

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CRIMINAL FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

v.

CURTIS JUDSON REEVES,
Defendant.

Case No: CRC1400216CFAES

Division: 1

DEFENDANT'S MOTION TO ALLOW NEGATIVE IMPEACHMENT

COMES NOW the Defendant, CURTIS J. REEVES, by and through undersigned counsel and pursuant to the Florida Evidence Code, and files this Motion to Allow Negative Impeachment and states as follows:

Florida Statutes, § 90.608, the rule of evidence that controls the impeachment of witnesses, provides that “[a]ny party, including the party calling the witness, may attack the credibility of a witness by: (1) Introducing statements of the witness which are inconsistent with the witness’s present testimony....”

It is well settled that “negative impeachment” or impeachment by cross-examination that points out the omission of a material and critical fact in a prior inconsistent statement or testimony, is allowed if the facts in question would naturally have been mentioned. *Varas v. State*, 815 So.2d 637, 640 (Fla. 3d DCA 2001). “This also includes omissions in police reports provided such omissions are of material and critical facts which are in serious contention at trial.” *Id.* (citing *State v. Johnson*, 284 So.2d 198 (Fla.1973)). Since a witness’ credibility is at issue when he or she testifies, negative impeachment is seen as more appropriate if the contention of the proponent is that the witness is fabricating. *Id.*

In *Varas*, law enforcement received a tip from an informant that the defendant would be going to a certain location to pick up cocaine. *Id.* Law enforcement set up surveillance and saw the defendant enter the home identified by the informant. Shortly thereafter, the defendant exited the residence carrying a brown bag. *Id.* Shortly thereafter, DEA agents conducted a traffic stop of the defendant. *Id.* When they asked the defendant if they could search the car, he consented. *Id.* A search of the brown bag located in the car led to the discovery of a kilo of cocaine. *Id.* at 638-39.

The defendant asserted as his defense that he did not know that there was cocaine in the bag, but, instead, he thought he was picking up a power drill. *Id.* at 639. At trial the agent testified for the first time that when he asked the defendant if he could search the car, the defendant had appeared nervous. *Id.* He also testified for the first time that when asked about the contents of the bag, the defendant appeared even more nervous, his eyes giving the appearance that he was scared. *Id.* The agent further added the facts that the defendant's face was sweating and that his eyebrows were twitching. *Id.* The defense attempted to attack the agent's credibility, suggesting that he was fabricating, by the use of negative impeachment. *Id.* Defense counsel specifically inquired as to why the agent had failed to mention these details in his written arrest report, his pre-trial deposition or in his testimony at the suppression hearing that been held the preceding day. *Id.* The trial court, however, sustained the state's objection to this line of questioning on the basis that the inquiry was "negative impeachment" and improper. *Id.*

The appellate court, in reversing the subsequent conviction, pointed out that the attempted impeachment, based on the fact that the agent had failed to previously mention the defendant's alleged nervous demeanor, was a material and significant fact that naturally would have been mentioned previously in order to present all of the pertinent facts, and did not qualify

as a mere detail. *Id.* The sole issue for the jury to decide in determining the defendant's guilt was whether or not he knew that the brown bag contained cocaine. *Id.* During closing argument the state used the agent's testimony concerning the defendant's alleged nervous demeanor to prove such knowledge circumstantially. *Id.* Since the defendant attempted to assert that the agent was fabricating these details in order to circumstantially prove the requisite knowledge that he possessed cocaine, the appellate court reversed the conviction on the basis that the trial court abused its discretion in disallowing the critical cross examination. *Id.* at 640-41.

The Second District Court of Appeal recently reversed a summary denial of a motion for post-conviction relief stating that the trial court erred in not recognizing that the victim's failure to affirmatively state in her deposition that she had seen obvious scars on the defendant's body was proper negative impeachment of her credibility which should have been explored by defense counsel. *Pierce v. State*, 137 So.3d 578, 580-81 (Fla. 2d DCA 2014). The victim had previously mentioned the defendant's tattoos and that he had ugly feet. *Id.* However, when asked if the defendant had any other abnormal physical features, she did not mention the scars. *Id.* "Despite having knowledge of these statements, [defense] counsel failed to attack the victim's credibility by impeaching her with these prior inconsistent statements." *Id.* The court found that "...the victim's statement would... have been admissible as a material circumstance that would have been natural to mention when asked to identify any abnormal physical features that she observed on [the defendant's] body. *Id.* (citing Charles W. Ehrhardt, *Florida Evidence* § 608.4 (2013 Ed.)) ('If the prior statement does not mention a material circumstance which would have been natural to mention in the statement, the omission in the statement should be admissible as an inconsistent statement.')

This negative impeachment could have allowed counsel to attack the victim's

credibility supporting [the defendant's] argument that the victim fabricated the allegations. (citation omitted)" *Id.* at 581.

In *Davis v. State*, 756 So.2d 205, 208 (Fla. 4th DCA 2000), the Fourth District Court of Appeal reversed the defendant's conviction, finding "...that the trial court erred in refusing to permit defense counsel to impeach the victim with her prior, material omissions. [The victim's] trial contentions that [the defendant] shoved her and waved a gun around are the type of facts that 'naturally would have been asserted' when police asked her what happened." In reaching its conclusion, the appellate court cited to another recent case, *Sanjurjo v. State*, 736 So.2d 1263 (Fla. 4th DCA 1999), in which a conviction had been reversed because the trial court had not allowed a witness to be negatively impeached for failing to mention critical trial testimony details in an earlier statement. The *Sanjurjo* court stated:

Section 90.608(1)(a), Florida Statutes (1997) recognizes the right to impeach a witness and attack his credibility with statements which are inconsistent with the witness's present testimony.

To be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. That includes allowing "witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." (citations omitted)

WHEREFORE, based on the above, Defendant, CURTIS JUDSON REEVES moves this Honorable Court to allow negative impeachment at trial.

Respectfully submitted,

/s/ Richard Escobar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this has been furnished by electronic delivery to the Office of the State Attorney for the Sixth Judicial Circuit, c/o Glenn Martin, Esq., at glenmartin@co.pinellas.fl.us and via U.S postal service at P.O. Box 5028, Clearwater, Florida 33758 on this 30th day of June 2020.

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