IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 67,663

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONTINUED)

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION BY INSTRUCTING THE JURY ON THE LAW CONCERNING TRANSFERRED INTENT OVER TIMELY OBJECTION, WHERE THE INSTRUCTION WAS NOT THE LAW OF THE CASE AND TENDED TO CONFUSE THE JURY ON THE ELEMENT OF PREMEDITATION.

The state contends that the doctrine of transferred intent applies to the facts of the instant case, if it doesn't then it ought to, and if it doesn't and if it oughtn't, then it's harmless error anyway. Each of these contentions is without merit.

IT DOESN'T

The Doctrine of Transferred Intent does not apply to the instant facts nor to the inferences reasonably drawn therefrom, even when viewed in a light most favorable to the state. In the criminal context[1] the doctrine applies only where one directs harm/force against one person, and that act results in another being accidentally or mistakenly hit. The focus is solely upon the intended act that directly results in accidental

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[1] Prosser notes that though in the criminal context the doctrine applies "in cases in which shooting, striking, throwing a missile or poisoning has resulted in unexpected injury to the wrong man," the doctrine in Tort applies where a defendant intends to commit a battery, assault, trespass to land or chattel, or false imprisonment, and the intent will be transferred to make the defendant liable for any of those five torts "provided that the harm is direct and immediate." Prosser on Torts, 4th Ed., pp. 32-33, §8.

or mistaken harm to another. e.g. Johnson v. State, 252 So.2d 361 (Fla. 1971); Foreman v. State, 47 So.2d 308 (Fla. 1950); Walker v. State, 93 Fla. 1069, 113 So. 96 (1927); Brown v. State, 84 Fla. 660, 94 So. 874 (1922); Pinder v. State, 27 Fla. 370, 8 So. 837 (1891). Specifically, as applied here, the "act" that directly resulted in harm to another was the act of shooting the shotgun at Wilkerson, not the act of going to the courthouse. If Provenzano was shooting at Shirley or Epperson and mistakenly or accidentally shot Wilkerson, the instruction would have been supported by the evidence. Those simply are not the facts. The state has totally failed to direct this Court's attention to any authority to support application of the doctrine under the instant facts.

IT OUGHTN'T

The state suggests that the doctrine of transferred intent should be expanded to apply to the "unusual facts of this case" (Answer Brief at p. 18), though the state does not say why an uncommon construction of the rule is here warranted. It is respectfully submitted that it is improper to misapply and contort an established rule of law under the guise of "unusual facts" solely to obviate what is otherwise harmful error. Appellant submits that this Court should impartially apply settled, time-honored principles of law and let the chips fall where they may.

IT'S REVERSIBLE ERROR

The state alludes to various testimony that supports a finding that the killing of Wilkerson was premeditated (Answer

Brief, pp. 18-20) and asserts that "[t]his honorable court cannot presume that the instruction so confused the jury that the substantial rights of the appellant were injuriously affected in light of the substantial evidence of premeditation without reference to transferred intent. §924.33, Fla.Stat. (1983)." (Answer Brief, p. 20). Appellant disagrees, and respectfully submits that this Court cannot presume otherwise.

> It is the rule in this court that in determining the correctness of charges they must be considered as a whole, but where a special charge in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that that presumptive harm caused thereby has been entirely removed, or the judgment should be reversed.

Lane v. State, 44 Fla. 105, 32 So. 896 (1902).

Where a trial judge gives an instruction that is incomplete or an incorrect statement of the law, and it is necessarily misleading to the jury on a material element at issue, the conviction should be reversed. See Carter v. State, 10 FLW 1305 (Fla. 2d DCA May 22, 1985)[fundamental error]; Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973).

The improper instruction simply cannot be considered harmless error because it goes to the very heart of the trial... whether the killing of Wilkerson was premeditated. Over timely, specific objection, the jury was instructed, "If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another, the killing is premeditated." (emphasis added). Incorrect application of the improper instruction was repeatedly argued to the jury by the prosecutor

in closing argument. Under the facts of this case the instruction and argument were grossly misleading, incorrect, and tantamount to an instruction from the Court that the killing of Wilkerson was premeditated.

It is respectfully submitted that the instruction was improper, in that it was not supported by the evidence and accordingly was not part of the law of the case. The instruction was grossly incorrect and misleading because the jury was told that the killing was premeditated if they believed Provenzano, in going to the courthouse, was thereby "attempting" to kill Shirley or Epperson. The confusing nature and erroneous application of the subject instruction and argument is self-evident. The convictions must be reversed and the matter remanded for retrial.

POINT II

THE DEFENDANT WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION, BY BEING TRIED IN ORANGE COUNTY IN THE COURTHOUSE THAT WAS THE SCENE OF THE ALLEGED CRIME OVER THE DEFENDANT'S REQUEST FOR CHANGE OF VENUE.

The state "strenuously urges this honorable court to dispose of this issue on procedural grounds", and argues that "[a] better case for lack of preservation cannot be found." (Answer brief at p. 23). Appellant respectfully disagrees. If no application whatsoever had been made to the court for a change of venue, perhaps this issue could be disposed of on procedural grounds. Such is not the case. The request for a change of venue was made both pro se[2] and by counsel, and it is respectfully submitted that it was an abuse of discretion for the trial court to fail to change venue.

The abuse of discretion obtains not only from the fact that the jury was not composed of reliably impartial jurors, but also because the trial was being conducted at the very scene of the shooting. The state gives this fact short shrift, not even deigning to mention this as an independent reason to relocate the

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[2] Provenzano stated that he concurred in being tried in Orange County only because he believed jurors from outside the county were being brought in to hear the case. When he learned otherwise, an immediate request to change venue was made (R 3-20). A trial judge may not be able to change venue absent a request from one of the parties. Here, however, there was a clear, unequivocal request from the defendant.

trial. Instead, the state concentrates on the publicity before and during the trial and the difficulty in selecting unbiased jurors. (Answer brief at pp. 26-27)

Appellant respectfully submits, however, that the scene of the crime also being the scene of the trial is equally as damaging to the precept of a fair, impartial trial. Factors other than pretrial publicity and community prejudice are properly to be considered in determining whether a trial judge abused his discretion in denying a requested change of venue. In Maine v. Superior Court of Mendocino County, 438 P.2d 372, 66 Cal.Rptr. 724 (1968), the Supreme Court of California approved a change of venue where election of the attorneys to a judgeship might have become a feature of the trial. That court stated:

> Political factors have no place in a criminal proceeding, and when they are likely to appear, as here, they constitute an independent reason for venue change. A "hotly contested election", we note, was a circumstance in Sheppard v. Maxwell, [384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)] (See also, Delaney v. United States, [199 F.2d 107, 115 (1st Cir. 1952)].

Maine, supra at 380.

The law in Florida concerning a change of venue is fully set forth in Manning v. State, 378 So.2d 274 (Fla. 1979), where a first degree murder conviction was reversed because strong community sentiment, fanned by pervasive pretrial publicity, may have improperly influenced the jury's verdict and recommendation of death. After noting that granting an application for change of venue is discretionary with the judge and noting that the burden is on the defendant to come forward and

show "that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants of the community", this Court stated that "[a] trial judge is bound to grant a motion for change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." Manning, supra at 276.

Appellant submits that the law set forth above controls this issue, and that the court abused its discretion in denying the requested venue change. The very fact that the trial was being conducted at the scene of the crime could not have helped but influence the jury. This is not a case where the voir dire showed "just" pervasive publicity and extensive fixed community opinion, as urged by the state. The added factor that the trial would be conducted at the scene of the crime makes this a unique case, mandating that the trial be relocated. It simply cannot be said that a reliably impartial jury issued the verdict and penalty recommendation in this case.

POINT VII

THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY GROSSLY IMPROPER PROSECUTORIAL QUESTIONING AND ARGUMENT DURING THE PENALTY PHASE OF TRIAL.

The state argues at length that the issue as it pertains to the argument of the prosecutor is not preserved for appellate review "because there was no motion for mistrial and no request for a curative instruction (Answer Brief, pp. 49-50). The state's preservation argument is without merit because here a timely, specific objection was made by counsel and overruled by the trial court, not sustained (R 2198). The court was fully apprised that the argument was improper because the prosecutor was "asking the jury to go outside [of] the aggravating factors." (R 2198). To require a motion to strike, a motion to caution the jury to disregard the testimony, and a motion for a mistrial is to "exalt form over substance" when those motions' basis was the same as had just been overruled by the trial court. See Spurlock v. State, 420 So.2d 877 (Fla. 1982); Thomas v. State, 419 So.2d 634 (Fla. 1982). Such motions in this case were necessarily implicitly denied.

Similarly, the state's contention that Provenzano somehow "invited" the prosecutor to ask whether he believed he had received a fair trial and that he believed he never had a chance with that jury is wholly without merit (Answer Brief, pp. 51-55). The state claims the inquiry generally was to "rebut... Provenzano's lack of logical thought, his alleged

insanity" (Answer Brief, p. 54), and otherwise proper "because it further illuminated matters testified to on direct." (Answer Brief, p. 55).

Appellant submits that questioning a defendant whether he believed he received a fair trial in front of the jurors who just convicted him is grossly improper and harmful error, regardless of the motives of the prosecutor. Such questions are wholly irrelevant and tend to distract and influence the jury. A person convicted of a crime is constitutionally entitled to appellate review before a neutral tribunal to determine if in fact a fair trial was had, and it is inconceivable that he should be cross-examined about his attitude concerning the fairness of those trial proceedings before a jury about to recommend a sentence. Clearly Provenzano's doubt over the fairness of his trial and partiality of the jurors was well-founded, as summarized in Point VIII of the Initial Brief of Appellant. A new sentencing hearing is required.

POINT IX

AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS.

In answer to this point on appeal, the state asserts, "[t]his argument has been previously considered and rejected by implication by this Honorable Court and Federal Courts. (citations omitted)" (Answer Brief, p. 61). The state forgets that legislation is presumed to be constitutional, and that a specific argument must be presented to an appellate court before that court will rule on its merits. The argument set forth in this point has never been ruled upon by this Court or a federal court.

In Medina v. State, 10 FLW 101 (Fla. January 31, 1985), this Court summarily treated several of the 28 issues raised by the defendant. This Court noted in footnote 2 that Section 921.141, Florida Statutes was not unconstitutional because the aggravating and mitigating factors are vague and overbroad, or because death was not the least restrictive means to further compelling state interests, or because the death sentence was being arbitrarily and capriciously imposed, or because the statute was procedural rather than substantive. To say that the statute is valid because it does not violate any of these constitutional proscriptions is not to say that the statute is constitutional in every respect for all time.

The state also relies on Randolph v. State, 463 So.2d 186 (Fla. 1984). This Court in Randolph merely stated, "We also

reject Randolph's contention that the capital sentencing statute is unconstitutional on its face and as applied." Id. at 193. Such language does not "implicitly" consider and reject the argument presently contained in this issue. The state's reliance on Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) is similarly erroneous. The majority of the United States Supreme Court in Proffitt held that imposition of Florida's death sentence did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The argument contained in this point on appeal was neither expressly nor impliedly before the United States Supreme Court, and it cannot be assumed that the United States Supreme Court has ruled on this issue.

In Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983), the Fourth District Court of Appeal held that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question on a special verdict form so indicating. That court expressly rejected the state's argument that the defendant had waived the issue by failing to secure the finding from the jury, noting that the burden was on the state. Id. at 948. This Court agreed with the position of the Fourth District Court of Appeal, stating that "[t]he question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by

the jury. Although a trial court may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." State v. Overfelt, 457 So.2d 1385 (Fla. 1984).

The state has been totally remiss in directing this Court's attention to any case, federal or state, holding that it is not constitutionally required for the jury to determine the facts with regard to matters concerning the criminal episode. Overfelt, on the other hand, specifically requires that the state meet its burden of securing such findings from the jury. It is respectfully submitted that, based upon the foregoing argument, Section 921.141 is being unconstitutionally applied. A new sentencing hearing is required, whereby the jury determines the facts concerned with the criminal episode.

CONCLUSION

Based upon the argument and authority set forth herein and in the Initial Brief of Appellant, this Court is respectfully asked for the following relief:

POINTS I, II and VIII: That the convictions be reversed and this matter remanded for retrial;

POINT III: That the first degree murder conviction be reversed and the matter remanded with directions that Appellant be adjudged guilty of second degree murder and resentenced accordingly; and

POINTS IV, V, VI, VII and IX: That the sentence of death be vacated and that either a new penalty proceeding be had or that this Court modify the sentence to life imprisonment with a twenty-five year mandatory minimum term of imprisonment.

Respectfully submitted,

JAMES B. GIBSON
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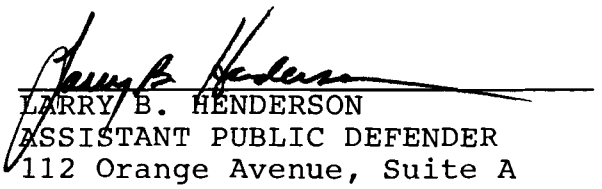
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Thomas H. Provenzano, Inmate No. 094542, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 19th day of June, 1985.

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