

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

STATE OF FLORIDA,
Plaintiff,

Case No.: CRC-1400216FAES

v.

Division: 1

CURTIS J. REEVES,
Defendant.

_____/

**DEFENDANT'S RESPONSE TO STATE'S MOTION IN LIMINE TO EXCLUDE
TESTIMONY THAT IN DECEMBER 2014 THE DEFENDANT FELL AND BROKE HIS
HIP**

COMES NOW, the Defendant, Curtis J. Reeves, by and through undersigned counsel submits the following response to State's Motion *in Limine* to Exclude Testimony That in December 2014 the Defendant Fell and Broke His Hip ("State's Motion") and as good cause would show:

The Defendant is an elderly man. He was seventy-one years old (71) at the time of the shooting incident on January 13, 2014. The Defendant has asserted an affirmative defense of self-defense. His perception of his vulnerabilities is an important aspect of the case and an integral component to his defense that he reacted reasonably in response to an imminent threat of great bodily harm or death or to prevent the commission of a felony. His actual vulnerability, as evidenced by a broken hip shortly after the incident, is relevant to show the accuracy of his perception at the time of the event and thus the reasonableness of his reaction to the threats perpetrated upon him. The average person not situated as the Defendant was, i.e., not elderly and not suffering from degenerative changes to his skeletal structure, may not have been as susceptible to great bodily harm or death in the same situation. The jury must understand that the

Defendant was in fact vulnerable to great bodily injury or death in order to properly weigh the evidence and make its determination.

The State seeks to exclude reference to the Defendant's broken hip that he sustained in December of 2014. In support of the State's Motion, the State cites to testimony of Jennifer Shaw, the Defendant's daughter, at the Immunity Hearing in 2017. Defense counsel asked Ms. Shaw if she was aware that her father had broken his hip and she answered affirmatively. (Immunity Hearing Tr. Vol. I/pg. 44:5-8, February 20, 2017). The State then objected as to relevancy and stated "[i]f they can try to tie it up with Dr. Foley, then we'll see if they can do it." (Tr. 44:14-15). Based upon the State's Motion that only references the question posed to Ms. Shaw and the State's response that it would be admissible if tied to Dr. Foley, it is unclear whether the State seeks to limit any and all testimony regarding the Defendant's broken hip. Nevertheless, the Court should deny the State's Motion to exclude this important and relevant evidence.

The question about the Defendant's broken hip posed to Ms. Shaw, as argued by defense counsel at the immunity hearing, is relevant to show the Defendant's actual vulnerability at his advanced age. His actual vulnerabilities, as evidenced by the broken hip less a year later, goes to show the reasonableness of his perception and hence the reasonableness of his actions based upon that perception.

The State argues that evidence of the Defendant's broken hip is inadmissible because it is not relevant to his state of mind at the time of the incident. State's Motion at pg. 3. The Defendant is not offering this as evidence of his state of mind at the time of the shooting, as it would not make sense that a future unknown event would have such a bearing. To the contrary, the Defendant offers his broken hip as evidence that his state of mind as a vulnerable elderly

man in fear of great bodily harm or death from Mr. Oulson's threats and actual physical aggression was accurate and therefore not unreasonable. This is an important distinction.

A broken hip from a fall while merely walking on his back porch that occurred less than a year after the event in question is corroborating evidence of the degenerative changes that the Defendant was suffering from and fully aware of at the time of the shooting incident. Dr. Michael Foley, diagnostic and forensic radiologist, testified at the immunity hearing regarding the degenerative changes that the Defendant was experiencing, as evidenced by the Defendant's broken hip, without objection from the State. (Immunity Hearing Tr. Vol. II/pg. 159:1-163:21, February 20, 2017). According to Dr. Foley, the Defendant has sclerosis (abnormal hardening) of the acetabulum (hip-bone socket), among other ailments. (Tr. 159:18-23; 163:13-21). The Defendant also has loss of bone mass, or osteoporosis, and both medical maladies were observable in the X-Ray scan. (Tr. 159:24-160:6). A degenerative change like the one present in the imaging of Defendant's hip takes many years to develop. (Tr. 164:3-10).

Legal Analysis

Relevancy is a low bar. *Tennard v. Dretke*, 542 U.S. 274 (2004). Relevancy of evidence has historically referred to the "logical tendency to prove or disprove a fact." Ehrhardt, *Florida Evidence* (2019) at 159. Citing *Johnson v. State*, 595 So.2d 132, 134 (Fla. 1st DCA 1992) ("The threshold test for admissibility of evidence elicited on cross-examination is relevance ... There are two main forms of relevancy: *logical* and *legal* ... The relevancy of a fact to an issue being tried is ordinarily a question of logic, rather than one of law. Logically relevant evidence is 'evidence tending to prove or disprove a material fact.')" (emphasis in original). To be relevant, evidence "must have a tendency to establish a fact in controversy or to render a proposition more or less probable." *Thigpen v. United Parcel Serv., Inc.*, 990 So.2d 639, 646 (Fla. 4th DCA 2008).

The Defendant's broken hip has "a logical tendency to prove" that the Defendant was in fact vulnerable to serious bodily injury or death from being struck by a younger, stronger man, corroborating his perception of his vulnerability, a "fact which is of consequence to the outcome of the case." *Wright v. State*, 19 So.3d 277 (Fla. 2009).

Evidence of the Defendant's broken hip passes the test of legal relevance. "To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons. Pearson, *Ungarbling Relevancy*, Fla. Bar J. 45 (1990)." *Sims v. Brown*, 574 So.2d 131, 134 (Fla. 1991). The evidence of the Defendant's broken hip is material as bearing on the fact that the Defendant was vulnerable and responded reasonably. The evidence is offered by competent persons in a position to know, i.e., Dr. Michael Foley, Dr. Donna Cohen, and the Defendant's family. The evidence of is relevant as having tendency to make the fact that the Defendant acted reasonably in the threatening situation more probable than not. *Id.* Evidence of the Defendant's broken hip is legally relevant.

Here, evidence of the Defendant's broken hip after the incident is highly probative of his actual vulnerability due to his advanced age and degenerative changes to his skeletal structure at the time of the offense. For the Defendant to say he felt vulnerable on January 13, 2014 without allowing him to prove that he was in fact vulnerable to bone breaks "ties his hands" in the ability to present his defense. The jury must understand what was reasonable to a person situated as the Defendant was and knowing what he knew." *See Toledo v. State*, 452 So.2d 661, 662-63 (Fla. 3d DCA 1984) quoting *Price v. Gray's Guard Services, Inc.*, 298 So.2d 461, 464 (Fla. 1st DCA 1974). A broken hip from a minor fall makes more probable the fact that the Defendant was

vulnerable to great bodily injury or death from being struck. The average, much younger person may likely not have been so vulnerable, and the average younger juror likely will not understand that being punched in the face at the age of seventy-one could cause great bodily injury or death. It was reasonable for the Defendant to perceive that being struck a second time by Mr. Oulson would lead to serious bodily injury or death and that is directly evidenced by the broken hip he suffered from a fall at a short distance less than a year later.

In a case similar "Stand Your Ground" case, the Fourth District Court of Appeal held it was reversible error to deny expert medical testimony regarding the defendant's medical diagnosis and resulting physical condition. *Elder v. State*, 296 So.3d 440, 445-46 (Fla. 4th DCA 2020). In an inquiry on the relevance of the evidence, the court held that the medical diagnosis was relevant to prove a material fact—whether the defendant's "physical condition made it unlikely that he would pursue activity requiring violent physical exertion." *Id.* at 446. The court further explained that the diagnosis was "relevant to put the defense theory of the case in proper context". *Id.* Evidence of the Defendant's broken hip is necessary to put this defense in the proper context. Without this evidence, the jury is unable to properly assess the Defendant's reactions to the threats that he received and the assault that was perpetrated upon him.

Subsequent events and acts have been ruled relevant to show that state of mind at the time of the prior event in question is more or less probable. *See Peshlakai v. Ruiz*, 39 F.Supp.3d 1264 (D. N.M. 2014) (subsequent liquor violations admissible as tended to make more likely that plaintiff had the wanton, willful, and reckless state of mind that the law requires to prove claim) *citing O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1449 (10th Cir. 1987) ("allowing evidence of subsequent bad acts if and only if the evidence is 'probative of the defendant's state of mind at the time of the transaction.'"), *see also U.S. v. Mack*, 643 F.2d 1119 (5th Cir. 1981) (extrinsic

evidence of subsequent drug sales relevant and admissible to show state of mind, i.e., intent, at prior sale). The Defendant's broken hip after the shooting incident makes it more likely than not that he reacted reasonably when threatened by a tall, fit man roughly half his age.

Relevant evidence must also pass the Rule 90.403 balancing test. To be admissible, the probative value must not be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. Fla. Stat. 90.403. Here, the probative value is high as evidence of the Defendant's broken hip is absolutely necessary to prove that the Defendant was vulnerable to great bodily harm or death from even a minor strike. *See Citrus County v. McQuillen*, 840 So.2d 343, 345 (Fla. 5th DCA 2003) (gruesome photo of deceased body not unduly inflammatory and admissible to support plaintiff's version of events). The danger of any unfair prejudice is low to non-existent. It is known that the Defendant's reaction to the threat of harm or death took a life on January 13, 2014. That is lost on no one, least of all the Defendant. The jury will not be swayed to sympathy by evidence of a broken hip and decide to acquit the Defendant based upon this evidence. The jury is also fully capable of understanding that this injury happened after the shooting and not before or during and therefore will not be misled.

The State has failed to show that the evidence of the Defendant's broken hip after the shooting is irrelevant and is misguided as to purpose and evidentiary value of the evidence. The State has also failed to show how this evidence would be unduly prejudicial.

WHEREFORE, the Defendant respectfully requests that this Court deny the State's Motion and allow testimony regarding the Defendant's broken hip.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this has been furnished by Electronic Submission and United States Postal Service to: the Office of the State Attorney for the Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758, this 11th day of September, 2020.

/s/ Richard Escobar
Richard Escobar, Esquire
Escobar and Associates, P.A.
2917 W. Kennedy Boulevard, Suite 100
Tampa, Florida 33609
Tel: (813) 875-5100
Fax: (813) 877-6590
rescobar@escobarlaw.com
Florida Bar No. 375179
Attorney for Defendant

/s/ Dino M. Michaels
Dino M. Michaels, Esquire
Escobar and Associates, P.A.
2917 W. Kennedy Boulevard, Suite 100
Tampa, Florida 33609
Tel: (813) 875-5100
Fax: (813) 877-6590
dmichaels@escobarlaw.com
Florida Bar No. 526290
Attorney for Defendant

/s/ Jami L. Chalgren
Jami L. Chalgren, Esquire
Escobar and Associates, P.A.
2917 W. Kennedy Boulevard, Suite 100
Tampa, Florida 33609
Tel: (813) 875-5100
Fax: (813) 877-6590
jchalgren@escobarlaw.com
Florida Bar No. 122231
Attorney for Defendant