NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

MATTHEW KENNETH ROBINSON
Appellant,

v.

Appeal No. CRC 14-00014 APANO
UCN: 522014AP000014XXXXCR

STATE OF FLORIDA
Appellee.
_____/

Opinion filed September 11, 2014.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Cathy McKyton

Thomas Matthew McLaughlin, Esquire
Attorney for Appellant

Jason Gell, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

Andrews, Judge.

THIS MATTER is before the Court on Appellant, Matthew Kenneth Robinson's appeal from a conviction, after a jury trial, of Battery. Appellant argues, among other things, the trial court erred by limiting cross-examination of the victim. We reverse.

Background

The Appellant's current wife is the victim's ex-girlfriend. The victim shares a child with his ex-girlfriend. The victim has been designated the custodial parent. The Appellant alleges that the victim struck him and he responded striking the victim several times in self-defense. At trial, on cross-examination of the victim, the Appellant sought to ask the victim questions related to the custodial arrangements as evidence of the victim's motives for striking the Appellant and to attack his credibility. The trial judge prohibited the testimony finding it irrelevant.

Standard of Review

"Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." *Ray v. State,* 755 So.2d 604, 610 (Fla. 2000). The failure to admit relevant testimony is subject to the harmless error analysis. *Marquard v. State,* 850 So.2d 417, 425 (Fla. 2002). "Under Florida's harmless error analysis, the reviewing court must determine "whether there is a reasonable possibility that the error affected the verdict." … The State, as the beneficiary of the error, has the burden to show that the error was harmless. … 'If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.'" *State v. Lopez*, 974 So.2d 340, 350-351 (Fla. 2008) (internal citations omitted).

Law, Analysis and Conclusion

It is the state who has to prove the defendant's guilt beyond every reasonable doubt. When the state presents witness testimony the credibility of the witness and the motive for the witness's testimony are at issue. Ehrhardt, *Florida Evidence*, 555 (2014 ed.). "Regardless of the subject matter of the witness's testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness's testimony." *Id.* at 555-556. The defense is entitled to

"wide latitude to demonstrate bias or possible motive for a witness's testimony. Any evidence tending to establish that a witness is appearing for the state for any reason other than to tell the truth should not be kept from the jury." *Lavette v. State*, 442 So.2d 265 (Fla. 1 DCA 1983) (citations omitted).

> Every defendant is entitled to present any evidence that tends to support the defendant's theory of defense. *See Vannier v. State,* 714 So.2d 470, 472 (Fla. 4th DCA 1998). "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. § 90.404(2)(a), Fla. Stat. (1985). However, the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." *See Rivera v. State,* 561 So.2d 536, 539 (Fla.1990). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat.

Patrick v. State, 104 So.3d 1046, 1056 (Fla. 2012). Where even the slightest relevant evidence exists supporting the theory of self-defense all doubts as to the admissibility of that evidence should be resolved in the favor of the defendant. *Arias v. State,* 20 So.3d 980, 984 (Fla. 3d DCA 2009) (citations omitted); *Edwards v. State*, 39 So.3d 447 (Fla. 4 DCA 2010).

In this case the theory of defense was self-defense. In an effort to attack the credibility of the victim and to support the self-defense theory the Appellant sought to cross-examine the victim about an ongoing family law case and related issues. The testimony was proffered. The proffered evidence revealed that in current posture of the family law case the victim has primary residential responsibility for a minor child he shares with the Appellant's then girlfriend. The victim testified that he obtained primary residential responsibility when the child's mother decided she could not handle raising the child and gave primary residential responsibility to him. The victim testified that the only issues outstanding before the family law judge at this time related to the failure of the child's mother to pay support. The victim did, however, express that he would like to have "more custody" of the child because the Appellant and the child's mother

"can't act like adults and behave." The trial judge was concerned that allowing testimony about the family law matters would turn the criminal trial into a mini trial on the outstanding family law matters. For this reason she refused to allow the defense to inquire about the family law related matters.

The evidence in the proffer is thin in support of the defense theory that the victim may have pushed or "glanced" the Appellant's chest to seek an advantage relating to child custody even though the evidence presented in the proffer revealed that at the time there was no dispute pending before the family law court related to child custody. That the victim was so Machiavellian that he was able to: 1) plot either in advance or impromptu to push the Appellant knowing pushing the Appellant would cause him to strike the victim; 2) understand that being struck by the Appellant would cause him injury; 3) assume that independent witnesses would be present who would not see him push the Appellant; 4) understanding that those independent witnesses would relate the same to the police; 5) know that the police would then arrest the Appellant and charge him with battery which would then assist him when seeking an advantage in a child custody case that wasn't active at the time is at best a stretch. Yet still, evidence was presented, though slight, to support the theory and allow the inquiry. The trial judge exceeded the scope of her authority by preventing the defense from offering this theory of defense and/or attack on the credibility of the witness. It is the jury's job and not the trial judge to assess the credibility of the theory and the witness. *See Hendrickson v. State*, 851 So.2d 808 (Fla. 2 DCA 2003) ("It was the jury's province, and not that of the trial judge, to determine the strength or weakness of defense counsel's theory of defense."). The witness's testimony and credibility were critical at trial, not collateral and relevant. The error is not harmless.

We have considered the other assignments of error complained of by the Appellant in this appeal. However, because the issue of prohibiting a full cross-examination of a state witness is dispositive, we do not find it necessary to address the merits of any other matters or issues brought before us on appeal.[1]

Conclusion

After review of the record and the briefs, this Court finds the trial court should have allowed the Appellant to cross examine the involved witness and the judgment and sentence entered by the trial court should be reversed.

IT IS THEREFORE ORDERED that the conviction of the Appellant is reversed and the matter is remanded to the trial court for a new trial.

ORDERED at Clearwater, Florida this 11th day of September 2014.

Original order entered on September 11, 2014 by Circuit Judges R. Timothy Peters, Michael F. Andrews, and Raymond O. Gross.

[1] We note that at trial considerable time was devoted to addressing defense counsel's failure to timely object to an improper comment on the defendant's right to remain silent. The failure to object intentionally *or inadvertently* waives the issue for appellate purposes. *See State v. Cumbie,* 380 So.2d 1031, 1033 (Fla.1980) ("Ordinarily, to preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver."). A motion for mistrial without objection cannot serve as a substitution for the failure to object and does not revive the issue or preserve the issue for appeal. *See Nixon v. State,* 572 So.2d 1336, 1340–41 (Fla.1990) (A motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve a claim).

cc: Honorable Cathy McKyton
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Office of the State Attorney