

Online Reference: FLWSUPP 3106TAUB

Criminal law -- Reckless or careless operation of vessel -- Violation of navigational rules causing serious bodily injury -- Failing to maintain proper lookout -- Defendant entitled to judgment of acquittal on charges stemming from collision between boat and swimmer resulting in serious bodily injury where state failed to present direct evidence identifying operator of boat at time of accident or establishing that operator failed to maintain proper lookout

STATE OF FLORIDA, Plaintiff, v. IRWIN ELLIOT TAUBER, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. M-20-010275. Citation No. V641222. Section M-3. Division CENTG. July 7, 2023. Raul Cuervo, Judge. Counsel: Andres Roberto Perez, Assistant State Attorney, Miami, for Plaintiff. Neal L. Sandberg, Simon Schindler & Sandberg LLP, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S

MOTION FOR JUDGMENT OF ACQUITTAL

THIS CAUSE came before the Court upon a non-jury trial held on April 21, 2023, and Defendant IRWIN ELLIOT TAUBER's Motion for Judgment of Acquittal pursuant to Fla. R. Crim. P. 3.380 made at the close of the State's case. The Court has reviewed the memoranda filed by the Defendant and the State along with the submitted case authorities, heard the parties' arguments, presided over the trial, reviewed the court file, and is otherwise duly advised in the premises.

The Defendant was charged with violating Florida Statute § 327.33(3)(a), as the operator of a vessel upon the water of the state by failing to maintain a proper lookout as required by Navigational Rule 5. After the State rested its case, the Defendant moved for judgment of acquittal, and in support thereof challenges the sufficiency of the evidence as to the offense alleged as to the Defendant. “If, at the close of the evidence for the state . . . the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the . . . defendant shall, enter a judgment of acquittal.” Fla. R. Crim. P. 3.380(a). “A motion for judgment of acquittal is designed to challenge the legal sufficiency of the evidence,” and it should not be granted “unless, when viewed in a light most favorable to the state, the evidence does not establish the prima facie case of guilt.” *State v. Williams*, 742 So. 2d 509, 511 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D2366a]. “It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences.” *Id.* “[T]he prosecution, in order to present a prima facie case, is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the prosecution fails to meet this burden . . . a judgment of acquittal should be granted.” *Baugh v. State*, 961 So. 2d 198, 203-04 (Fla. 2007) [32 Fla. L. Weekly S197a], citing *Williams v. State*, 560 So.2d 1304, 1306 (Fla. 1st DCA 1990).

To support a conviction, The State was required to present evidence to prove: (1) the Defendant operated a vessel upon the waters of the state; (2) the Defendant violated Navigational Rule 5, maintaining a proper look-out (33 C.F.R. § 83.05); (3) the violation resulted in an accident; and (4) the accident caused serious bodily injury. The testimony established a collision between the vessel and a swimmer resulting in a serious bodily injury to the swimmer, but little else. The State failed to present evidence of the other elements sufficient for the fact finder to establish guilt beyond a reasonable doubt. Defendant was not cited for any violation other than that based upon Rule 5. The Defendant was not charged with reckless operation of a vessel. The parties stipulated that the vessel was travelling at a proper speed.

At trial, the State was required to establish its prima facie case. The State failed to present direct evidence identifying the operator of the subject vessel, establishing the operator failed to maintain “a proper lookout by sight or hearing” or of the standard for a “proper lookout”. Officer Gomez' testimony at trial that Arboca Holdings, LLC was the owner of record of the vessel and that Defendant was a member of that limited liability company was insufficient to establish Defendant was in control of the vessel at the time of the accident. Indeed, there was no evidence presented as to who was on the bridge and charged with the duty to act as a lookout.

Nor has the State presented any authority to support the contention that Defendant, as a member or manager, can be held *criminally* responsible for a failure that may have occurred on the subject vessel. *See Franzone v. State*, 58 So. 3d 329, 334 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D631b] (“In denying Mrs. Franzone's motion for judgment of acquittal, the trial court failed to recognize that the State did not charge that Mrs. Franzone was individually responsible for the criminal acts of the LLC.”).¹

The State appears to take the position that by merely presenting evidence that an accident occurred and that a vessel struck a swimmer it has met its burden to establish that the operator of the vessel failed to maintain a proper lookout. That is not so. *See, Baltrunas v. State*, CRC 08-00075 (Fla. 6th Circuit App. Court, Pinellas County Florida (August 31, 2009) [16 Fla. L. Weekly Supp. 1110d] (“The fact that there was a boating accident does not establish a failure to maintain a proper lookout or create a conflict in the evidence.”). In the instant case, the State did not present evidence that the Defendant was the operator of the vessel and in that capacity failed to provide a proper lookout.

Further, the State did not present evidence that there was not a proper lookout on the vessel. The State argues that because it presented evidence that the injured party was visible to others nearby, she must have been visible to the operator of the boat. Even viewed in a light most favorable to the state that is insufficient to prove that the operator did not have a proper lookout. The Court finds that the State failed to prove its prima facie case beyond a reasonable doubt because it failed to prove beyond a reasonable doubt a necessary element of the offense charged.²

Based on the above, the court concludes that Defendant is entitled to a judgment of acquittal on the cited offense, Florida Statute § 327.33(3)(a). It is therefore,

ORDERED AND ADJUDGED that the Defendant's Motion for Judgment of Acquittal is **GRANTED**.

¹The State's reliance upon *de la Osa v. State*, 158 So. 3d 712 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D467a] is misplaced. *De la Osa* was a prosecution for conspiracy, conspiracy to commit racketeering and organized scheme to defraud and did not involve a limited liability company. The State has not charged any of those offenses in the instant case. Nor does *Stirrup v. Reiss*, 410 So. 2d 537 (Fla. 4th DCA 1982), also cited by the State, justify the imposition of criminal liability on Defendant. In *Stirrup*, a civil case, the plaintiff and one of two defendants appealed from a summary judgment entered in favor of the defendant-alleged boat owner after an accident. They claimed the alleged boat owner was present at the time of the accident and therefore liable for negligent operation of the boat. On appeal, the Fourth District held disputed issues of fact as to ownership of the boat precluded summary judgment, but that the allegations of independent negligence against the purported owner were without merit: “As to the furnishing of beer to the boat occupants (if Moss did so), such conduct would not independently impose liability on Moss for negligent operation of the vessel. As to his negligently failing to maintain a proper lookout, there is no evidence in the record that Moss was specially charged to act as a lookout, nor is there any evidence from which it might reasonably be inferred that the collision would not have occurred had Moss acted as lookout.” *Id.* at 539 (citation omitted). In addition to being factually distinguishable in numerous respects, that case did not impose criminal liability as the State seeks to do in the instant case.

²As the trier of fact in this bench trial, the Court would acquit the Defendant based on the evidence presented because the Court has reasonable doubt.