# Third District Court of Appeal

**State of Florida**

Opinion filed August 26, 2020.
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-980
Lower Tribunal No. 13-9567

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**Joel Gonzalez,**
Appellant,

vs.

**The State of Florida,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Carlos J. Martinez, Public Defender, and Susan S. Lerner, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and David Llanes, Assistant Attorney General, for appellee.

Before SALTER, LINDSEY and HENDON, JJ.

SALTER, J.

Joel Gonzalez appeals his convictions and sentences for aggravated burglary with a firearm (count 1), armed kidnapping with a firearm (count 2), attempted second degree murder with a firearm (count 3), and possession of a firearm by a convicted felon (count 4). Count 4 was bifurcated. Following the jury trial and a guilty verdict on counts 1 through 3, Gonzalez was sentenced on those counts to forty years in state prison followed by ten years of probation.

The trial court pretermitted a jury trial on bifurcated count 4 for possession of a firearm by a convicted felon, concluding that the element of "with a firearm" in counts 1 through 3 and the jury's verdicts on those counts sufficed (the defense had stipulated for purposes of count 4 that Gonzalez was a convicted felon). The trial court sentenced Gonzalez to a term of fifteen years in state prison on count 4, to be served concurrently with the forty-year term on the other counts.

On appeal, Gonzalez contends that he is entitled to a new trial based on three errors by the trial court:

1. The admission, over objection, of a glove found a week after the crime inside a van owned by Gonzalez's sister;

2. The trial court's failure to submit count 4, the charge for possession of a firearm by a convicted felon, to the jury; and

3. The trial court's consideration of Gonzalez's lack of remorse during the sentencing hearing.

We summarize the background and procedural history of the case in the circuit court, and then address in order the three points of error raised by Gonzalez. Finding each point well taken and independently sufficient, we reverse the convictions and sentences and remand the case to the trial court for a new trial. In an abundance of caution, we also direct that the new trial and any sentencing, should a conviction again ensue, is to be conducted by a different circuit court judge.[1]

**Background and Procedural History**

This case stems from a home invasion robbery perpetrated by two males in April 2013. The victim was home alone when two men forced their way inside. One man held the victim at gunpoint while the other ransacked rooms in the house. The victim was struck on the side of her head with the butt of the gun and then was shot in the side of the neck. After the intruders left, and noticing that her cellphone had been taken, the victim walked to the neighborhood beauty salon where fire rescue and police officers were called for assistance.

That same day, not long after the incident, Lieutenant De Los Santos happened to drive by the victim's neighborhood and saw two men walking around aimlessly near a busy intersection. On direct examination at trial, the lieutenant testified that he had seen the men walking from a white van. However, on cross-examination and

[1] See Chiong-Cortes v. State, 260 So. 3d 1154, 1155 (Fla. 3d DCA 2018).

after defense counsel refreshed his recollection with his prior deposition testimony from 2015, the lieutenant admitted that he never mentioned seeing a white van.

Thereafter, the lieutenant saw Gonzalez walk into the yard of a house that had a Ford Mustang for sale. Gonzalez peered into the Mustang and placed his hand on the front passenger side window as he did so. The lieutenant figured that the two men were only interested in the car and so he drove away without incident. Based on Lieutenant De Los Santos' observation, law enforcement recovered a latent palm print from the Mustang.

After further investigation, Gonzalez was considered a suspect. A photo lineup was conducted for the victim. The lineup contained six photographs of persons that looked like Gonzalez. The victim selected Gonzalez's photo and identified Gonzalez as the man who had shot her. Gonzalez was arrested six days after the home invasion and shooting. A white cargo van located at Gonzalez's residence and its contents were photographed. Crime scene investigators processed the victim's house, but no latent fingerprints were recovered.

At trial, the State called the victim and other witnesses to testify, including Lead Detective Cosner, Lieutenant De Los Santos, a crime scene investigator, a fingerprint examiner, and two civilians who were present the day of the incident. Two witnesses, Lieutenant De Los Santos and Ms. Arritola (who lived nearby) testified that they saw Gonzalez in the vicinity of the crime scene. Ms. Arritola testified that

Gonzalez looked like one of two men who came to her door around noon on the day of the incident looking for a man who did not live in Ms. Arritola's home.

The theory of defense was misidentification, as there was no direct physical evidence linking Gonzalez to the crime scene. Further, Gonzalez had noticeable tattoos along both of his arms and the victim never described her assailant as having tattoos. She testified at trial that she did not notice them. There was only circumstantial evidence potentially linking Gonzalez to the crime, including a latent palm print recovered from the Mustang parked a few blocks away from the victim's home and a glove that was found inside a van owned by Gonzalez's sister.

The defense filed a motion in limine to exclude two items that were found inside the white van that belonged to Gonzalez's sister. One item was a .380 shell casing different from the casing found inside the victim's home, which came from a .32 caliber gun. The other item found inside the van was a glove. Law enforcement searched the van after Gonzalez's sister, as owner of the vehicle, gave consent.

The State confirmed that the glove did not have any fingerprints, and later stated that the glove was never processed. The State's theory for admitting the glove into evidence at trial was that no DNA or fingerprint evidence was recovered at the scene of the crime. While Gonzalez held the victim at gunpoint, the other perpetrator, presumably wearing gloves, was ransacking the house. Thus, the State concluded this glove was probative that Gonzalez was involved in the crime. The trial court

ruled that the shell casing was out, but the glove was in. The prosecution introduced three photographs of the glove.

The jury deliberated for three days. During deliberation, the jurors sent out questions about the timeline of events testified to by the witnesses and the time the 911 call was made, and they asked why the interior of the van was not processed for evidence. On the third day, the jury sent a note stating that they could not "come to a unanimous decision." The trial court encouraged the jury to relax over lunch and look again through the evidence and answers to questions in an effort to reach a verdict. Later that day, the jury returned a guilty verdict on the lesser included offense of attempted second degree murder and guilty verdicts on the other offenses as charged.

As previously described, the trial court found the convictions on counts 1 through 3 were also sufficient to enter a judgment of conviction (without a separate jury trial and verdict) on the bifurcated count charging possession of a firearm by a convicted felon.

At the sentencing hearing, the trial court stated:

> So, as to the sentencing in Mr. Gonzalez, after reviewing the PSI, after hearing testimony from the victim and hearing arguments from both counsel, and Mr. Gonzalez, so you understand as well, **there's clearly been no sign of remorse or concern for the victim**. The victim has been put through multiple traumas of coming to court, both for the probation violation, here today, and during trial. [Emphasis provided].

Gonzalez did not admit guilt and did not attempt to raise remorse as part of his allocution at sentencing. Immediately after the trial court's pronouncement, the prosecution requested a sidebar, and the following discussion transpired:

> STATE: Your Honor, I'm just unclear with, like, basically your ruling. Your Honor can't consider his lack of remorse in determining your sentence.[2]
>
> THE COURT: That's correct.
>
> DEFENSE: You raised it as an issue specifically. You argued it in your sentencing, why the statement made by [the prosecution] is – the judge said what he said. You can't rule that out. This is the sentencing. So, I don't know why we're going to sidebar. This should be on the record.
>
> STATE: It is on the record.
> . . .
> THE COURT: I mean, it is on the record. I was reiterating what the comments were and what goes into [what] was said today, but again, as I said, sentencing is based on the crimes that were committed, and it's a 40 year sentence.

Following the entry of the judgment of convictions and sentences, this appeal was timely filed.

**Analysis**

I. The Photographs of the Glove

[2] This colloquy followed at least three references by the State to Gonzalez's lack of remorse during the State's presentation on sentencing. "[G]enerally, it is improper for the State to comment on a defendant's lack of remorse." Jordan v. State, No. SC18-899, 2019 WL 8161276, at *5 (Fla. Dec. 5, 2019) (but noting that an exception arises if the State's comments were in response to defense arguments based on remorse).

Gonzalez first contends that it was error for the trial court to deny his motion in limine and to admit photographs of a glove found a week after the crime inside of a van that belonged to his sister. Gonzalez argues this evidence was more prejudicial than probative and there was no direct link to the charged offenses. At trial, the glove recovered from the van belonging to Gonzalez's sister took on significance. During closing arguments, defense counsel argued a lack of evidence, including an absence of DNA evidence at the crime scene. The prosecution tried to explain the lack of fingerprint and DNA evidence by pointing to the glove recovered from the van and suggesting that the perpetrators must have used a glove or gloves to assure that no such evidence would be left at the crime scene.

"The standard of review of a trial court's ruling on a motion in limine is abuse of discretion. Such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an 'erroneous view of the law or on a clearly erroneous assessment of the evidence.'" Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012) (internal citations omitted).

Relevant evidence is defined as that which tends "to prove or disprove a material fact." § 90.401, Fla. Stat. (2018). In order to be admissible, evidence must be relevant. Id., § 90.402. Relevant evidence may be excluded, however, where "its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Id., § 90.403.

The Second District has held that evidence which is not connected to the charged offenses, nor to the defendant, is too prejudicial to be admitted into evidence. Green v. State, 27 So. 3d 731, 737 (Fla. 2d DCA 2010).[3] The Florida Supreme Court summarized the Second District's analysis in Green as follows:

> [T]he Second District Court of Appeal held that the trial court erred in admitting three firearms found in the defendant's home two days after the murder, none of which was tied to the charged offenses in any way. The State had argued . . . that the firearms were relevant to corroborate witness testimony. Id. The State had asserted that "the firearms were relevant to corroborate the codefendants' testimony that Green had firearms at his home and that they went to Green's house specifically to obtain firearms to use in the burglary." Id. As to two of the three firearms, which were found in the bedroom of the defendant's roommate, the Second District held that they were "completely irrelevant" because "[t]he fact that Green's roommate possessed two .380 semiautomatic firearms that were not connected to the charged offenses did not tend to prove or disprove any material fact in controversy and thus had absolutely no relevance whatsoever." Id. at 737–38. Accordingly, the Second District concluded that "those firearms should not have been admitted into evidence under any theory." Id. at 738.
>
> As to the remaining firearm, which was found in the defendant's bedroom, the Second District held that it was "marginally relevant" because it "would tend to render the proposition that the codefendants

[3] See also Pickard v. State, 666 So. 2d 579, 580 (Fla. 2d DCA 1996) ("We find that to admit testimony about the blood-spattered work shirt in these circumstances was error. Without being able to show whose shirt it was, whether it was worn by the [defendant] that evening, or what its relationship was to the events in question, there was no relevant basis upon which to admit testimony concerning the shirt as evidence of the [defendant's] guilt.").

> went to his house to get a firearm more probable." Id. However, the Second District then conducted the important balancing test under section 90.403, Florida Statutes, and determined that "any probative value of the firearm … was outweighed by the danger of unfair prejudice." Id. Utilizing the weighing test set forth in section 90.403 and the criteria set forth in Steverson v. State, 695 So. 2d 687, 689 (Fla. 1997), the Second District emphasized that evidence "requir[ing] an extended chain of inferences to be relevant or that suggests an improper basis for the jury's verdict should be excluded." Green, 27 So. 3d at 738. The Second District concluded that "any possible probative value of [the] firearm … was outweighed by the possibility that the jurors would improperly rely on this evidence to determine that since Green owned this .380 handgun, he must have owned another one that he used to commit the charged crimes." Id.

Agatheas v. State, 77 So. 3d 1232, 1236–37, 1240 (Fla. 2011) (footnote omitted).

Gonzalez contends that the admission of the photographs depicting the glove was an abuse of discretion, as the State did not present any evidence that a glove was used in the crime. Gonzalez further asserts that the error was not harmless, especially since the prosecution compounded the error of the admission of the photographs of the glove during closing argument by stating: "This glove just makes it more likely that these people were up to no good."

In Nshaka v. State, 92 So. 3d 843 (Fla. 4th DCA 2012), the Fourth District, applying Green, concluded that latex gloves found in the defendant's home eighty days after the burglary "should not have been entered into evidence because they did not tend to prove or disprove any material fact related to the precise charged offenses." Id. at 848. Moreover, the Fourth District disapproved of the State's intent "to introduce the gloves into evidence to show why there were no fingerprints on the

victim's vehicle." Id. Specifically, the Fourth District determined that "the State did not introduce evidence to show that those gloves were connected to that burglary charge, nor that the gloves were connected to [the defendant]." Id.

Similarly, in Lavallee v. State, 958 So. 2d 509, 510 (Fla. 4th DCA 2007), the Fourth District held that allowing testimony indicating that the defendant had gloves and a screwdriver in his pockets when arrested immediately after a burglary was an abuse of discretion. In reversing and remanding for a new trial, the Fourth District reasoned:

> [T]here was no evidence that [the defendant] used, or even attempted or intended to use, the screwdriver or gloves to facilitate his burglary of [the victim]'s home. Thus, . . . the evidence that [the defendant] possessed a screwdriver and gloves shortly after the burglary, and most probably during the burglary, was irrelevant. There was simply no connection shown between [the defendant]'s possession of the items and the crime charged. Indeed, the State compounded the error of the admission of the screwdriver and gloves by stating in closing arguments: "These are not items of a biker; these are items of a thief."

Id. at 511.

In all the cases cited above there is one recurring theme: the prosecution failed to establish a nexus between the evidence sought to be admitted and the charged offenses or the defendant. That is what happened here, and the trial court abused its discretion in admitting photographs of the glove in the van, which did not even belong to Gonzalez, discovered a week after the crime took place. The State did not present any evidence that a glove was used in the crime. None of the witnesses, including

the victim, testified that a glove was present at the crime scene. During cross-examination, the victim testified that she was not "paying attention" to whether the man holding her at gunpoint was wearing gloves and that she "didn't see any." The victim later testified: "I don't remember having seen any gloves."

The probative value, if any, of such evidence was far outweighed by its prejudicial effect. Clearly, there is nothing unlawful about keeping gloves in a car, and there was no direct connection between the glove and the crimes for which Gonzalez was charged. The photographs of the glove and the State's insinuation supported an improper implication that Gonzalez must have committed the crimes charged because (1) he was seen by a police officer near the scene of the crime and a palm print was later recovered from a car that was for sale a few blocks away, (2) no DNA or fingerprint evidence was found at the scene, and (3) a glove was recovered from a van parked where Gonzalez lived which might (or might not) have been used during the crime.

Based on such an extended chain of inferences, the photographs of the glove should have been excluded by the trial court. See Green, 27 So. 3d at 738. Moreover, the error was not harmless as the State compounded it during its closing argument by suggesting that Gonzalez was "up to no good" because a glove was recovered a week after the crime inside a van parked where Gonzalez resided.

For its part, the State argues that Gonzalez cannot establish unfair prejudice and that the photographs of the glove were relevant to the issue of the lack of fingerprints inside the victim's home. As support, the State cites Watkins v. State, 516 So. 2d 1043, 1046 (Fla. 1st DCA 1987), in which the First District held that there was no error in admitting surgical gloves found in a defendant's pocket after his arrest because they were relevant to the issue of the lack of fingerprints on a gun that was also found inside the defendant's car. However, Watkins is clearly distinguishable, and we must respectfully disagree with the dissent's reliance on that case.

In Watkins, the defendant was driving erratically and made several hand and body movements just before he was pulled over. Id. at 1044. In the immediately-ensuing search, the police officer found a pair of surgical gloves in Watkins' pants pocket and a gun underneath the front seat. Id. at 1045. Watkins was prosecuted for possession of a firearm by a convicted felon. At trial, expert testimony described nine latent prints found on the .45 caliber handgun, but only one of those was suitable for comparison (the match was to a passenger in the vehicle driven by the defendant). The fingerprint expert testified that he could not determine whether or not the other prints on the handgun came from a gloved human hand or otherwise, thus establishing an arguably-relevant link between the gloves found on Watkins' person and the gun found inside the car well within his reach. The First District concluded that "there

was no error in admitting the gloves into evidence as they were relevant to the issue of the lack of fingerprints on the gun." Id. at 1046.

Not only was there a reasonable connection between the gloves found in Watkins' pants pockets and the charged offense, but the gloves were found on **his** person, helping to explain the lack of fingerprints on the gun that he had inside **his** car. Here, the glove was not found on Gonzalez's person or even inside a vehicle that he owned. There was also no other evidence to link the glove to Gonzalez or to the crime. Accordingly, the trial court erred in admitting the photographs of the glove.

The State's brief further contends that there was evidence presented linking the glove to the crime because the glove was "found in the van used to facilitate Gonzalez's crimes." This contention is not supported by the record. There was no evidence or testimony presented at trial linking the van to the crime scene or to the commission of the crime. The van was not processed, and the only "link" that exists is Lieutenant De Los Santos' testimony that he saw a similar white van parked in the vicinity of the victim's home – not at the crime scene itself. The van was never processed for evidence, and the State never demonstrated that it was used for the commission of the crime.

Finally, the State argues that admitting the photographs of the glove was harmless because the evidence of guilt was overwhelming given that three witnesses

"placed Gonzalez **near** the victim's home around the time of the shooting," and "Gonzalez's palm print was collected from the Mustang parked **near** the victim's home." (emphasis added). But Gonzalez's alleged proximity to the crime scene is not conclusive evidence of guilt. As the Second District aptly stated:

> The defendant's close proximity to the actual commission of the crime does not alter the circumstantial nature of the evidence against him. The State has the burden of proving beyond a reasonable doubt all the elements of its case. Beyond this, where circumstantial evidence is relied upon, such evidence must be consistent with guilt; but further, must be inconsistent with any reasonable hypothesis of innocence. The circumstances, which themselves must be proven beyond a reasonable doubt, must be of such a conclusive nature that the defendant's guilt is proven beyond a reasonable doubt.
>
> * * * * *
>
> Circumstantial evidence is insufficient as a matter of law if it produces nothing more than a suspicion of guilt.

Whitehead v. State, 273 So. 2d 146, 147 (Fla. 2d DCA 1973) (internal citations omitted) (reversing and remanding for a new trial because evidence was inconclusive to link the defendant to either a robbery or a murder).

Moreover, the fact that the "victim provided a sketch that matched Gonzalez's appearance at the time of the shooting" does not establish overwhelming evidence of Gonzalez's guilt. During cross-examination, the victim was asked whether the photo that she had identified of Gonzalez resembled that of the man who held her at gunpoint. The victim testified: "Well, not very different" and "I was shown several pictures. I needed to select one."

The victim gave varying testimony regarding her assailant's physique as compared to Gonzalez's. For example, she described the armed assailant as having a full beard and a large afro haircut. When shown Gonzalez's booking photo, which depicted him with short hair and very little facial hair, the victim confirmed that the person in the photo had short hair and suggested "but, he can get a haircut." When asked whether she had described the scar or mark on Gonzalez's forehead as seen in his booking photo, the victim testified: "I didn't tell the officers. I didn't see it." Thus, the victim was not able to describe any noticeable characteristics of Gonzalez's physique, even though at the time she was being held at gunpoint she was looking at the assailant's face, hair, and the gun in his hand.

Applying these opinions to the record before us, we conclude that the trial court abused its discretion in denying Gonzalez's motion in limine and admitting the photographs of the glove found inside the van. The State failed to present any evidence of a nexus between the glove and the charged offenses or Gonzalez, and the glove was more prejudicial than probative. The error has not harmless because the State compounded the error during closing argument. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Thus, the convictions must be reversed, the sentences vacated, and the case remanded for a new trial.

## II. Bifurcated Charge: Possession of a Firearm by a Convicted Felon

Gonzalez next argues the trial court committed reversible error by not submitting the possession of a firearm by a convicted felon charge to the jury. The charge for possession of a firearm by a convicted felon, count 4, was bifurcated by the trial court. After the jury returned its verdict on the first three counts, the trial court stated:

> [Gonzalez has] been convicted of the two elements. The two elements to prove [are] that he's a convicted felon, [and] that he carried a weapon. Defense has stipulated that he is a convicted felon. It was proved in the verdict, and the jury has, already, found that he carried a firearm. He's already – both charges have already been proved. And, there's nothing else that needs to be done; he's convicted.

The State objected: "It's the State's position that the jury has to make a finding, as to Count Four, possession of a firearm by a convicted felon." The trial court replied: "Okay. Well, the State is, respectively, I think the State is wrong; okay?" There was no objection by defense counsel.

At the outset, there appears to be a question whether this alleged error was preserved. The State objected to the trial court's determination to adjudicate Gonzalez on count 4 based on the jury verdict (i.e., possession of a firearm) and the stipulation of the parties that Gonzalez was a convicted felon. The State objected, but the record shows that Gonzalez failed to object. Gonzalez asserts that a defense objection would have been an "exercise in futility" given the court's statement that the State's objection was wrong.

Statutory and case law alike require a defendant to preserve issues for appellate review by raising them initially in the trial court. Section 924.051, Florida Statutes (2018), addresses the "[t]erms and conditions of appeals and collateral review in criminal cases." It reads in part as follows:

> (3) *An appeal may not be taken from a judgment* or order of a trial court *unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or if not properly preserved, would constitute fundamental error.

§ 924.051(3), Fla. Stat. (2018) (emphasis added). See also Harrell v. State, 894 So. 2d 935, 939–40 (Fla. 2005).

In Florida, fundamental error is defined as an error that "can be considered on appeal without objection in the lower court." State v. Smith, 240 So. 2d 807, 810 (Fla. 1970); see also Caraballo v. State, 39 So. 3d 1234, 1249 (Fla. 2010) ("Fundamental error is that which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'"). This Court has defined fundamental error as "an error that would result in a miscarriage of justice if not considered . . . and is of such a nature that it essentially amounts to a denial of due process." Martinez v. State, 933 So. 2d 1155, 1158 (Fla. 3d DCA 2006).

In Walters v. State, 933 So. 2d 1229, 1231 (Fla. 3d DCA 2006), we held that in a case such as this, the jury must "reconvene in the second phase for the trial of the charge of possession of a firearm by a convicted felon." In that case, as in the present case, it was conceded by the defense that the defendant was a convicted felon, and in the first phase the jury verdict established that the defendant "possessed a firearm." Id.[4] While it may seem an empty exercise for the trial court to reconvene the jury only to instruct the jurors on both elements, the trial court is not free to supplant the jury as the ultimate finder of fact on the severed possession count. The error is fundamental. Gonzalez is also correct that an objection, following the objection on that point by the State and the response by the trial judge, would have been futile.

## III. "Lack of Remorse" at Sentencing

On Gonzalez's final point on appeal, at sentencing the trial court expressly mentioned Gonzalez's lack of remorse. See Green v. State, 84 So. 3d 1169, 1171 (Fla. 3d DCA 2012) (vacating sentence of conviction and remanding for a new

[4] In Walters, "the defendant had testified in the first phase and admitted that he was a convicted felon," and the State could "rely on that admission in phase two." 933 So. 2d at 1231. In the present case, following the phase one verdict, Gonzalez's attorney did not explicitly agree to the trial court's use of the stipulation that Gonzalez was a convicted felon as a basis for pretermitting phase two of the jury trial, and the State objected to such a procedure. That is not a stipulation to the procedural departure, as opposed to a partial stipulation to the fact that Gonzalez was a convicted felon. The trial court did not colloquy Gonzalez to determine his understanding of, and consent to, the trial court's shortcut after overruling the State's objection.

sentencing hearing because it was improper for trial court, in fashioning defendant's sentence, to consider defendant's silence and, by his silence, the failure to express remorse). A prior section of this opinion detailed the trial court's remarks regarding Gonzalez's lack of remorse, as well as the State's comments at sidebar that remorse was not a proper consideration during Gonzalez's sentencing.

Recently, in Chiong-Cortes v. State, 260 So. 3d 1154 (Fla. 3d DCA 2018), this Court reversed and remanded for a new sentencing based on the same issue. We held in that case that the trial judge had considered the defendant's lack of remorse in fashioning the sentence and reiterated:

> Although a defendant's expression of remorse and acceptance of responsibility are appropriate factors for the court to consider in mitigation of a sentence, a lack of remorse, the failure to accept responsibility, or the exercise of one's right to remain silent at sentencing may not be considered by the trial court in fashioning the appropriate sentence.

Id. (quoting Green, 84 So. 3d at 1171).

Here, as in Chiong-Cortes, we reverse the sentences and, "[a]s we have in the past, in an abundance of caution, we direct the new sentencing hearing be conducted by a different circuit court judge." Id. at 1155. Because we are reversing and remanding all four convictions for a new trial, the practical effect of this decision is to require the new trial and any sentencing (if a conviction ensues) to be conducted by a different circuit court judge.

Conclusion

Gonzalez's judgment of convictions and sentences are reversed on all four counts, and the case is remanded for a new trial. The new trial is to be conducted by a different circuit judge.

Reversed and remanded, with directions.

HENDON, J., concurs.

LINDSEY, J. (dissenting)

I respectfully dissent, in part, from the majority opinion. For the reasons set forth below, I would affirm the conviction but remand to the trial court for resentencing before a different trial judge.

The trial court's denial of Appellant's motion to exclude the photographs of the glove was not an abuse of discretion. Discretion "is abused only where no reasonable man would take the view adopted by the trial court." Nolte v. State, 726 So. 2d 307, 309 (Fla. 2d DCA 1998) (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). It has not been met here.

At trial, Appellant argued the lack of fingerprints found at the crime scene as support for his theory of misidentification. Our sister court in the First District has upheld the admission of gloves as relevant in a case where there were, likewise, no fingerprints. See Watkins v. State, 516 So. 2d 1043 (Fla. 1st DCA 1987). The First District found the gloves were properly admitted into evidence "as they were relevant to the issue of the lack of fingerprints on the gun." Id. at 1046. Similarly, in consideration with the other evidence in this case, the photographs of the glove were

relevant to show a lack of fingerprints found at the crime scene. Thus, I find no abuse of discretion in the trial court's denial of Appellant's motion in limine to exclude them.

I likewise disagree with the majority that, on the record before us, any objection to the trial court's failure to reconvene the jury to instruct the jurors on both elements of Count IV, possession of a firearm by a convicted felon, would have been futile. I further disagree with the majority's conclusion that the trial court's failure to reconvene the jury constituted fundamental error. The jury verdicts for the first three counts had already established that Appellant possessed a firearm. After trial and based on the jury's findings, the trial judge noted that the only remaining issue left to establish was whether Appellant was a convicted felon. In response, Appellant and the State informed the court as follows:

> THE COURT: Could I have the jury form, again, please?
>
> Okay. A few things. First, as to the bifurcated charge, I believe they have found all the elements in this verdict. But, I'm looking.
>
> The Defense has stipulated to the prior conviction.
>
> [DEFENSE COUNSEL]: That's correct, Judge.
>
> THE COURT: And, the jury has found the use of a firearm.
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: So, what element is left to prove?

[THE STATE]: Well, we have to prove that he is a convicted felon. And, prior -- before we started this trial -- Defense stipulated that --

THE COURT: Defense has stipulated to that.

[THE STATE]: Well, we do -- we're asking to enter a written stipulation to send that to the jury and -- for them to find --

THE COURT: So, as to the open charge, is Defense not stipulating to the charges?

[DEFENSE COUNSEL]: No, Judge. *We stipulated that he is a convicted felon*.

THE COURT: Correct.

[DEFENSE COUNSEL]: I mean, they came back that he is armed. So, I think the State has met their burden.

I think they came back -- if I heard, correctly, they came back -- they came back the highest felony they could on Count One.

They came back the highest felony they could on Count Two. And, on Count Three, if I heard, correctly, I think they came back attempted second.

[THE STATE]: Yes.

[DEFENSE COUNSEL]: Did I hear, correctly?

[THE STATE]: Yes.

[DEFENSE COUNSEL]: Right. So, it was armed kidnapping, burglary with a battery with a firearm, and attempted second-degree; correct?

*So, we've, already, stipulated that he's a convicted -- I don't think there is anything for the jury to do.*

[THE STATE]: I think they have to find him –

> THE COURT: No. The jury has, already, found everything. We have -- let's come sidebar for a minute.
>
> [DEFENSE COUNSEL]: Yes. I agree, Judge.

(Emphasis added).

Neither of the cases relied on by the majority, Walters v. State, 933 So. 2d 1229 (Fla. 3d DCA 2006) or Jackson v. State, 881 So. 2d 711 (Fla. 3d DCA 2006) involved stipulations. In Jackson, we explicitly stated:

> The jury's verdict established that the defendant possessed a firearm. On the charge of possession of a firearm by a convicted felon, the only remaining issue was whether the defendant was a convicted felon. *The defendant declined to stipulate that the trial judge could determine the existence of the prior convictions, so the defendant was entitled to have a jury determination that he was a convicted felon.*

881 So. 2d at 716 (emphasis added).

Likewise, in Walters, we expressly noted that the "defendant declined to stipulate that the trial judge could determine the existence of the prior convictions, so the defendant was entitled to have a jury determination that he was a convicted felon." 933 So. 2d at 1231 (quoting Jackson, 881 So. 2d at 716). We further explained that "[i]t was error for the trial court to make the factual determination, over the defendant's objection, that the defendant was guilty of the offense of possession of a firearm by a convicted felon." Id.

Appellant stipulated to the only element of the charge that was left to be proven at a second phase trial. Any objection by Appellant would not have been futile. This is because Appellant, in fact, invited the error. I find no fundamental error.

Finally, I concur with the majority that the case should be remanded to a different trial judge, in the event of an affirmance, for resentencing or, in the event of reversal, for a new trial and, in the event of another conviction, sentencing.