NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2004

AUDRIA D. GENSLER,	**	
Appellant,	**	
vs.	**	CASE NO. 3D02-3019
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 01-13142
Appellee.	**	

Opinion filed January 28, 2004.

An Appeal from the Circuit Court for Miami-Dade County, Jerald Bagley, Judge.

H. Dohn Williams, Jr. (Boca Raton), for appellant.

Charles J. Crist, Jr., Attorney General, and John D. Barker, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., LEVY and SHEVIN, JJ.

SHEVIN, Judge.

Audria D. Gensler appeals her conviction and sentence for vehicular homicide. We reverse and remand for a new trial.

Metro-Dade Police Officer Audria D. Gensler was dispatched to assist in a disturbance call at 3:00 a.m. On route to the

call, her patrol car struck a pedestrian who was standing in the right through traffic lane on South Dixie Highway. The victim was then run over by another vehicle. Prior to trial, the court prohibited introduction of any evidence regarding the victim's alcohol and cocaine intoxication, which the medical examiner had opined was sufficient to impair the victim's judgment. The court also prohibited testimony that it was common practice for prostitutes in that area to step out into the path of oncoming vehicles to get the drivers to stop.

The speed at which the officer's car was traveling prior to impact was highly contested at trial. The court permitted a medical examiner - who did not perform the autopsy - to testify, over defense objection, that the injuries to the body were consistent with having been hit by a vehicle traveling at 80 miles per hour. The examiner canvassed his co-workers and based his opinion on their collective ideas in view of victim injuries in other cases. Another expert testified that the car was traveling at 65 miles per hour. There was also testimony that the victim's death was inevitable, regardless of the vehicle's speed at the time of impact. Furthermore, the state was allowed to introduce evidence that Officer Gensler had been dispatched on a false alarm, and that she was using a cellular phone some time before the accident. Officer Gensler was convicted of vehicular homicide. Officer Gensler appeals.

A reversal is required in this case because of the many evidentiary errors. The trial court abused its discretion in excluding evidence of the deceased's crack cocaine and alcohol intoxication on the night of the accident, and testimony that area prostitutes commonly step into the path of oncoming vehicles. This information is relevant to the defendant's version of the events and explanation of the accident, and tends to demonstrate that the defendant may not be at fault for causing the accident. See Persaud v. State, 755 So. 2d 150 (Fla 4th DCA 2000); Bush v. State, 543 So. 2d 283 (Fla. 2d DCA), review denied, 548 So. 2d 663 (Fla. 1989). At the defendant's new trial, this evidence shall be permitted.

Second, the court erred in permitting the medical examiner to testify as to the defendant's rate of speed at the time of the accident based on the victim's injuries. The medical examiner stated that such a conclusion was beyond his field of specialty, and there was no predicate for admitting this testimony. See Laffman v. Sherrod, 565 So. 2d 760 (Fla. 3d DCA 1990).

Finally, it was also an abuse of discretion to allow the introduction of evidence regarding defendant's violation of various police department protocol, the case's notoriety, defendant's use of her cellular telephone before the accident, and that defendant was responding to a call that was later declared a false alarm. This evidence was not inextricably

intertwined with the charged crime. In addition, this evidence was not relevant to any issue in the case, and was unfairly prejudicial to the defendant and deprived her of a fair trial. See Stephens v. State, 787 So. 2d 747 (Fla.)(relevant evidence has logical tendency to prove or disprove a fact of consequence to the outcome of the case), cert. denied, 534 U.S. 1025 (2001).

Moreover, any mention of police department protocols regarding lunch break procedures, or use of emergency lights, and the emphasis placed on this evidence at closing argument, was improper. Although this case does not involve the introduction of police manuals, per se, the prosecution's introduction of the department protocols created a "false standard in the measure of reckless driving[,]" Lozano v. State, 584 So. 2d 19, 24 n.8 (Fla. 3d DCA 1991)(citing Pitts v. State, 473 So. 2d 1370 (Fla. 1st DCA 1985)), review denied, 595 So. 2d 558 (Fla. 1992), an element of the vehicular homicide offense with which the defendant was charged. This evidence permitted the jury to hold the defendant to a higher standard than that to which any ordinary citizen would have been held.

Based on the foregoing, we reverse the conviction and sentence, and remand for a new trial.

LEVY,J., concurs.

SCHWARTZ, Chief Judge (specially concurring in part, dissenting in part).

While I disagree with the majority as to the other evidentiary points it relies upon, because I think that they involve either no error,[1] no harm, or both, I concur in reversal solely because of the exclusion of evidence concerning the decedent's drug and alcohol use prior to the accident. I would agree that, in the "ordinary" case, such evidence is properly excludable because it does not directly relate to any pertinent issue, including that of legal cause. See Filmon v. State, 336 So. 2d 586 (Fla. 1976), cert. denied, 430 U.S. 980, 97 S.Ct. 1675, 52 L.Ed.2d 375 (1977); Palmer v. State, 451 So. 2d 500 (Fla. 5th DCA 1984), pet. for review denied, 461 So. 2d 115 (Fla. 1985). In this instance, however, in an attempt to carry its burden of proving the vital element that the defendant's excessive speed was a legal cause of the accident,[2] the state

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[1] This is particularly true of the ruling that evidence of the defendant's alleged violation of certain police rules was improperly admitted. Specifically unlike Lozano, in which the police manual which was introduced into evidence to demonstrate the standard of care required of policemen in the commission of the very acts of which he was accused, the defendant's violation of the rules in this case was merely admitted to show a motivation for her alleged excessive speed. I think that was perfectly appropriate.

[2] In the light of the fact that there was no evidence whatever as to how the decedent got into the roadway or her reactions thereafter, I think that there may have been a total absence of evidence of legal cause in this case, so that a directed verdict might have been appropriate. It is not

affirmatively introduced "expert" testimony that a normal person would have been able to see and get out of the way of a vehicle traveling at a reasonable speed, but presumably could not have done so when confronted with one, like the defendant's, traveling at eighty to ninety miles per hour. In these circumstances, it was obviously appropriate, indeed vital, to show that this decedent was not an ordinary citizen, but one apparently incapable of protecting herself because of her consumption of drugs and alcohol. See Smith v. State, 65 So. 2d 303 (Fla. 1953); Persaud v. State, 755 So. 2d 150 (Fla. 4th DCA 2000).

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necessary, however, further to explore the issue, since the point was not presented on appeal because, we were told at oral argument, appellant's counsel did not consider that it had been appropriately preserved below.