to present sufficient evidence to establish a causal connection between the intent to purchase cannabis and the shooting of Paul. The State contends that Polanco's testimony that he was a cannabis customer of Paul supplied the nexus between the attempt to purchase the cannabis and the murder. We believe that the State has taken an inaccurate view of the testimony. Polanco's original story to the police, or one of the original stories, was that he went to Paul's apartment with the other men to buy cannabis from Paul. But Polanco admitted that this was a lie after he made his deal for immunity with the police and after he became aware of the self-serving importance to tell the truth. Moreover, the jury specifically found that Santiago had not carried a firearm during the crime and also found him not guilty of the robbery charge. Santiago argues that this left the jury with his testimony, which failed to establish a causal connection between the intent to purchase cannabis from an unnamed third party and Paul's murder.

The record clearly shows that the State failed to present any evidence of an actual drug purchase or of an attempted drug purchase. At most, the State presented evidence of an intent to purchase cannabis, but there must be more. In addition to the specific intent to commit a crime, the State must also show that the defendant committed some actual overt act toward actually committing the crime that was more than mere preparation. [*State v. Duke*, 709 So.2d 580 (Fla. 5th DCA 1998); *Morehead v. State*, 556 So.2d 523 (Fla. 5th DCA 1990)] "The overt act must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime." [*Morehead*, 556 So.2d at 525 (citing *State v. Coker*, 452 So.2d 1135 (Fla. 2d DCA 1984)]

In *Duke*, for example, the defendant met a person who he thought was a twelve-year-old girl in a chat room on the Internet when, in reality, the defendant was communicating with a law enforcement officer. The officer eventually set up a meeting with the defendant so they could get together and engage in sex. As arranged, the defendant drove to the designated spot and flashed his lights as a signal to the girl. Upon flashing his lights, the defendant was arrested and charged with attempted sexual battery. This court held that the defendant's conduct, the planning of the act and proceeding to the designated location, was not sufficient to reach the level of an overt act leading to the commission of sexual battery. Therefore, this court reversed the defendant's conviction.

Santiago argues that in the instant case, his acts did not extend as far as those in *Duke* because, although he went to the apartment complex where he intended to buy drugs, he did not arrive at the exact apartment where the purchase was to occur. We agree and conclude that Santiago's conviction must be reversed. Now we must proceed to determine the appropriate remedy. Santiago's motion requests a new trial with directions that a judgment of acquittal subsequently be entered on the ground that the evidence was insufficient to prove the crime for which he was convicted. Although we agree with Santiago that the evidence was insufficient to support a conviction for third-degree murder, we must determine whether that is a proper ground for a motion for new trial in light of our concern that a retrial may violate double jeopardy principles.

Historically, the courts of this state held that a motion for new trial was a necessary prerequisite to review on appeal the sufficiency of the evidence to support a conviction. [See *State v. Owens*, 233 So.2d 389 (Fla.1970) (holding that a motion for new trial based on alleged insufficiency of the evidence must be filed as a prerequisite to review of the sufficiency of evidence on appeal in criminal cases); see also *State v. Wright*, 224 So.2d 300 (Fla.1969)] Essentially these cases recognized that this issue was typically brought to the trial court's attention via a motion for directed verdict. In order to preserve that issue for appellate review, these cases held that it must be raised in a motion for new trial. In *Mancini v. State*, [273 So.2d 371, 373 (Fla.1973)], the court receded in part from *Owens* and *Wright* when it held that the issue need not be raised in a motion for new trial if it was first raised in a motion for directed verdict in the trial proceedings. Hence, it was no longer necessary to preserve the issue of the sufficiency of the evidence via motion for new trial as long as it was properly raised in a motion for directed verdict.

Subsequently, in *Nogar v. State*, [277 So.2d 257 (Fla.1973)], the court further explained that the issue could be raised in either a motion for directed verdict or motion for new trial. Based on this historical view, Florida courts have held that when the issue on a motion for new trial is sufficiency of the evidence, a trial judge abuses his or her discretion in granting a new trial if the state presented sufficient evidence to support the conviction. [See *State v. Coles*, 91 So.2d 200 (Fla.1956); *State v. McMahon*, 485 So.2d 884 (Fla. 2d DCA), review denied, 492 So.2d 1333 (Fla.1986); *Gonzalez v. State*, 449 So.2d 882 (Fla. 3d DCA), pet. for review denied, 458 So.2d 274 (Fla.1984); *State v. Haliburton*, 385 So.2d 11 (Fla. 4th DCA 1980)]

Decisions of more recent vintage indicate that an appropriate ground for a motion for a new trial in a criminal case is the sufficiency of the evidence. Some of these decisions seem to rely on the historical role that a motion for new trial played in preserving the issue of the sufficiency of the evidence for appellate review. Other decisions rely on Florida Rule of Criminal Procedure 3.600(a)(2), which provides that a new trial may be granted if "[t]he verdict is contrary to law or the weight of the evidence." For example, in *Thomas v. State*, [574 So.2d 160 (Fla. 4th DCA 1990)], the court indicated that the provision in the rule that a new trial may be granted if the "verdict is contrary to law" means that the insufficiency of the evidence is a proper basis for that relief.

This court and others have recognized clear distinctions between the "sufficiency of the evidence" and the "weight of the evidence" standards. [*Tibbs v. State*, 397 So.2d 1120 (Fla.1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *McArthur v. Nourse*, 369 So.2d 578 (Fla.1979); *State v. Brockman*, 827 So.2d 299 (Fla. 1st DCA 2002); *Geibel v. State*, 817 So.2d 1042 (Fla. 2d DCA 2002); *Moore v. State*, 800 So.2d 747 (Fla. 5th DCA 2001); see also *Guebara v. State*, 856 So.2d 1087 (Fla. 5th DCA 2003)] The "sufficiency of the evidence" standard determines whether the evidence presented is legally adequate to permit a verdict and is typically utilized to decide a motion for directed verdict. "In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." [*Tibbs*, 397 So.2d at 1123] Sufficiency of the evidence is generally an issue of law that should be decided pursuant to the de novo standard of review. [See *Jones v. State*, 790 So.2d 1194 (Fla. 1st DCA 2001); *State v. Hawkins*, 790 So.2d 492 (Fla. 5th DCA 2001)] The "weight of the evidence" standard determines whether a greater amount of credible evidence supports one side of an issue or the other. [*State v. Hart*, 632 So.2d 134, 135 (Fla. 4th DCA 1994)] The standard of review that applies to this issue is abuse of discretion. [See *Stephens v. State*, 787 So.2d 747, 754 (Fla.) ("A trial court's denial of a motion for a new trial is reviewed under an abuse of discretion standard."), cert. denied, 534 U.S. 1025, 122 S.Ct. 556, 151 L.Ed.2d 431 (2001)]

Prior to the United States Supreme Court's decision in *Burks v. United States*, [437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)], insufficiency of the evidence may have been a proper ground for a motion for new trial in a criminal case and this may have been a logical interpretation of rule 3.600(a)(2). However, in *Burks*, the Court held that if it is determined either by the trial court or appellate court that the evidence is insufficient to sustain a conviction, the proper remedy is acquittal and not a new trial. The Florida

courts have applied *Burks* to grant acquittals in cases where a finding was made that the evidence was insufficient to support a conviction. Indeed, in *Tibbs*, the Florida Supreme Court noted the distinction between the "sufficiency of the evidence" and the "weight of the evidence" standards in the criminal rules of procedure.

At the trial level, the weight-sufficiency distinction is apparent in our Rules of Criminal Procedure. We noted in *McArthur v. Nourse*, [369 So.2d 578 (Fla.1979)] that:

> [a] critical distinction has existed at least since 1967, when rules 3.380 (formerly 3.660) and 3.600 of the Florida Rules of Criminal Procedure were adopted. Rule 3.380(a) provides that a motion for judgment of acquittal should be granted if, at the close of the evidence, "the court is of the opinion that the evidence is insufficient to warrant a conviction." In contrast, rule 3.600(a)(2) provides that a motion for new trial shall be granted if the jury verdict is "contrary to law or the weight of the evidence." [Id. at 580]

Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror. It follows that a finding by the trial judge that the verdict is against the weight of the evidence is not a finding that the evidence is legally insufficient. [*Tibbs*, 397 So.2d at 1123 n. 9]

In light of the clear distinctions between the "sufficiency of the evidence" and the "weight of the evidence" standards, and based on the decision in *Burks* and the decisions of the Florida courts that have properly applied the holding of that case, we conclude that "sufficiency of the evidence" is not a proper ground for a motion for new trial in a criminal case. The issue of the sufficiency of the evidence should be raised in the context of a motion for a directed verdict, not a motion for new trial. In order to obtain effective appellate review of orders granting or denying motions for new trial and for directed verdict, litigants should be careful in framing the issues presented to this court for resolution and be especially careful to request the relief to which they are actually entitled.

Here, Santiago has raised the issue that the trial court erred in denying his motion for a new trial based on the insufficiency of the evidence. In essence, Santiago is asking for a new trial, which is an inappropriate remedy given our conclusion that the evidence is indeed insufficient to sustain Santiago's conviction in the instant case. We note, however, that even though Santiago raised the wrong issue, he did appeal his judgment and sentence and the State did argue the sufficiency of the evidence in its brief without raising any argument regarding Santiago's request for an inappropriate remedy. Based on the record before us, we believe that the State has had a fair and adequate opportunity to argue the sufficiency of the evidence in these proceedings. Hence, we revert to the tried and true rules of appellate procedure, which allow us in situations like this to grant the relief that is just and proper. [See Fla. R.App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought...."); Fla. R.App. P. 9.140(i) ("In the interest of justice, the court may grant any relief to which any party is entitled.")]

We conclude that the evidence is insufficient to support Santiago's conviction. Therefore, Santiago is entitled to discharge, and we grant him that relief. Accordingly, Santiago's conviction and sentence are reversed, and this matter is remanded to the trial court with instructions to discharge Santiago.

Critical Thinking Question(s): Explain your own terms the concepts of "weight" verses "sufficiency" of the evidence. Doesn't the weight of the evidence contribute to the sufficiency of the evidence? In a previous case in this chapter, we saw the Court provide an alternate conviction for a lesser crime rather than an acquittal or new trial. Do you think it is a proper double jeopardy issue if a person is acquitted of a greater crime and the State wants to try and convict for a lesser crime on remand?

II. Manslaughter

Section Introduction: Manslaughter is the lesser of the two forms of criminal homicide. Where typically divided into voluntary and involuntary, Florida statute utilizes only one type of manslaughter. You will find this statute below, along with two Florida court cases that apply it.

Florida statutes, sec. 782.07 - Manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; aggravated manslaughter of an officer, a firefighter, an emergency medical technician, or a paramedic.

> (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) A person who causes the death of any elderly person or disabled adult by culpable negligence under s. 825.102(3) commits aggravated manslaughter of an elderly person or disabled adult, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) A person who causes the death of any person under the age of 18 by culpable negligence under s. 827.03(3) commits aggravated manslaughter of a child, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (4) A person who causes the death, through culpable negligence, of an officer as defined in s. 943.10(14), a firefighter as defined in s. 112.191, an emergency medical technician as defined in s. 401.23, or a paramedic as defined in s. 401.23, while the officer, firefighter, emergency medical technician, or paramedic is

performing duties that are within the course of his or her employment, commits aggravated manslaughter of an officer, a firefighter, an emergency medical technician, or a paramedic, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

***Ayala v. State*, 2003 WL 22259691 (App. 2 Dist., 2003)**

Procedural History: Following appellate affirmance of his conviction of manslaughter, as lesser-included offense of second-degree murder, [834 So.2d 163], petitioner filed original petition for post-conviction relief, alleging ineffective assistance of appellate counsel.

Issue(s): Ayala has filed a petition pursuant to Florida Rule of Appellate Procedure 9.141(c) raising claims of ineffective assistance of appellate counsel. He argues that his appellate counsel should have raised as error the trial court's "merging of the voluntary and involuntary manslaughter instructions," which he claims was fundamental error.

Facts: In the early morning hours of February 26, 2000, Mr. Ayala had a fight with Raul Yanez. At the time, they were living in the same apartment in Immokalee, Florida. Both men were intoxicated, and Mr. Yanez told an offensive joke. The joke generated an argument, and eventually Mr. Yanez apparently struck Mr. Ayala. One thing led to another and within a few minutes, Mr. Ayala plunged a large knife into Mr. Yanez's chest. Mr. Yanez died in the parking lot of the apartment complex. The State charged Mr. Ayala with one count of second-degree murder. The information alleged in part that Mr. Ayala "did unlawfully, by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, kill and murder [the victim] ... by stabbing the victim with a knife." The information did not allege that the imminently dangerous act was either a voluntary act or an act of culpable negligence.

At trial, the State focused on the charged offense of second-degree murder. Mr. Ayala's counsel primarily argued self-defense. When the parties and the trial court prepared jury instructions and verdict forms for this case, the State requested that, as the next lesser offense to second-degree murder, the trial court read to the jury the standard manslaughter instruction, which includes an instruction on both voluntary manslaughter and manslaughter by culpable negligence. [See Fla. Std. Jury Instr. (Crim.) 7.7] This was a logical request because the schedule of lesser-included offenses in the standard jury instructions lists manslaughter as a category one lesser-included offense. [See Fla. Std. Jury Instr. (Crim.) 7.4] Mr. Ayala's counsel did not object to this request. Likewise, the parties agreed to a verdict form that gave the jury the option of finding Mr. Ayala guilty "of the lesser-included offense of manslaughter." The form did not distinguish between voluntary manslaughter and manslaughter by culpable negligence.

During closing arguments, neither the State nor Mr. Ayala's counsel relied to any extent upon the instructions that were about to be given on lesser-included offenses. Nevertheless, the jury returned a verdict convicting Mr. Ayala of the lesser-included offense of manslaughter. The trial court entered judgment on the verdict and imposed a

downward departure sentence of 78 months' incarceration. On appeal, Mr. Ayala's counsel filed a well-written brief that raised two issues on appeal. The brief did not raise any issue concerning these jury instructions or the verdict form. This court affirmed without written opinion. [*Ayala v. State*, 834 So.2d 163 (Fla. 2d DCA 2002)]

Holding: On rehearing, the District Court of Appeal, Altenbernd, C.J., held that conviction of manslaughter was not fundamental error.

Opinion: ALTENBERND, Chief Judge.

Mr. Ayala has filed a timely petition alleging ineffective assistance of appellate counsel. He argues that his appellate counsel should have raised as error the trial court's "merging of the voluntary and involuntary manslaughter instructions," which he claims was fundamental error under *Looney v. State*, [756 So.2d 239 (Fla. 2d DCA 2000)]. In *Looney*, this court reviewed a case in which manslaughter was the charged offense. The information alleged manslaughter by act and did not allege manslaughter by culpable negligence. [*Looney*, 756 So.2d at 240] The trial court modified the standard instructions so that the jury received the standard instructions for manslaughter by act and also the definition of culpable negligence. [Id.] This court held that it was fundamental error to instruct the jury on a variety of manslaughter that had not been included within the information. [Id.] Relying on *Looney*, this court initially granted Mr. Ayala relief in a reported opinion. [*Ayala v. State*, 28 Fla. L. Weekly D2283 (Fla. 2d DCA Oct.3, 2003)] We granted rehearing upon realizing that we had overlooked the supreme court's opinion in *Ray v. State*, [403 So.2d 956 (Fla.1981)]. Accordingly, we withdrew that opinion. [*Ayala v. State*, 2003 WL 22259691 (Fla. 2d DCA Nov.14, 2003)]

In *Ray*, the supreme court held that it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense, or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action. [*Ray*, 403 So.2d at 961] This court followed *Ray* in *Thomas v. State*, [820 So.2d 382 (Fla. 2d DCA 2002)], a case that is similar in many respects to Mr. Ayala's case. In *Thomas*, we affirmed a conviction for driving under the influence (DUI) with serious bodily injury, even though this offense was not a permissive lesser-included offense of DUI manslaughter as charged in the information. [*Thomas*, 820 So.2d at 384-85] Nevertheless, the offense of DUI with serious bodily injury was lesser in degree and penalty and the defendant had not objected to the instructions. Admittedly, this court has not always consistently followed *Ray*, but we recently receded from those cases that conflicted with *Ray*, and reaffirmed the principles announced in *Ray*. [See *Chambers v. State*, No. 2D03-1716, 880 So.2d 696, 2004 WL 895856 (Fla. 2d DCA Apr.28, 2004)]

In Mr. Ayala's case, the instructions provided on manslaughter by act and manslaughter by culpable negligence were standard instructions that had not been modified as they were in *Looney*. Mr. Ayala did not object to these instructions. Either form of manslaughter was lesser in degree and penalty than the main charge of second-degree

murder. Thus, *Looney* is not applicable in this case, and Ray controls. Accordingly, we conclude that Mr. Ayala's appellate counsel was not ineffective when counsel chose not to brief an issue as fundamental error when there was controlling precedent from the supreme court that would have prohibited this court from granting any relief to Mr. Ayala. Denied.

Critical Thinking Question(s): Sometimes the State or Defense purposely refuses instructions on lesser offenses. What would be possible reasons that the State or Defense would refuse such instructions?

***House v. State,* 831 So.2d 1230 (App. 2 Dist., 2002)**

Procedural History: Defendant was convicted in the Circuit Court, Hillsborough County, Daniel L. Perry, J., of multiple offenses, including third-degree murder, vehicular homicide and grand theft of a motor vehicle. Defendant appealed. The District Court of Appeal, Whatley, J., held that: (1) state failed to prove that grand theft and homicide bore a sufficient connection to support felony murder conviction, and (2) evidence did not support defendant's charge of vehicular homicide.

Issue(s):

Facts: The record shows that on August 26, 2001, Emma Sanders rented a Dodge Intrepid and parked it at her hotel near Tampa International Airport at approximately 9:00 p.m. She discovered that the car was missing the following day around 7:30 a.m. At about 1:00 p.m., the Intrepid grazed and damaged Frederick Brown's car as he was sitting at the intersection of Central Avenue and Martin Luther King Boulevard waiting for the light to change. The driver of the Intrepid was Lovy House. He did not stop but drove through the intersection on a red light. Brown called 911 on his cell phone and followed the Intrepid on Central Avenue when the signal changed in an attempt to obtain the tag number. House drove at not too fast a rate of speed at first, but he then "really accelerated" and took off. Brown stated that the Intrepid was going "a whole lot faster" than the forty miles an hour that he was driving. Brown was never able to catch up to the Intrepid to obtain the tag number.

The Intrepid then crashed into another car farther up the road, but Brown did not witness the collision. The collision killed Kevin Rogers. Valecia Sampson lived just south of the intersection at which the collision occurred. She described the area as a residential neighborhood. She saw the Intrepid traveling at "a very high rate of speed" that was unusual for the neighborhood, and she saw it swerve in an attempt to avoid hitting Rogers' car at the intersection. House had the right of way at the intersection. Sampson could not see Rogers' car because of a large tree blocking her view. She said that trees blocked drivers' views from both directions at the intersection and that drivers coming from Rogers' direction had to pull past the stop sign to see oncoming traffic. Sampson has witnessed quite a few accidents at that intersection, most of which were fender

benders. The evidence revealed that the Intrepid was stolen by someone prying the door lock, popping the ignition, and using a blunt object to start the car.

Detective David Puig, who is assigned to the hit and run traffic homicide squad, testified as an expert in accident reconstruction and speed calculation. He stated that the speed limit along Central Avenue at the site of the collision was thirty miles per hour. The Intrepid was traveling at approximately sixty miles per hour before the collision. There were skid marks for approximately forty-seven feet before the point of impact, which was more or less in the middle of the intersection. Puig estimated that due to his braking, House was driving at a minimum of fifty miles per hour at the time of impact. The victim's vehicle was traveling at approximately ten to fifteen miles per hour. The day was hot, dry, and clear. The collision occurred about a half a mile and less than a minute from the intersection where House side-swiped Brown's vehicle.

Based on these facts, the State charged House with third-degree murder of Rogers, vehicular homicide of Rogers, grand theft of a motor vehicle, burglary of a conveyance, operating a vehicle without a valid driver's license and causing death or serious bodily injury, and leaving the scene of a crash. A jury found House guilty as charged.

Holding: Affirmed in part, reversed in part, and remanded.

Opinion: WHATLEY, Judge.

Lovy House appeals his convictions and sentences of several offenses arising out of his driving a stolen car that was involved in a fatal collision. We reverse House's conviction of third-degree murder. We agree with House that the trial court erred in denying his motion for judgment of acquittal of the charge of third-degree murder. Consistent with the third degree murder statute, Fla. Stat. § 782.04(4) (2001), the State charged that House unlawfully killed Rogers without any design or intent while engaged in the perpetration of, or the attempt to perpetrate, the grand theft of a motor vehicle.

"In any felony murder conviction the element of causation, i.e. [sic] that the homicide was committed in the perpetration of the felony, must be established." [*Allen v. State*, 690 So.2d 1332, 1334 (Fla. 2d DCA 1997)] Stated another way, the State must prove that there was no break in the chain of circumstances beginning with the felony and ending with the murder. [*Parker v. State*, 641 So.2d 369 (Fla.1994)] Here, the State presented no evidence of when House came into possession of the Intrepid, which was discovered missing nearly six hours before the fatal collision. Consequently, "[t]he State did not prove that the grand theft and the homicide bore a sufficient connection 'in point of time, place, or causal relationship' to support" House's conviction of third-degree murder. [*Lester v. State*, 737 So.2d 1149, 1152 (Fla. 2d DCA 1999) (quoting *Allen*, 690 So.2d at 1334)]

The State argues that grand theft is a continuing offense and that the theft of the Intrepid began right before House grazed Brown's vehicle. We agree with the Fourth District's

sound rejection of this argument in *State v. Williams*, [776 So.2d 1066 (Fla. 4th DCA 2001)]:

> [F]or the felony murder statute to apply when the underlying felony is theft, a "court must determine whether the killing is closely connected to the initial taking of the property in time, place, causation, and continuity of action."

If the [felony murder] rule is to have any deterrent effect, it must not be extended to killings which are collateral to and separate from the underlying felony. Moreover, requiring a close nexus between the initial taking and the killing is particularly appropriate given that the felony murder rule is "a legal fiction in which the intent and the malice to commit the underlying felony is 'transferred' to elevate an unintentional killing to ... murder."

If, as the state contends, grand theft is an offense that continues throughout a defendant's unauthorized use, it would follow that a prosecution could commence ten years after the initial taking, so long as the defendant were caught using the property ten years later. However, we have held that grand theft is not a continuing offense for the purpose of the statute of limitations.... Acceptance of the continuing crime argument in this case would create an anomaly - a defendant could be charged with third degree felony murder even where the statute of limitations would preclude prosecution for the underlying felony of grand theft. [Id. at 1072 (quoting *State v. Pierce*, 23 S.W.3d 289, 295, 296 (Tenn.2000)]

Pursuant to Florida Statutes, section 924.34 (2001), this court may direct the trial court to enter judgment for the lesser included offense of vehicular homicide if the evidence supports that offense. [See *I.T. v. State*, 694 So.2d 720 (Fla.1997)] House contends that the evidence does not support the charge of vehicular homicide and that the trial court erred in denying his motion for judgment of acquittal of that offense. We agree. Vehicular homicide is the killing of a person by operating a motor vehicle in a reckless manner likely to cause death or great bodily injury. [Fla. Stat. § 782.071 (2001)] Speed alone will not support a charge of vehicular homicide. [*Hamilton v. State*, 439 So.2d 238 (Fla. 2d DCA 1983)] The only evidence of the manner in which House was driving at the time he collided with Rogers is that he was speeding. Accordingly, we reverse House's conviction of third-degree murder and remand for resentencing. We affirm House's remaining convictions.

Critical Thinking Question(s): Would it have made a difference to the Court if House was being pursued by the police after a call to 911 about the car he swiped? For vehicular homicide, what evidence other than speeding should be taken into account in the instant case?

III. Other Relevant Statutes

Section Introduction: Following are four Florida statutes that are also relevant to the issue of homicide. The first, vehicular homicide, is a special form of homicide that can be

classified as either a first or second degree felony. The statute on excusable homicide will show what types of homicide do not fall under the statutes that impose criminal liability and punishment. The third statute cited shows an important distinction of Florida law with regards to the year-and-a-day doctrine employed by other states. Finally, the last statute will show how Florida treats the difficult issue of when life begins.

Florida statutes, sec. 782.071 - Vehicular homicide

"Vehicular homicide" is the killing of a human being, or the killing of a viable fetus by any injury to the mother, caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another.

(1) Vehicular homicide is:

(a) A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if:

1. At the time of the accident, the person knew, or should have known, that the accident occurred; and

2. The person failed to give information and render aid as required by s. 316.062.

This paragraph does not require that the person knew that the accident resulted in injury or death.

(2) For purposes of this section, a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.

(3) A right of action for civil damages shall exist under s. 768.19, under all circumstances, for all deaths described in this section.

(4) In addition to any other punishment, the court may order the person to serve 120 community service hours in a trauma center or hospital that regularly receives victims of vehicle accidents, under the supervision of a registered nurse, an emergency room physician, or an emergency medical technician pursuant to a voluntary community service program operated by the trauma center or hospital.

Florida statutes, sec. 782.03. - Excusable homicide

Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Florida statutes, sec. 782.035 - Common-law rule “year-and-a-day rule”

The common-law rule of evidence applicable to homicide prosecutions known as the “year-and-a-day rule,” which provides a conclusive presumption that an injury is not the cause of death or that whether it is the cause cannot be discerned if the

interval between the infliction of the injury and the victim's death exceeds a year and a day, is hereby abrogated and does not apply in this state.

Florida Statutes, sec. 782.09 - Killing of unborn quick child by injury to mother

(1) The unlawful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed murder in the same degree as that which would have been committed against the mother. Any person, other than the mother, who unlawfully kills an unborn quick child by any injury to the mother:

(a) Which would be murder in the first degree constituting a capital felony if it resulted in the mother's death commits murder in the first degree constituting a capital felony, punishable as provided in s. 775.082.

(b) Which would be murder in the second degree if it resulted in the mother's death commits murder in the second degree, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Which would be murder in the third degree if it resulted in the mother's death commits murder in the third degree, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) The unlawful killing of an unborn quick child by any injury to the mother of such child which would be manslaughter if it resulted in the death of such mother shall be deemed manslaughter. A person who unlawfully kills an unborn quick child by any injury to the mother which would be manslaughter if it resulted in the mother's death commits manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) The death of the mother resulting from the same act or criminal episode that caused the death of the unborn quick child does not bar prosecution under this section.

(4) This section does not authorize the prosecution of any person in connection with a termination of pregnancy pursuant to chapter 390.

(5) For purposes of this section, the definition of the term "unborn quick child" shall be determined in accordance with the definition of viable fetus as set forth in s. 782.071.