IN THE SUPREME COURT OF FLORIDA

WILSON TILLMAN,

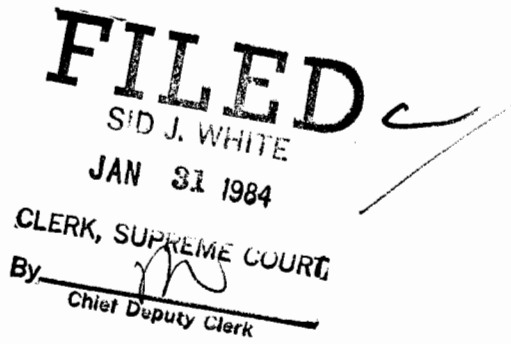
Petitioner,

vs. CASE NO. 64,653

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the First District Court of Appeal, and the Defendant in the Circuit Court of Escambia County. Respondent was the Appellee in the First District Court of Appeal, and the prosecuting authority in the Circuit Court.

Citations to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts with the following additions and clarifications.

Linda Lewis, the dead victim's cousin, testified that after her cousin had told Petitioner he better use what he was clicking, Petitioner stood up for what "might have been around five minutes." (R 151) While he was standing up, her cousin remained seated. Shortly after Petitioner sat down, he began shooting (R 152). She testified that her cousin had not gotten off the couch and that she just slumped to the floor after she had been shot. Petitioner was standing over her (R 153).

On cross-examination, the defense asked whether she knew if the victim had ever hurt Petitioner (R 161). She answered that she did not know what had happened at the liquor store. She began to answer that the victim had called her on the night of the incident, but the State objected on hearsay grounds (R 162). The defense was allowed to ask if the victim had told the witness about the incident, and the State's hearsay objection was overruled (R 162). The defendant then had the rest of the testimony proffered outside the jury's presence.

On proffer, she testified that her brother had told her that the victim had hit Petitioner with a mug or something after Petitioner had hit the victim "up side the head ...." (R 165). Defense counsel then asked that the testimony be permitted "to show the reasonable apprehension or fear at the time of the shooting." (R 166) Although

Petitioner argued in the First District and is still arguing in this Court that the testimony should have been admissible as a statement against interest, the record reveals that at trial, defense counsel never mentioned anything about the testimony being admissible as a statement against interest pursuant to §90.804(2)(c), Fla. Stat. In the First District, the State argued that this specific ground was not properly before the First District because of Petitioner's failure to object on those grounds at trial. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The State's hearsay objection was sustained (R 166).

The victim's brother, Richard Harris, testified that he had heard his sister tell Petitioner that he could click the gun, "but long as he don't shoot it." (R 175) According to Harris, Petitioner "shot it at my sister and then he moved it over and shot it at my cousin." (R 176) Harris testified that at the time of the shooting, the victim was sitting on the couch, drinking a beer, and that she had a plastic cup in her hand (R 177).

During his opening statement, defense counsel "testified" in detail about the previous incident in which the victim had cut Petitioner with a glass (R 268). Defense counsel also "testified" that on the evening of the murder, the victim "got up, grabbed a glass and started coming for Mr. Tillman, between him and the front door." (R 269)

Petitioner testified in his own behalf. On cross-examination, Petitioner claimed it was impossible for him to have shot the victim in the back because the victim had run into the path of the bullets

(R 282). According to Petitioner, the victim was coming at him with a glass, although Petitioner was unable to point out in any of the photographs in evidence where the glass was located (R 283). Petitioner testified that he did not call an ambulance to help the victim, and he agreed that he had not called the police to report the previous incident when he was cut with a glass several weeks before (R 284). Petitioner denied reaching into his pocket and clicking the gun that evening, and he claimed that Linda Lewis was lying when she had testified differently (R 285, 286). Although Petitioner claimed he had dropped the gun by the front door when he ran out of the apartment, he could not explain why the gun had never been found (R 286).

During the charge conference, the Judge stated that he intended to charge the jury under Count II that the defendant could be found not guilty, guilty of attempted first degree murder, attempted second degree murder, and attempted manslaughter (R 298). Not only did defense counsel not object to that charge, he even agreed that such a charge was correct (R 299). During the discussion on the various penalties, Petitioner's lawyer volunteered that the penalty for attempted manslaughter was five years (R 309).

During his closing argument, defense counsel emphasized that a week prior to the shooting, the victim "took a bottle and disabled Wilson, cut him, forty-one stitches, made it so he couldn't go back to work after that, after that cutting." (R 320) In fact, most of defense counsel's argument was premised upon Petitioner's belief that he had a right to fear what the victim would do to him (R 321).

However, during his closing argument, the prosecutor emphasized that Petitioner's story was not consistent with the testimony of the pathologist, and he claimed that Petitioner's story was incredible--particularly the part about how the victim had run three times into the line of bullets (R 340). The prosecutor also remarked that the glass Petitioner claimed the victim was brandishing had never been found (R 340). Concerning the prior cutting incident, the prosecutor argued that Petitioner had every reason to lie and that his claim of self-defense was unreasonable in light of the evidence (R 341).

On appeal, Petitioner argued that there was no such offense as attempted manslaughter (Brief of Appellant at 13). Petitioner summarized his argument, i.e., since an attempt required proof of a specific intent to commit an offense, and since manslaughter did not require any specific intent, "it is both logically and legally impossible to specifically intend to have no intent and, therefore, the offense of attempted manslaughter cannot exist." (Brief of Appellant at 17) No mention was made of the distinction between attempted manslaughter by culpable negligence and attempted manslaughter by act or procurement.

The State responded by arguing that this Court had recently ruled that it was possible for someone to be convicted of attempting a crime even if the completed crime required no proof of specific intent. (Brief of Appellee at 10) See Gentry v. State, 437 So.2d 1097 (Fla. 1983). The First District affirmed and certified the question of whether there was a crime of attempted manslaughter in Florida. Shortly thereafter, this Court decided Taylor v. State,

___ So.2d ___, 8 F.L.W. 509 (Fla. 1983), which specifically answered the certified question in the affirmative. The First District did not mention Petitioner's second argument raised in this petition, i.e., whether the trial court had properly sustained the State's hearsay objection to Petitioner's proffered testimony concerning the prior incident at the liquor store.

ARGUMENT

ISSUE I

CERTIORARI SHOULD BE DISMISSED BECAUSE THE COURT HAS ALREADY ANSWERED THE CERTIFIED QUESTION IN TAYLOR V. STATE, ___ So.2d ___, 8 F.L.W. 509 (Fla. 1983).

As Petitioner has conceded (Brief of Petitioner at 18), the certified question has already been answered by the Court. However, Petitioner then argues that Petitioner is entitled to a new trial because it is impossible to tell from the facts of his case whether he was convicted of attempted manslaughter by culpable negligence or attempted manslaughter by act or procurement. The State disagrees--the State's position is that since this issue was never argued in those terms in either the trial court or District Court of Appeal, Petitioner is estopped from raising it at this stage in the proceedings.

In Ray v. State, 403 So.2d 956, 961 (Fla. 1981), the Court found that a defendant could not be convicted of a non-existent

crime absent a showing of waiver in the trial court. In Petitioner's case, there is a showing of waiver. This is because defense counsel specifically agreed with the trial court that the jury should be instructed on the crime of attempted manslaughter (R 299). Defense counsel even volunteered that the penalty for that crime was five years (R 309). Therefore, even if the evidence in this case could be construed only to show attempted manslaughter by culpable negligence (and the State submits that it cannot), it would make no difference because of Petitioner's waiver. See Ray v. State, supra.

In the alternative, the State submits that since Petitioner never argued anything about there being no such crime as attempted manslaughter by culpable negligence in either the trial court of the District Court of Appeal, Petitioner should not prevail with that argument in this Court. Steinhorst, supra.

Finally, should the Court disagree with the State's previous arguments and take this case anyway even though the certified question has already been answered, the State submits that the only reasonable construction of the evidence supports a finding of attempted manslaughter by act or procurement. The record was replete with testimony that the victim was shot while she was in a sitting position and that Petitioner had clicked his gun in a threatening manner at least several minutes prior to the actual shooting. The victim's brother specifically testified that Petitioner shot the gun "at my sister" and that he then pointed it and "shot it at my cousin." (R 176) Linda Lewis testified that her cousin had not gotten off the couch and that she just slumped to the floor after she had been shot. She also testified

that Petitioner was standing over the victim (R 153). Although Petitioner claimed he was acting in self-defense, there was no evidence of a glass (R 283). Petitioner denied reaching into his pocket and clicking the gun and he alleged that Linda Lewis was lying (R 285, 286). Therefore, the State submits that the only reasonable construction of the evidence supports a finding of attempted manslaughter by act or procurement.

In summary, the State contends that certiorari should be dismissed because the certified question has already been answered. In the alternative, the First District's opinion should be affirmed because Petitioner should not be permitted to raise his culpable negligence argument for the first time on certiorari--especially when under Ray, supra, he acquiesced in the trial court's instruction to the jury concerning the crime of attempted manslaughter. Finally, should the Court reach the merits, the only reasonable construction of the evidence supports a finding of attempted manslaughter by act or procurement rather than culpable negligence.

ISSUE II

CERTIORARI SHOULD BE DISMISSED BECAUSE THE FIRST DISTRICT'S OPINION DID NOT ADDRESS THIS ISSUE AND BECAUSE THE RECORD REVEALS THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING THE EVIDENTIARY RULING.

Although this issue was not part of the certified question and although the First District's opinion did not address this issue, Petitioner has contended that the Court should review this issue anyway. While the State agrees that the Court has the discretion to review this issue, the State contends that there is no cogent reason for exercising that discretion in this case.

On appeal, Petitioner argued that the State's hearsay objection should not be sustained for two reasons. First, the statement was admissible as an exception to the hearsay rule because it was a statement against interest. Second, the evidence was relevant to Petitioner's theory of self-defense. However, the State responded by pointing out that the only ground for Petitioner's objection at trial was that the cross-examination might relate to Petitioner's theory of self-defense. In other words, the issue of whether the cross-examination was admissible as an exception to the hearsay rule was not raised in the trial court. (See Brief of Appellee at 6).

Therefore, the only theory which is viable at this stage of the proceedings concerns whether the cross-examination should have been allowed as being relevant to Petitioner's theory of self-defense. Steinhorst, supra; Castor v. State, 365 So.2d 701 (Fla. 1978).

The law is clear that an appellate court will not disturb a trial court's evidentiary ruling unless there has been a showing of an abuse of discretion. Maggard v. State, 399 So.2d 973 (Fla. 1981). Moreover, the scope and limitation of cross-examination also lies within the sound discretion of the trial court. Sireci v. State, 399 So.2d 964 (Fla. 1981). In fact, even an erroneous refusal to allow cross-examination is not reversible error if the answers defense counsel were attempting to elicit from the witnesses were ultimately put into the record. Harris v. State, 229 So.2d 670 (Fla. 3rd DCA 1969). Finally, the scope of cross-examination "is not without bounds." Jones v. State, 440 So.2d 570, 576 (Fla. 1983).

With these standards in mind, it should be readily apparent that the trial court did not abuse its discretion and that there is no reason for the Court to re-review the First District's opinion on this issue. As was argued by the State on direct appeal, a proper predicate must first be laid before the showing of an overt act by a victim is admissible testimony in relation to a defendant's self-defense theory. Williams v. State, 252 So.2d 243, 247 (Fla. 4th DCA 1971). While the showing in Williams was a sufficient predicate, in Petitioner's case, at the time of the State's objection, there was absolutely no evidence of any overt act on the part of the victim whatsoever. Freeman v. State, 97 So.2d 633, 636 (Fla. 3rd DCA 1957), should be persuasive. In a case which is strikingly similar to Petitioner's, the Court explained that when two parties had some type of conflict or argument at a remote time and had resumed co-habitation, specific acts of violence were inadmissible. The Court

explained that "specific acts of violence, to be the proper subject of testimony, must have some relation to the claimed apprehension of the defendant at the time of the fatal act." The Court quoted from this Court's opinion in Barwicks v. State, 82 So.2d 356 (Fla. 1955), for the proposition that evidence that the victim "cut" the defendant "three or four weeks prior to the homicide was too remote, inasmuch as deceased and appellant lived together after their altercation." Id. Of course, in Petitioner's case, there was testimony that Petitioner and the victim were living together at the time of the incident (R 142), and even Petitioner admitted that he had not called the police when the victim had cut him prior to the shooting incident (R 275). In fact, Petitioner even admitted that he and the victim had made up after the first incident. Therefore, the State submits that the proper predicate was not laid at the time the State's objection was sustained because there was absolutely no testimony that the victim had made an overt act which would cause Petitioner to be in fear for his life--in fact, the testimony was undisputed that the victim had been holding a plastic cup full of beer. Moreover, even after Petitioner testified, there was still no evidence that the alleged glass was ever present in the apartment.

However, should the Court disagree with the State and find that some type of error occurred, the error would have to be harmless beyond a reasonable doubt. This is because Linda Lewis was subsequently allowed to testify that the previous incident had occurred, and Richard Harris was cross-examined about how he had heard Petitioner say just prior to the shooting that the victim had cut him before

and was not going to be allowed to cut him again (R 186). It should also be remembered that Petitioner testified in detail about the previous incident, and it simply cannot be argued that the jury did not know about the incident--even to the extent that they knew how many stitches Petitioner had received at the hospital (R 275). See Mobley v. State, 409 So.2d 1031 (Fla. 1982); Zamora v. State, 361 So.2d 776 (Fla. 3rd DCA 1978); Crespo v. State, 350 So.2d 507 (Fla. 3rd DCA 1977). Since the answers that defense counsel was seeking to elicit were ultimately put into the record and necessarily considered by the jury, any error which occurred had to be harmless beyond a reasonable doubt. See Harris, supra.

Petitioner has shown no valid reason why the trial court abused its discretion. The First District's opinion does not speak to the issue, and in that regard, should be considered a per curiam affirmance which does not confer jurisdiction upon this Court. Finally, the issue fails as a matter of law because a proper predicate was not laid for the testimony. Even assuming that the Court finds that a proper predicate was laid, since the jury ultimately heard substantially the same testimony which defense counsel sought to elicit and since the defense counsel was allowed to argue his theory to the jury, any error would have to be harmless beyond a reasonable doubt.

CONCLUSION

Based on the facts and foregoing arguments, the State submits that certiorari should be dismissed because the certified question has already been answered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Carl S. McGinnes, Assistant Public Defender, Tallahassee, Florida, on this 31st day of January, 1984.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL