IN THE
SUPREME COURT OF THE UNITED STATES

NO: 1D17-3675

APPENDIX

Mario Daniels, DC # N17238
DeSoto Correctional Institution Annex
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

Pro Se Petitioner

EXHIBIT "A"

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-3675

MARIO DANIELS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

June 8, 2020

WINOKUR, J.

A jury found that Mario Daniels committed aggravated assault while possessing and discharging a firearm, in addition to other crimes. After appellate counsel filed an *Anders*[1] brief, we directed briefing as to whether Daniels' motion for judgment of acquittal on his aggravated assault charge should have been granted based on the victim's testimony that she was not put in fear. After briefing, we find that our precedent requires affirmance.

[1] *Anders v. California*, 386 U.S. 738 (1967).

Trial

In between arguments, threats, and punches, Mario Daniels and his then-girlfriend, the victim, decided to break up. Daniels packed up his belongings from the victim's house and drove, with the victim in the passenger's seat and her children in the back, to another woman's house. During the drive, Daniels threatened to shoot and kill the victim multiple times and, as the car stopped, he took out a pistol and fired it several times through a window. The victim, again in a relationship with Daniels at the time of trial, denied that Daniels had hit her and stated that she did not remember whether he shot a gun while next to her in the car. The victim acknowledged previously telling police that Daniels had shot the gun out of the car, but testified that she did not see him with a gun, no gun was pointed at her, and she was never in fear from having a gun pointed at her. The jury found that Daniels did in fact commit an aggravated assault against the victim and fired a gun.

Analysis

Section 784.011, Florida Statutes, prohibits assault, which "is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."[2] Daniels argues that the statute requires that the threat must objectively be one that would put a reasonable person in fear ("well-founded") and subjectively does put the victim in fear ("creates . . . fear in such other person"). Because the victim denied that she was in fear, Daniels argues that the State presented insufficient evidence of assault. We disagree.

This Court and others have held that whether the victim actually testifies that he or she was in fear is not conclusive of the fear element, as long as "a reasonable person would experience a well-founded fear of imminent harm." *Tash v.*

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[2] An aggravated assault is an assault 1) with a deadly weapon without an intent to kill, or 2) with an intent to commit a felony. § 784.021, Fla. Stat.

Rogers, 246 So. 3d 1304, 1305 (Fla. 1st DCA 2018) ("Appellate courts apply an objective standard in determining whether a reasonable person would experience a well-founded fear of imminent harm."). *See also Fussell v. State*, 154 So. 3d 1233, 1236 n.5 (Fla. 1st DCA 2015) (In determining whether evidence of assault is sufficient regarding the victim's fear, "[w]e have rejected the view that the state must meet both an objective and a subjective standard.").

This issue mostly arises when a victim either does not testify or does not specifically testify as to whether he or she was put in fear by the defendant's threat, but the fact finder can infer that the victim was fearful. In this situation, every district court has held that an objective standard applies, irrespective of the lack of the victim's testimony. *See, e.g.*, *Bryant v. State*, 154 So. 3d 1164, 1165 (Fla. 2d DCA 2015); *Johnson v. State*, 888 So. 2d 691, 693 (Fla. 4th DCA 2004) (noting that "the fact the victim did not testify, and thus could not describe or articulate any such fear, does not bar a conviction"); *L.R.W. v. State*, 848 So. 2d 1263, 1266 (Fla. 5th DCA 2003) (holding that "[i]f the circumstances are such as would ordinarily induce fear in the mind of a reasonable person, then the victim may properly be found to have been in fear"); *Calvo v. State*, 624 So. 2d 838, 839 (Fla. 5th DCA 1993) (noting that "a court may find that the victim was in fear without the victim testifying as to the victim's own state of mind concerning fear"); *McClain v. State*, 383 So. 2d 1146, 1147 (Fla. 4th DCA 1980) (noting that "there is no requirement that the victim in an assault actually testify to his own state of mind"); *Gilbert v. State*, 347 So. 2d 1087, 1088 (Fla. 3d DCA 1977) (holding that "where the circumstances were such as to ordinarily induce fear in the mind of a reasonable man, then the victim may be found to be in fear, and actual fear need not be strictly and precisely shown"). However, courts have applied an objective standard even when the victim *denies* being in fear. *See Sullivan v. State*, 898 So. 2d 105, 108 (Fla. 2d DCA 2005) (holding that the deputy's "testimony that during the episode, he did not believe that violence to him was imminent" was "not dispositive" to determine if the defendant committed an assault); *Thomas v. State*, 183 So. 2d 297, 300 (Fla. 3d DCA 1966) ("Even though the victim herein testified that he was never in fear . . . the proper rule is that if the circumstances attendant to the robbery were

such as to ordinarily induce fear in the mind of a reasonable man, then the victim may be found to be in fear, and actual fear need not be strictly and precisely shown.").[3] This result logically follows from the use of an objective standard. A denial of fear is certainly a factor that may be weighed against other circumstances presented, but it is not conclusive. And in this case, there is evidence to support the conclusion that Daniels' conduct was sufficient to create well-founded fear.[4]

As Daniels' threats and actions could create a well-founded fear of imminent violence in a reasonable person, *see Williams v. State*, 238 So. 3d 915, 916-17 (Fla. 1st DCA 2018), we affirm his conviction for aggravated assault.

AFFIRMED.

M.K. THOMAS, J., concurs; MAKAR, J., concurs specially with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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[3] While *Thomas* was a robbery case, robbery is theft "when in the course of the taking there is the use of force, violence, *assault, or putting in fear.*" § 812.13(1), Fla. Stat. When the robbery involves assault or putting in fear, the fear element is the same as assault. For example, in describing the analysis of the fear element in *Fussell*, this Court cited *Thomas v. State*, 989 So. 2d 735 (Fla. 1st DCA 2008) and *Cliett v. State*, 951 So. 2d 3 (Fla. 1st DCA 2007), both robbery cases.

[4] We reject Daniels' argument that the evidence was not sufficient to induce well-founded fear of imminent violence notwithstanding the victim's testimony.

MAKAR, J., concurring specially.

The element of victim fear, and its proof at trial, is at issue in this aggravated assault case, one in which the defendant verbally threatened his on-again/off-again girlfriend and then fired a gun out of the window of the car in which they were traveling, but she disavowed any fear about the episode at trial. Defendant says a judgment of acquittal is required because the victim said she lacked fear; the State says it need only prove that the victim should have been in fear, as the jury was instructed. The language of the assault statute favors the defendant's view, but the interpretive trend in Florida has been to uphold the use of a reasonable person standard by which fear may be inferred and, as here, the victim's motive to deny fear can be explained.

To begin, by statute an "'assault' is an intentional, unlawful threat by word or act to do violence *to the person of another*, coupled with an apparent ability to do so, and doing some act which creates *a well-founded fear in such other person* that such violence is imminent." § 784.011(1), Fla. Stat. (2020) (emphasis added). "Aggravated assault" is "an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony." *Id.* § 784.021(1)(a) & (b).

By their terms, the statutory phrases "to the person of another" and "fear in such other person" clearly require that a specific victim actually be in fear as an element of an assault (or an aggravated assault). *Fussell v. State*, 154 So. 3d 1233, 1236 (Fla. 1st DCA 2015) ("In assault cases, the state must prove the victim was in fear."). For this reason, proof of fear in an assault case focuses upon "the person" who is the victim of the assault; it is a subjective, person-centric inquiry. Indeed, in multiple victim cases an "individual determination is called for as to *each* alleged victim of assault." *Id.* (emphasis added).

This person-centric feature of the assault statute, however, has been interpreted differently depending on whether the victim testifies or not. In cases where the victim testifies, the State must meet both a subjective and objective standard of proof; in cases where the victim does not testify, it need not. And the statutory language has been diluted by judicial reliance on caselaw

involving other crimes, such as robbery, which do not have a requirement of actual victim fear.

When a victim of an alleged assault *testifies*, a two-part inquiry applies: the evidence must show an actual, subjective fear on her part to satisfy the statute; but the evidence must also show that her fear was "well-founded" and objectively reasonable under the circumstances. *See, e.g., L.R. v. State*, 698 So. 2d 915, 916 (Fla. 4th DCA 1997) ("Where the victim testifies, the victim's subjective perception of fear, so long as it is determined to be well-founded, is sufficient to prove the element of fear."). Consistent with the assault statute's language, a subjective, actual fear on the victim's part must exist and it must be objectively "well-founded" to establish the element of victim fear.[1] Both a subjective fear and an objective basis for that fear must be shown; it is misnomer to say otherwise.

When the victim of an alleged assault *does not testify*, and her subjective, actual fear is *unknown*, an exception has evolved to the long-standing general rule[2] that the assault victim must be shown to have actually experienced fear. To fill the evidentiary

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[1] In these situations, appellate courts have upheld convictions for assault where the victim said she was subjectively fearful, and the fear was deemed well-founded under an objective standard of reasonableness. *See, e.g., M. M. v. State*, 391 So. 2d 366, 367 (Fla. 1st DCA 1980) (victim testified that he was not afraid of defendant until he pointed gun at him). Likewise, courts have overturned convictions where the victim testified she was subjectively fearful, but the fear was not well-founded under an objective standard of reasonableness. *See, e.g., L.R.*, 698 So. 2d at 916 (victim's equivocal testimony that she "might have been fearful" insufficient).

[2] *See State v. White*, 324 So. 2d 630, 631 (Fla. 1975) (rejecting State's argument that such evidence is not required), *aff'g, White v. State*, 299 So. 2d 143, 144 (Fla. 1st DCA 1974) (holding that victim fear is an element of aggravated assault and that defendant was entitled to instruction allowing evidence that victim was not placed in fear).

gap, courts have used a substitute for the required element of actual fear: whether a reasonable (but imagined) person would feel fear under the circumstances; if so, it can be inferred that the victim must have too.

Under this approach, the defendant can be convicted of assault without evidence of the victim's actual fear, provided evidence exists that she should have been fearful; indeed, one victim's testimony that she was fearful can be deemed sufficient to prove fear by a second victim who did not testify, in essence a form of transferred fear. *Thomas v. State*, 989 So. 2d 735, 736 (Fla. 1st DCA 2008) (testimony of victim as to facts surrounding an offense sufficient as to second victim who did not testify). This approach is an important one, particularly where a victim is unable to testify or lacks memory as to how the assault occurred.

A standard jury instruction—used in this case—was developed long ago to address situations where a victim does not testify.[3] Notably, the three cases cited by the standard jury instruction committee in support of the instruction's application in assault cases each involve either (a) the lack of witness testimony as to fear in an assault case or (b) a robbery case.[4] The interlacing of these two lines of precedent (no witness

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[3] Fla. Std. Jury Instr. (Crim) 8.2. ("If the circumstances were such as to ordinarily induce a well-founded fear in the mind of a reasonable person, then (victim) may be found to have been in fear, and actual fear on the part of (victim) need not be shown.").

[4] *McClain v. State*, 383 So. 2d 1146, 1147 (Fla. 4th DCA 1980) (recognizing that victim fear is required but that a "very clear inference" of fear was shown such that a "jury could find that a reasonable man under such circumstances would be afraid and that these individuals were in fact in fear."); *Smithson v. State*, 689 So. 2d 1226 (Fla. 5th DCA 1997) (robbery case); *Gilbert v. State*, 347 So. 2d 1087 (Fla. 3d DCA 1977) (extending the ruling from a robbery case where victim did not testify to aggravated assault such that "fear in the mind of a reasonable man" need only be shown and "actual fear need not be strictly and precisely shown").

testimony/robbery) has resulted in somewhat imprecise language saying that a subjective and objective test is *not* always required under section 784.011, the assault statute. *See Fussell*, 154 So. 3d at 1236 (this Court has "rejected the view that the state must meet both an objective and a subjective standard."). Like the standard jury instruction committee, support for this statement is also found in cases where (a) the victim *did not testify* at all or as to her fear or (b) the offense at issue (such as robbery) involved *different statutory language* thereby limiting its application to those situations, not the one at issue here. *Id.*

Reliance on robbery cases is inapt because the robbery statute's language is markedly different from the assault statute's as to the fear element. Robbery requires that during "the course of the taking there is the use of force, violence, assault, or *putting in fear.*" § 812.13, Fla. Stat. (2020) (emphasis added). This language does not require that "putting in fear" be directed at a particular "person," only that the inducing of fear generally existed in the commission of the taking.[5] In contrast,

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[5] *Cliett v. State*, 951 So. 2d 3, 4 (Fla. 1st DCA 2007) (noting that the standard instruction on robbery "does not use the term 'subjective,' nor does it ask the jury to view the circumstances from the victim's point of view. The instruction simply asks whether, from a jury's external viewpoint, the victim was put in fear-an objective analysis."); *see also Gilbert v. State*, 347 So. 2d 1087, 1088 (Fla. 3d DCA 1977) ("we find that the defendant's action in pointing the pistol at the victim's head in plain view of the victim and other persons present met all of the essential elements of aggravated assault. It is unlikely in the course of human events that a person in [victim's] circumstances would not have a well-founded fear that violence is imminent when a pistol is pointed at her head."); *Thomas v. State*, 183 So. 2d 297, 300 (Fla. 3d DCA 1966) ("Even though the victim herein testified that he was never in fear we do not perceive that this is the effective rule. It seems to us that the proper rule is that if the circumstances attendant to the robbery were such as to ordinarily induce fear in the mind of a reasonable man, then the victim may be found to be in fear, and actual fear need not be strictly and precisely shown.").

the language in the assault statute requires a threat to a "*person* of another" and a "well-founded fear in such other *person.*" *Id.* § 784.011(1) (emphasis added). Plainly, the statutory language is different; the assault language personalizes the element of fear in a particular person while the robbery statute does not; the former emphasizes an actual subjective and well-founded fear in a real person while the latter relies upon a more general finding that a reasonable person (not the actual person) would have been put in fear under the circumstances of the robbery. Nonetheless, Florida's jurisprudence on assault has a dose of robbery principles injected into it.

This all leads to the question of what happens when the victim testifies that she was *not fearful* during an alleged criminal episode, as occurred here. In a civil assault case based on general tort principles, the lack of fear/apprehension/anticipation[6] dooms the victim's claim for lack of a key element. But in a criminal case, which has broader societal concerns and purposes, can the victim's testimony that she lacked subjective fear be disregarded and replaced with an objective standard of whether a reasonable person would have been fearful, even if she was not? That's what happens when a victim does *not* testify, so why shouldn't it apply here where she *does*?

One searches long and hard to find a published Florida appellate case that directly explains what ought to happen when an assault victim expresses no fear, but a reasonable person would. The closest is *Sullivan v. State*, 898 So. 2d 105, 108 (Fla. 2d DCA 2005), where an officer testified at trial that he "did not believe that violence to him was imminent." On appeal, the

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[6] *See generally* Restatement (Third) of Torts: Inten. Torts to Persons § 105 T.D. No 1 (2015). Of note, most jurisdictions do not require fear, only that the assault victim apprehended or anticipated an imminent harmful or offensive contact to recover in tort. *Id.* ("A better and more precise term [for apprehension] is anticipation—that is, a conscious belief that harmful or offensive contact is imminent, whether or not the plaintiff is fearful of that outcome.").

defendant argued that the officer's lack of fear of imminent harm necessitated a judgment of acquittal on the aggravated assault charge. The Second District agreed, concluding that the "State failed to present sufficient evidence that the officer had a well-founded fear that violence was *imminent*" under the circumstances. *Id.* at 106 (emphasis added). As emphasized, the deciding factor in *Sullivan* was the lack of *imminent* violence to the officer (who was outside the path of harm) such that any fear would be unfounded. Stated differently, whether the officer had expressed fear or not was irrelevant in the legal analysis because any such fear would not be "well-founded" under the objective part of the assault statute under the circumstances.

The holding as to lack of imminence should have ended the legal analysis because the officer's subjective view played no role in it. The panel in *Sullivan*, however, had said in passing that "for the purpose of assault, it is not always necessary for the victim to testify that he was afraid. . . . Where 'the circumstances were such as to ordinarily induce fear in the mind of a reasonable man, then the victim may be found to be in fear, and actual fear need not be strictly and precisely shown.'" 898 So. 2d at 108 (citations omitted).[7] It then made the dubious and unnecessary statement that the officer's "subjective view of his lack of fear is not dispositive of the legal import of [defendant's] actions." *Id.* Because the panel held that a well-founded fear hadn't been proven, its statement as to the lack of importance of the officer's subjective view was unnecessary and clearly dicta.

Nonetheless, this pronouncement took on a life of its own as then-Chief Judge Casanueva explained in his concurrence to the

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[7] These statements are extrapolated from two distinguishable Third District cases involving, as one might expect, no victim testimony and a robbery. *Biggs v. State*, 745 So. 2d 1051, 1053 (Fla. 3d DCA 1999) (no testimony from victims); *Gilbert v. State*, 347 So. 2d 1087, 1088 (Fla. 3d DCA 1977) (concluding that it saw "no reason why the same rule [applied in robbery cases] should not apply to aggravated assault" where victim does not testify directly as to fear).

per curiam affirmance in *S.P.M. v. State*, 66 So. 3d 317 (Fla. 2d DCA 2011), an aggravated assault case where the victim testified to a lack of fear. His thoughtful and thorough analysis explains how and why *Sullivan* may have jumped the gun jurisprudentially and why a strict construction of the assault statute did not justify displacement of the subjective standard. *Id.* at 318 ("I write to express my concern that our case law deviates from the plain meaning of the legislature's words in section 784.011(1)."). He concluded as follows:

> The fact that this court is bound by its prior decision in *Sullivan* is the only reason I concur with my fellow judges. Before *Sullivan,* the reasonable person standard . . . had only been used when there was no direct evidence of the victim's fear or lack thereof. By utilizing a reasonable person standard in a case where the victim testified that he was not afraid and there was no evidence to the contrary, the *Sullivan* court essentially eliminated the subjective standard that the statute requires. I respectfully disagree with this court's holding in *Sullivan* that the reasonable person standard should be applied even in the face of direct, uncontroverted evidence from the victim regarding his subjective state of mind. However, because I am bound by that precedent, I concur in result only.

S.P.M., 66 So. 3d at 321 (citations omitted). Though Judge Casanueva accepted *Sullivan* as binding, it is not at all clear that the contested language was anything but dicta.

That said, Judge Casanueva's plain reading of the assault statute and its requirement of subjective fear would likely prevail in a case where the victim "testified that he was not afraid *and there was no evidence to the contrary*" presented. *Id.* at 321 (emphasis added). In this case, however, there is evidence to the contrary, making the jury's consideration of an objective standard defensible. Unlike tort law (whose primary goal is remediating personal losses caused by others), the criminal laws serve broader societal purposes such as retribution, deterrence, restoration, avoiding recidivism, and rehabilitation. Society has an interest in ensuring that criminal conduct is punished and deterred even

where a victim may want to refrain from participating as a witness, perhaps due to the status of the defendant (family/friend/etc.), fear of the defendant, and the like. Where a victim has a motive to disclaim or diminish her fear, perhaps to protect a defendant, it becomes justifiable to allow a jury to determine the truth, which may be that the victim's testimony is unreasonable or unbelievable under the circumstances. Just as a jury may reject a victim's testimony that she *was fearful*, finding it not well-founded under the circumstances, a jury may also reject a victim's testimony that she *wasn't fearful*, finding that a reasonable person would have had a well-founded fear under the circumstances. Affirmance is thereby warranted.

Valarie Linnen, Jacksonville, for Appellant.

Ashley Moody, Attorney General, and Robert Quentin Humphrey, Assistant Attorney General, Tallahassee, for Appellee.

EXHIBIT "B"

Supreme Court of Florida

WEDNESDAY, MARCH 10, 2021

CASE NO.: SC20-1651
Lower Tribunal No(s).:
1D17-3675;
372016CF000959AXXXXX

MARIO DANIELS vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, LAWSON, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

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Served:

QUENTIN HUMPHREY
ROBERT "CHARLIE" LEE
MARIO DANIELS
HON. GWEN MARSHALL, CLERK
HON. KRISTINA SAMUELS, CLERK
HON. ANGELA COTE DEMPSEY, JUDGE

Supreme Court of Florida

WEDNESDAY, DECEMBER 2, 2020

CASE NO.: SC20-1651
Lower Tribunal No(s).:
1D17-3675;
372016CF000959AXXXXX

MARIO DANIELS vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

In reviewing our records, we note that your case is subject to dismissal for failure to comply with this Court's direction. *See* Fla. R. App. P. 9.410.

We have not received the petitioner's jurisdictional brief with appendix in accordance with Florida Rule of Appellate Procedure 9.120(d). Failure to file the above referenced documents with this Court within 15 days from the date of this order could result in the imposition of sanctions, including dismissal of the petition.

Please understand that once this case is dismissed, it may not be subject to reinstatement.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

db
Served:

ROBERT Q. HUMPHREY
MARIO DANIELS