

THE ADMISSIBILITY OF WEAPONS NOT USED IN THE CRIME CHARGED

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In many prosecutions in which weapons have been used to commit charged offenses, the State seeks to introduce into evidence weapons not actually used in the crime but purportedly related either to the charged crime or to the credibility of a witness. For years, courts have struggled with the issue of whether the State has established the relevancy of a weapon not used in the crime underlying the case at hand as well as whether the admission of a weapon under those circumstances would cause unfair prejudice to the defendant. Case law on the relevancy of weapon evidence presents a myriad of opinions with fine and detailed distinctions in reasoning and conclusions. Not too long ago, Florida's high court weighed in on the issue in a decision that set out the considerations that a trial court must make before admitting weapons not used in the charged crime. This article discusses that opinion and compares past and subsequent cases to its parameters.

In *Agatheas v. State*,¹ the Florida Supreme Court considered whether the admission of a gun recovered from a backpack in the defendant's possession five years after the charged murder had any connection to the crime. Citing to *Jackson v. State*,² the court stated that it had "previously held that in order for evidence of a firearm to be admissible . . . [at] trial, 'the State must show a sufficient link between the [firearm] and charged crime.'"³ The court stressed that before the trial court considers the prejudicial effect of weapon evidence under Florida Statutes section 90.403,⁴ the trial court first must address whether the evidence is even relevant, to either the crime or to a witness's credibility.⁵ The court

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1. *Agatheas v. State*, 77 So. 3d 1232 (Fla. 2011).
2. *Jackson v. State*, 25 So. 3d 518, 528 (Fla. 2009).
3. *Agatheas*, 77 So. 3d at 1236 (quoting *Jackson*, 25 So. 3d at 528).
4. FLA. STAT. § 90.403 (2013).
5. See *Agatheas*, 77 So. 3d at 1237.

determined that the gun that was discovered five years after the crime, which had a different caliber than the bullet casings found at the scene, was in no way related to the murder, pointing in part to the “significant time difference.”⁶ The court also decided that it was not relevant to corroborate the testimony of the State’s witness, the defendant’s former girlfriend, who testified that the defendant told her that he had murdered the victim while the defendant and the witness were watching a news airing about the murder, and who testified that the backpack in which the defendant kept his gun was missing on the night of the murder.⁷ The court emphasized that the gun did not relate to any matters on which the witness was impeached or to any issues raised on redirect. The court then stated that the simple fact that the witness was impeached by the defense did not open the door to evidence of the gun.⁸

The court in *Agatheas* declared that the district court of appeal had failed to conduct the balancing test under Florida Statutes section 90.403, to determine whether evidence should be excluded because “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.”⁹ It first stated that the only relevancy of the evidence in *Agatheas* was to demonstrate the defendant’s bad character or propensity, and then it deemed the evidence confusing to the jury since the gun had no connection with the murder and was not introduced until a full day after the witness’s testimony.¹⁰ The court held that the admission of the gun into evidence, as well as the admission of photographs and testimony regarding the weapon was “unquestionably error.”¹¹

A. RELEVANCY—THE LINK BETWEEN THE WEAPON AND CHARGED CRIME

1. SUFFICIENT LINK

Prior to *Agatheas*, courts admitted evidence of weapons not shown to have been used in the charged crimes for no reason other than that they highlighted some aspect of the defendant’s association with the victim or the charged offense. The State might have established a link to the crime

6. *Id.* at 1235, 1237.

7. *Id.* at 1234–35, 1238.

8. *Id.* at 1239.

9. *Id.* at 1240 (quoting FLA. STAT. § 90.403).

10. *Id.* at 1239–40.

11. *Agatheas*, 77 So. 3d at 1240.

by showing that the defendant had access to the weapons or had understanding of how they operate. Presumably, these cases withstand scrutiny under *Agatheas* in light of the *Agatheas* court's direction that admissibility is premised in part on the connection to the charged crime.¹²

Notably, in *Irizarry v. State*, weapon evidence was admitted to show the defendant's penchant for a particular type of weapon.¹³ In *Irizarry*, the defendant was charged with first-degree murder of his former wife and attempted first-degree murder of his former wife's lover, who awoke one night from a blow to his head. The victim testified that he saw someone leaving the bedroom carrying a machete, and then looked down to find his lover, who had sustained five slash wounds, lying unresponsive on the floor.¹⁴ The defendant told the police when he was questioned as a possible suspect that he would have "cut off his head before he would cut off hers . . . ," even though the police had only informed him of his former-wife's death and had not told him about how she died.¹⁵ "The police never located the murder weapon, but they did obtain two machetes connected with the [defendant]. . . ."¹⁶ The defendant said he gave one of the machetes to his former-wife and he left the other machete at his stepdaughter's house after cutting the weeds.¹⁷ The Court found no error in allowing the State to admit into evidence the two machetes, neither of which were shown to be the murder weapon, based on the testimony that the defendant "favored machetes as tools and weapons."¹⁸

In a more recent case, *Monestime v. State*,¹⁹ the defendant was charged with trafficking cocaine and money laundering. The detective testified he followed the defendant and watched him transfer a black bag and speaker box from his vehicle into a house.²⁰ He approached the defendant and noticed the zipper of the bag was open, revealing bundles of U.S currency. When the drug-sniffing police dog arrived at the scene, the dog alerted to a t-shirt wrapped around a baggie, which contained cocaine,

12. See *Holloway v. State*, 114 So. 3d 296, 297 (Fla. Dist. Ct. App. 2013). The court stated that where there is a nexus between the ammunition and the charged crime, the fact that an expert cannot say that the bullets found in the defendant's possession were the same bullets fired in the crime is a matter that bears on the weight of the evidence. *Id.*

13. *Irizarry v. State*, 496 So. 2d 822, 825 (Fla. 1986).

14. *Id.* at 823.

15. *Id.* at 824.

16. *Id.*

17. *Id.*

18. *Id.* at 825.

19. *Monestime v. State*, 41 So. 3d 1110 (Fla. Dist. Ct. App. 2010).

20. *Id.* at 1111-12.

and also alerted to a speaker box, which contained an AR-15 rifle.²¹ The court determined that the trial court did not abuse its discretion in allowing a photograph of the AR-15 rifle into evidence.²² It concluded the rifle “was inextricably intertwined with the crimes charged” because it provided a context out of which the crimes arose.²³

Of course, evidence of weapons other than those used in the commission of the crime may be admitted if it tends to prove the identity of the perpetrator. Under this basis for admission, the link to the crime is the tendency of the evidence to show that the defendant is more likely than not to be the perpetrator. In *Harris v. State*,²⁴ for example, the defendant and two other co-defendants were charged with first-degree murder after the victim was shot during a fight between the parties at a restaurant. Three .38-caliber pistol balls, removed from the victim by the medical examiner, were offered into evidence.²⁵ Shortly after the brawl and shooting, law enforcement found a .38-caliber pistol, still warm and appearing to have been recently fired, in the defendant’s abandoned vehicle. At trial, the defendant objected to the admission of two other pistols, a .44-caliber, and a .45-caliber.²⁶ The court held that even though none of the guns were shown to be the one actually used in the crime, the fact that there was only one .38-caliber found amongst the three co-defendants, coupled with the testimony that the wounds could not have been made by a .44- or .45-caliber gun, rendered the other guns probative in establishing the guilt of the defendant.²⁷

Similarly, in *Dowell v. State*,²⁸ a case involving the armed robbery and murder of a real estate agent in a house that she was showing, the weapon evidence was used to link the defendant to the crime. The victim was shot with a .38-caliber pistol. “Two Winchester .38, 110 grain, semi-jacketed, hollow-point bullets were found at the scene.”²⁹ In “[a] consensual search of the defendant’s home [the police discovered] five rounds of Winchester .38, 110 grain, semi-jacketed, hollow-point ammunition.”³⁰ This ammunition was shown to have likely been manufactured by the same manufacturer on the same day as the

21. *Id.* at 1112.

22. *Id.* at 1113.

23. *Id.* at 1112–13.

24. *Harris v. State*, 177 So. 187 (Fla. 1937).

25. *Id.* at 735.

26. *Id.* at 736.

27. *Id.* at 738.

28. *Dowell v. State*, 516 So. 2d 271 (Fla. Dist. Ct. App. 1987).

29. *Id.* at 272.

30. *Id.* at 273.

ammunition found at the scene. Evidence was also admitted showing that the defendant had purchased a .38-caliber pistol.³¹ The court concluded that the trial court did not commit error in admitting the ammunition found at the defendant's house.³²

In *Council v. State*,³³ the court, likewise held that the common characteristics between the gun seen at the time of the crime and the gun obtained at the time of the defendant's arrest were sufficient to allow the jury to view the seized gun.³⁴ *Council* involved the armed robbery of a doctor's office during which the perpetrator held a gun at the office manager, demanded money, and held a gun to another employee's temple as he fled outside of the office.³⁵ The court's determination was notwithstanding the discrepancies between the descriptions given of the gun used at the scene and the gun discovered under the defendant's mattress. The court reasoned that the witnesses' testimony suggesting a significant match without the witnesses' actual identification of the gun as the robbery weapon was enough for the jury to weigh the evidence. The court referred to the gun as "another link in the chain of identification testimony"³⁶

Using the same logic articulated in *Council*, the court in *Thornton v. State* decided that the trial court did not err in admitting into evidence the gun found in the desk of the defendant's accomplice, who was alleged to have held a gun on the victim during the robbery.³⁷ The court stated that the gun fit the description of the one used in the robbery so that it was probative of identity despite the State's failure to show that the gun was the one actually used in the robbery.³⁸ With similar reasoning, the court in *Gartner v. State*³⁹ determined that there was a sufficient nexus between the BB gun offered into evidence and the weapon used in the robbery, since the victim testified that she recognized the grips and shape of the handle of the BB gun and because she was unwilling to say that the BB gun was not the robbery weapon.⁴⁰

31. *Id.*

32. *Id.* at 274–75.

33. *Council v. State*, 691 So. 2d 1192 (Fla. Dist. Ct. App. 1997).

34. *Id.* at 1194.

35. *Id.*

36. *Id.* at 1195.

37. *Thornton v. State*, 767 So. 2d 1286, 1288 (Fla. Dist. Ct. App. 2000).

38. *See Luton v. State*, 934 So. 2d 7, 8 (Fla. Dist. Ct. App. 2006) (affirming the admission into evidence of a pocket-knife found in the defendant's possession at the time of his arrest for aggravated battery and attempted robbery with a deadly weapon).

39. *Gartner v. State*, 118 So. 3d 273 (Fla. Dist. Ct. App. 2013).

40. *Id.* at 275.

Evidence of weapons clearly not used in an offense has also been deemed admissible to highlight other evidence. The reasoning for this might be based on concealment of a weapon, which is generally relevant to show consciousness of guilt. In a shooting case, *Knight v. State*, the court upheld the introduction of the photographs of guns found in the defendant's bedroom during a search of his home.⁴¹ This evidence was juxtaposed to the AK-47, the type of firearm used in the charged shooting that was uncovered in the insulation of a crawl space.

Of course, the *Agatheas* opinion held that evidence of a weapon not used in the crime may be admitted to corroborate a witness on a material point. Hence, in *Johnson v. State*,⁴² the district court held that the evidence of the unrelated gun was pertinent to a central fact in the testimony of a prosecution's witness. It distinguished the case before it from the situation in *Agatheas* because it concluded that the gun tended to corroborate a material fact contained in the witness's testimony, as opposed to being unrelated to the testimony.⁴³ In *Johnson*, a first-degree murder and armed robbery case, the State permissibly introduced a .45-caliber gun found in the home where the defendant was staying based on a witness's testimony that the defendant, who confessed his involvement in the robbery to her, told her that after shooting the victim three times, he sold the nine-millimeter gun and purchased a .45-caliber gun to replace it.⁴⁴ Recently, in *Young v. State*,⁴⁵ the court held that photographs of the Uzi submachine gun and ammunition, found in the defendant's girlfriend's safe but not used in the crime, were admissible because the Uzi required nine-millimeter ammunition, which could have been used in the shooting, and which could have explained the jamming of the .40-caliber gun used in the offense.⁴⁶

Perhaps the decision in *Dias v. State*, in which the defendant stabbed the victims with a knife as he fled from a room that the victims were trying to enter to retrieve a guitar that the defendant had borrowed,⁴⁷ was predicated in part on the premise that the knife tended to corroborate the victim's testimony about the offenses. Three weeks after the incident in *Dias*, a knife of about fifteen inches in length was found in the defendant's van. It was steel and pointed like the one used in the stabbing, but it was a few inches longer than the estimation of the length of the knife provided by

41. *Knight v. State*, 15 So. 3d 936, 937–38 (Fla. Dist. Ct. App. 2009).

42. *Johnson v. State*, 93 So. 3d 1066 (Fla. Dist. Ct. App. 2012).

43. *Id.* at 1068–69.

44. *Id.* at 1068.

45. *Young v. State*, 38 Fla. L. Weekly D 1590 (Fla. Dist. Ct. App. 2013).

46. *Id.*

47. *Dias v. State*, 812 So. 2d 487, 489–90 (Fla. Dist. Ct. App. 2002).

one of the victims.⁴⁸ A sheath different than the one found in the room was also located in the van. Notwithstanding these differences, the court determined that the knife taken from the van was probative in the case.⁴⁹

Evidence of weapons that the prosecution has not shown to have been used in the charged offenses may also be introduced into evidence to rebut the defense's presentation. The court in *Irving v. State* noted that the gun tended to refute the defendant's claim of mistake or accident.⁵⁰ In *Maldonado v. State*, the court stressed that ammunition and gun boxes for types of guns not used in the shooting, which were found at the defendant's residence during a search, rebutted the defendant's statement, and therefore, were relevant.⁵¹ In his statement to police, the defendant in *Maldonado* denied shooting at the deputy sheriff and went so far to say that he did not own a gun and that the holster that he was wearing during the episode was for his BB gun.⁵²

2. INSUFFICIENT LINK

Without question, as in *Agatheas*, many courts have consistently held that when there is no justification for admission of a weapon other than it tends to establish the defendant's familiarity with the type of weapon used in the crime, the weapon should be excluded from evidence, either on the ground that it is irrelevant or that it is unduly prejudicial. For instance, in *Huhn v. State*,⁵³ the defendant held a gun to the victim and made threats while not allowing him to leave. The appellate court held however, that the gun found in the defendant's glove box was irrelevant because it was not connected to the crime charged.⁵⁴ The State only contended that the gun shed light on the character of the crime charged. The court in *Rigdon v. State*⁵⁵ based its decision on *Huhn* in holding that the semiautomatic weapon found under the defendant's bed had no connection to the charged crime of aggravated assault with a firearm.⁵⁶

48. *Id.* at 490.

49. *Id.* at 493–94.

50. *Irving v. State*, 627 So. 2d 92, 94 (Fla. Dist. Ct. App. 1993).

51. *Maldonado v. State*, 64 So. 3d 166, 169 (Fla. Dist. Ct. App. 2011).

52. *Id.* at 168.

53. *Huhn v. State*, 511 So. 2d 583 (Fla. Dist. Ct. App. 1987).

54. *Id.* at 589.

55. *Rigdon v. State*, 621 So. 2d 475 (Fla. Dist. Ct. App. 1993).

56. *Id.* at 478. *Contra* *Rayburn v. State*, 188 So. 2d 374 (Fla. Dist. Ct. App. 1966). *Huhn* and *Rigdon* should be contrasted with *Rayburn v. State*, in which the victim testified that a gun was used by the defendant to perpetrate the charged robbery. *Rayburn*, 188 So. 2d at 375. The court decided that the trial court did not err in allowing evidence that a tear gas pencil or pellet was found on the defendant at the time of his arrest even though there was no evidence that such a

In *Sosa v. State*,⁵⁷ the court made a similar determination in a second-degree murder case. The police found .380-caliber bullets in the defendant's car pursuant to a search. However, a testifying officer conceded that the rounds retrieved from the victim's car were more consistent with .22-caliber bullets and said that .380-caliber bullets could not have been fired in the gun used against the victim. The district court held that the .380 bullets were not relevant to the offense.⁵⁸ Citing to *Sosa*, the court in *Fugate v. State*⁵⁹ stated that because there was nothing to connect the gun to the charge, the gun was not relevant to the offense and was inadmissible.

In *Green v. State*,⁶⁰ ballistics testing actually showed that the three firearms taken from the defendant's home, two from his roommate's room and one from his room, were not connected to the firearms used in the charged offenses. The State argued that the firearms were relevant to corroborate the codefendant's testimony that they went to the defendant's home to obtain firearms to use in the burglary. The court held that the two firearms found in the roommate's room were in no way connected to the crime and that the one found in the defendant's room was only marginally relevant to the defendant's participation.⁶¹ However, the court found that the probative value of the firearm was substantially outweighed by the possibility that the jurors would improperly rely on this evidence to determine that because the defendant owned a .380-caliber handgun, which was the type of firearm used to shoot the victim, he must have owned another one to commit the charged crimes.⁶²

In a case with seemingly more apparent relevance, the court in *Cooper v. State*,⁶³ a first-degree murder case, determined that the connection of the ammunition to the casings at the scene was simply too attenuated. The trial court had allowed the admission of A-merc nine millimeter ammunition found in a nine millimeter semiautomatic weapon

weapon was used in the robbery. *Id.* at 376. The court did not articulate its reasoning other than to indicate that the evidence was of some probative value. *Id.*

57. *Sosa v. State*, 639 So. 2d 173 (Fla. Dist. Ct. App. 1994).

58. *Id.* at 174.

59. *Fugate v. State*, 691 So. 2d 53, 54 (Fla. Dist. Ct. App. 1997).

60. *Green v. State*, 27 So. 3d 731 (Fla. Dist. Ct. App. 2010).

61. *Id.* at 737–38.

62. *Id.* at 738; accord *Downs v. State*, 65 So. 3d 594, 596–97 (Fla. Dist. Ct. App. 2011).

Along the lines of the reasoning in *Green*, the court in *Downs v. State*, decided that the gun found in a bedroom of a house where the defendant stayed in the living room should have been excluded since the State did not show a connection of the gun to the defendant, much less to the aggravated battery. *Id.*

63. *Cooper v. State*, 778 So. 2d 542 (Fla. Dist. Ct. App. 2001).

in the defendant's possession when he was stopped by police nine months after the offense, despite excluding the gun from evidence.⁶⁴ The trial court pointed to the uniqueness of the three A-merc nine millimeter spent casings that were found at the scene based upon the firearm examiner's testimony in a pretrial hearing that such ammunition had only been manufactured for a few years and that he had not seen it used in another case.⁶⁵ However, on appeal, the district court concluded that the State had not adequately shown the rare nature of the ammunition since the firearm examiner testified that one of his colleagues at the crime lab had encountered A-merc ammunition in other cases and that he had not asked the other five examiners at his lab whether they had encountered it.⁶⁶ In addition, the court pointed to the temporal separation between the crime and the seizure, as well as the fact that the bullets were taken from a firearm not connected to the crime.⁶⁷

On occasion, evidence of a defendant's weapon possession is offered where there is no evidence of such a weapon having been used at all in the commission of the crime. In such a case, the evidence should be excluded as irrelevant. This is true even where the State purports to create a link, since relevance of a weapon cannot be manufactured by reference to anecdotal testimony, such as "people often wear a bullet proof vest when they are doing a 'drug armed robbery . . .'"⁶⁸

Accordingly, in *Jackson v. State*,⁶⁹ the court stated that the references made to the defendant's possessing weapons and bullet-proof vests were not relevant to any material facts in issue.⁷⁰ Along the same lines, the court in *Westlund v. State*⁷¹ ruled that there was no connection between the defendant owning a buck knife and the charged attempted burglary and resisting arrest with violence,⁷² while the court in *Garcia v. State*⁷³ held that the empty holster found in the defendant's car was not related to the scene of the drug transaction.

Shortly before the *Agatheas* decision, the court in *Zama v. State*⁷⁴ held

64. *Id.* at 543.

65. *Id.* at 543.

66. *Id.* at 544.

67. *Id.*

68. *O'Connor v. State*, 835 So. 2d 1226, 1228, 1231 (Fla. Dist. Ct. App. 2003).

69. *Jackson v. State*, 522 So. 2d 802 (Fla. 1988).

70. *Id.* at 806.

71. *Westlund v. State*, 570 So. 2d 1133 (Fla. Dist. Ct. App. 1990).

72. *Id.* at 1135.

73. *Garcia v. State*, 655 So. 2d 194, 195 n. 1 (Fla. Dist. Ct. App. 1995).

74. *Zama v. State*, 54 So. 3d 1075 (Fla. Dist. Ct. App. 2011).

that it was error for the State to refer multiple times to the bulletproof vest found in the defendant's car where the vest was unconnected to the offense.⁷⁵ The court acknowledged that counsel failed to object to the references but noted that the prosecutor commented in closing that the vest was of no consequence to the case and merely pointed out that it was in the defendant's car.⁷⁶ In reversing the summary denial of a post-conviction relief motion on a claim that counsel was ineffective for failing to object to a firearm from her house, the court in *Moore v. State*⁷⁷ summarized, "if there was no evidence linking any of the firearms to the charged crime, evidence of the firearms would be *irrelevant*."⁷⁸

B. BALANCING TEST: WHETHER RELEVANCY IS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE

Like the Florida Supreme Court in *Agatheas*, courts point to the prejudice due to the possibility of a propensity-line of reasoning based on a defendant's gun ownership. However, courts have also noted factors beyond this reasoning in holding that a defendant was prejudiced due to the introduction of weapon evidence. For example, the court in *McIntosh v. State*⁷⁹ found "adverse connotations" in the case where three different types of firearms not used in the crimes were introduced at trial where they were found in a duffle bag hidden under a porch instead of some place like a locked box in a home.⁸⁰ On the other hand, in finding that any error in admitting the gun, when it was unclear whether it was the one used in the crime, was harmless, the court in *Herman v. State*⁸¹ pointed out that there were no "adverse connotations" in the case before it, like there might be if the firearm was a "Saturday night special or zip gun," which might have prejudicial stigmas that would affect a jury.⁸²

In another case, *Metayer v. State*,⁸³ the court acknowledged that the State sought to use the .40-caliber firearm found at the defendant's home on the theory that there could have been another weapon that fired the shots at the victim, since the firearms examiner testified at trial that it was possible that the .40-caliber projectiles that were recovered from the

75. *Id.* at 1079.

76. *Id.*

77. *Moore v. State*, 1 So. 3d 1177 (Fla. Dist. Ct. App. 2009).

78. *Id.* at 1178.

79. *McIntosh v. State*, 858 So. 2d 1098 (Fla. Dist. Ct. App. 2003).

80. *Id.* at 1099.

81. *Herman v. State*, 396 So. 2d 222 (Fla. Dist. Ct. App. 1981).

82. *Id.* at 229.

83. *Metayer v. State*, 89 So. 3d 1003 (Fla. Dist. Ct. App. 2012).

victim's body could have been fired from a different .40-caliber firearm than the co-defendant's .40-caliber firearm that was entered into evidence. However, the court deemed that this argument was based on a speculative premise and, for this reason, found that the danger that such evidence would be used to show the bad character or propensity of the defendant substantially outweighed the marginal relevance.⁸⁴

Sometimes, courts have deemed weapon evidence irrelevant because the weapons are just too general in nature to be tied to the crime. For instance, in *Williams v. State*,⁸⁵ the court held that the two baseball bats taken from the defendant's home should not have been admitted into evidence in the aggravated battery trial because they were not shown to have been connected to the crime and they were ordinary bats common in many American homes.⁸⁶ For this same reason, however, it found that their admission was harmless.⁸⁷ In another case, *Jones v. State*,⁸⁸ the court held that the gun cleaning kit found in the defendant's home was not relevant to the robbery and attempted murder.⁸⁹ It stated that the kit only tended to show that at some point the defendant may have owned guns and noted that the kit was not shown to be connected in any way to the charged offenses, or to the gun used to perpetrate them.⁹⁰

C. WEAPONS AS DEMONSTRATIVE AIDS

Although *Agatheas* focused on the matter of weapons actually introduced into evidence, Florida courts have also grappled with the propriety of using weapons not actually involved in the offenses as demonstrative aids. In *Chamberlain v. State*,⁹¹ the Florida Supreme Court considered the demonstration with such a weapon to be relevant since it tended to show the defendant's level of involvement in the crimes. A witness in *Chamberlain* used an asp firearm to aid her in relaying the description of the weapon, one with a "flat black handle."⁹² The witness said that she saw the defendant holding such a weapon on the night of the murders, but said that it was smaller than the one on display.⁹³ The court

84. *Id.* at 1007–08.

85. *Williams v. State*, 34 So. 3d 768 (Fla. Dist. Ct. App. 2010).

86. *Id.* at 772–73.

87. *Id.*

88. *Jones v. State*, 32 So. 3d 706 (Fla. Dist. Ct. App. 2010).

89. *Id.* at 713.

90. *Id.*

91. *Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004).

92. *Id.* at 1101–02.

93. *Id.* at 1102.

held that there was no abuse of discretion in allowing the witness to use the weapon as a demonstrative aid because it was not admitted as evidence and because the State did not claim that it was the actual weapon.⁹⁴

In a similar vein, in *Walker v. State*⁹⁵ the prosecutor was permitted to use a .38-caliber gun as a demonstrative aid to demonstrate to the jury how the victim could see the ammunition in the gun when he was threatened with it. The State had first shown that a gun was held to the victim's head during the robbery and that the victim described the gun as being similar to a .38-caliber revolver based on the small size and "snub nose."⁹⁶ The State also showed that .38-caliber ammunition was found in the defendant's pocket on his arrest. The firearm was not admitted into evidence, and the trial court instructed the jury that it was not recovered in the crime.⁹⁷ The Court concluded that the firearm helped demonstrate what the victim could and could not have seen with regard to the weapon and tied the .38-caliber bullets found on the defendant to the firearm used in the robbery.⁹⁸ The court in *McKenney v. State*⁹⁹ also declined to find an abuse of discretion where the State expert used an AK-47 semiautomatic assault weapon as an exhibit to demonstrate how the weapon worked and to correlate the location of the spent shell casings to the likely location of the shooter at the scene.¹⁰⁰ The Court stressed that an eyewitness identified the AK-47 as the kind of weapon used in the shooting and highlighted that the weapon was not admitted into evidence or taken to the jury room, and that the State explained that it was not the weapon actually used in the shootings.¹⁰¹

The Florida Supreme Court has tackled the unique situation of using a replica of a weapon, instead of an actual weapon, as an aid to assist the jury in picturing the actual weapon used in the offense. The State's firearm expert in *Harris v. State*¹⁰² used a plastic replica of the murder weapon in his testimony. He first identified the admitted evidence at trial and explained how the various components could fit together to form a weapon.¹⁰³ The evidence showed that after discussing killing his wife with his mistress, the defendant later called his mistress and said that he had

94. *Id.* at 1102.

95. *Walker v. State*, 82 So. 3d 115 (Fla. Dist. Ct. App. 2011).

96. *Id.* at 116.

97. *Id.*

98. *Id.* at 118.

99. *McKenney v. State*, 967 So. 2d 951 (Fla. Dist. Ct. App. 2007).

100. *Id.* at 956-57.

101. *Id.* at 956.

102. *Harris v. State*, 843 So. 2d 856 (Fla. 2003).

103. *Id.* at 863.

done it.¹⁰⁴ He told her that he had welded parts together to make a gun. He gave her a bag containing the gun to dispose, along with another bag of items to dispose.¹⁰⁵ The court held that the plastic replica was not erroneously admitted because (1) the mistress testified about the bags and about the defendant's statement to her, and (2) the expert explained how the recovered components could fit together and linked the weapon to the type of hole left in the victim's skull.¹⁰⁶

D. CONCLUSION

In every case in which a weapon not used in a crime is sought to be introduced into evidence, the trial court must consider its relevancy, either to the perpetration of the crime or to the credibility of a witness, and then weigh the probative value, if any, against the possibility of unfair prejudice to the defendant. Practitioners should be aware of the nuances of case law dealing with the admission of weapons not used in crimes because it is often a slight factual detail in a case that distinguishes one opinion from another. The Florida Supreme Court's decision in *Agatheas* provides guidance because it makes clear that relevancy cannot be grounded on attenuated or speculative reasons, but must be based on matters material to the prosecution. It left open, however, the admissibility of weapon evidence when it corroborates a material aspect of the case, and other courts have held this to be permissible when the weapon evidence tends to contradict a defense witness or rebut the defense. On a separate consideration, when the weapon is not introduced into evidence, but is used as a demonstrative aid, courts must undergo a different analysis. Courts must ensure that the weapon is similar to the one used in the crime and that its display is pertinent to testimony, and must inform the jury that the demonstrative aid is not actual evidence.

104. *Id.* at 860.

105. *Id.*

106. *Id.* at 863.