IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NATHANIEL HILL,

Respondent.

CASE NO. 67,110

PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida 32301

ROBERT L. TEITLER
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

LIST OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

Appendix District Court's Opinion.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's statement of the case and his statement of the facts as set forth in his Answer Brief to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and/or clarifications:

1. The victim, Julie Gessler, via a deposition to perpetuate testimony, which was read at trial, did testify at Respondent's trial.

2. In her deposition to perpetuate testimony, the victim testified that her assailant weighed "... around 165 pounds ...", and when cross-examined stated that such was an approximation and a guess within a range from 140 to 165 pounds (R 66, 96). She testified that she did not give a definite weight (R 97).

3. On appeal to the Fourth District Court of Appeal, the Respondent's conviction was affirmed, but his sentence was vacated and the cause was remanded for resentencing. [Petitioner posits that pursuant to this Court's decision in Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982), this Court should refrain from considering issues raised by Respondent in his Answer Brief other than that relating to sentencing.]

POINTS ON APPEAL

POINT I

WHETHER THIS COURT'S RECENT DECISION IN JACKSON IS DISPOSITIVE OF THIS POINT?

POINT II

WHETHER THE TRIAL COURT ERRED IN ALLOWING PROSECUTION WITNESSES TO TESTIFY REGARDING PRIOR STATEMENTS BY THE VICTIM PERTAINING TO THE IDENTIFICATION OF HER ASSAILANT?

POINT III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE THE JURY INSTRUCTIONS REQUESTED BY RESPONDENT?

POINT IV

WHETHER THE FOURTH DISTRICT COURT OF APPEAL BELOW PROPERLY ADMONISHED AGAINST RETAINING JURISDICTION OVER A GUIDELINES SENTENCE UPON RESENTENCING?

SUMMARY ARGUMENT

POINT I: Petitioner respectfully acknowledges this Honorable Court's very recent decision in Jackson, infra, which is dispositive of this point.

POINT II: The issue raised herein was not raised below, and is therefore not preserved for appellate review. The victim testified at trial via her deposition to perpetuate testimony, wherein the Respondent had a full opportunity to confront and cross-examine the victim regarding her testimony on the identification of her assailant. Therefore, pursuant to §90.801(2)(c) Fla.Stat. (1983), the police officers were properly permitted to testify as to what the victim told them the assailant looked like, and such testimony did not constitute hearsay.

POINT III: The issue raised regarding the trial court's alleged error in not giving the requested special instruction is not preserved for appellate review. The requested Special instruction not given, 3, 4, 6, and 8, which Respondent alleges was error, were properly deemed either incorrect statements of the law or adequately covered by Standard Instruction 2.03. As held in State v. Freeman, 380 So.2d 1288 (Fla. 1980) and Brown v. State, 423 So.2d 599 (Fla. 3rd DCA 1982), such separate instructions on the identity issue were not required.

POINT IV: The Fourth District Court of Appeal, in its decision below, properly cautioned the trial court that on resentencing of the cause not to retain jurisdiction over a sentence imposed pursuant to the guidelines.

ARGUMENT

POINT I

PETITIONER RESPECTFULLY ACKNOWLEDGES THAT THIS COURT'S RECENT DECISION IN JACKSON IS DISPOSITIVE OF THIS POINT. (Restated).

Petitioner respectfully acknowledges that this Court's recent decision in State v. Jackson, 10 FLW 564 (Fla., Oct. 17, 1985) is dispositive of this point. Jackson, supra, was decided by this Court subsequent to Petitioner filing its Initial Brief.

Regarding the other points raised by Respondent, which will be subsequently replied to, Petitioner posits that pursuant to Trushin, supra at 1130, this Court should refrain from considering other issues raised by Respondent in his Answer Brief other than that relating to sentencing:

> While we have the authority to entertain issues ancillary to those in a certified case, Bell v. State, 394 So.2d 979 (Fla. 1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case.

POINT II

THE TRIAL COURT DID NOT ERR IN ALLOWING PROSECUTION WITNESSES TO TESTIFY REGARDING PRIOR STATEMENTS BY THE VICTIM PERTAINING TO THE IDENTIFICATION OF HER ASSAILANT. (Restated).

Initially, Petitioner maintains that the specific issue raised by Respondent, regarding "prior consistent statements", was not raised below, and was therefore not preserved below for appellate review. Defense counsel specifically objected at trial to the police officer's testimony as it related to hearsay and his Sixth Amendment right to confrontation (R 17-19, 111-113, 133-134), but did not object below on the grounds of improper "prior consistent statements". The Respondent may not tender a position to the trial court on one ground and successfully offer a different basis for that position on appeal. Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982). The trial court was never put on notice of the ground alleged to be error herein, and therefore this issue is not properly raised in this appeal. See Sapp, supra.

Addressing the merits of this issue, the record reveals in this case that the victim did not personally appear to testify at trial, but that a previous deposition to perpetuate the testimony of the victim was read to the jury (R 53). Fla.R.Crim.P. 3.190(j). In this deposition to perpetuate testimony, the victim testified, on direct examination, regarding the identification of her assailant, and that she gave a description of the assailant to the police (R 66).

Q Did you give a description to the police when they came?

A Yes, I did.

Q What description did you give?

A Okay, they asked if he was white or black and I told him he was a black male and then they asked questions and I just said he was between five-ten and six feet, around 165 pounds, was wearing a green kind of sweat-shirt, muscle shirt with, I believe, at the time a kind of round face, well, you know, I didn't mean skinny face at the time. I said he had kind of a short fro and brown eyes.

Q Did the police take that description on January 17th of "84, the night that this happened?

A Yes, they did. (R 66).

The victim was, thereafter, fully cross-examined by the Respondent, regarding this identification, in the deposition (R 81-82, 86-88). The Respondent therefore was present and had a full opportunity to confront and cross-examine the victim regarding the identification during this deposition. See State v. Basiliere, 353 So.2d 820 (Fla. 1977).

At trial, police officers Allen and Ewing were permitted by the trial court to testify as to how the victim described the assailant to them (R 112-114, 133-140). The trial court determined, as Petitioner maintains, that pursuant to §90.801(2)(c), Fla.Stat. (1983), the testimony of the police officers, as to what the victim told them the assailant looked like, was not hearsay and was properly admissible (R 112). Section 90.801(2)(c) states:

> 90.801 Hearsay; definitions; exceptions.-
>
> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (c) One of identification of a person made after perceiving him.

In this case, the victim (declarant) had been confronted by the ac-

cused and was subject to cross-examination during the deposition to perpetuate testimony, on the issue of identification, and after this deposition was read to the jury, the police officers then properly testified as to what the victim said to them regarding the description of the assailant. Since in this regard the victim did testify at trial, via the deposition which preserved her testimony (R 301), and was subject to cross-examination, the officer's testimony regarding the victim's statements on identification was not hearsay, and was therefore properly admissible.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE JURY INSTRUCTIONS REQUESTED BY RESPONDENT.

Regarding the denial by the trial court of the requested special instructions, the record reveals that the Respondent failed to contemporaneously object to the trial court's denials (R 183-194). And, after the jury had retired to deliberate, the Appellant "renewed" his "objections" to not giving the special instructions (R 308). At that point there was nothing to "renew", and further, pursuant to Shephard v. State, 455 So.2d 479 (Fla. 5th DCA 1984), and Fla.R.Crim.P. 3.390(d), such objection after the jury retired was not timely. Therefore this issue has not been preserved for appellate review. See Castor v. State, 365 So.2d 701 (Fla. 1978).

On the merits, the Respondent contends that the trial court erred in failing to give his special jury instructions number three, four, six and eight pertaining to identification (R 344, 345, 347, 349). The trial court held, as Petitioner herein maintains, that instruction number three was not a correct statement of the law (R 188-189), that instruction number four was covered by Standard Instruction 2.03 (R 185), that instruction number six was repetitive of instruction number three (R 185), and instruction number eight was as well covered by Standard Instruction 2.03 (R 185).

Regarding requested instructions three and six, which were deemed incorrect statements of law, it is well settled that it is not error to refuse to give a jury instruction which is an incorrect statement of law. Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982); Carron v. State, 414 So. 2d 288 (Fla. 2nd DCA 1982).

Regarding special instructions four and eight, which were deemed covered in Standard Instruction 2.03, where such instructions are so covered

by the Standard Instructions and add nothing to them, the trial court does not err in so using the applicable Standards. See Bailey v. State, 411 So. 2d 1377 n. 1 (Fla. 4th DCA 1982).

All four requested special instructions pertained to identity, and as held by this Court in State v. Freeman, 380 So.2d 1288 (Fla. 1980), separate instructions on identity, and the State's burden of proof thereon, do not have to be given in every case where identity is in issue and such instructions are requested; the trial court does not err in refusing to give requested identity instructions where the charges given by the trial court were clear, comprehensive, and correct, and where from the instruction given it was clear that the burden was upon the State to prove beyond a reasonable doubt all of the elements of the alleged crime, including the identity of the defendant. Brown v. State, 423 So.2d 599 (Fla. 3rd DCA 1982). Standard Instruction 2.03 was sufficient. As held in Brown, supra at 600:

> As to the conviction, appellant seeks reversal on the ground that the trial court erred in denying his request for a special jury instruction on identification since it was a critical issue at trial. We find no error in the trial court's instructions to the jury. The instructions given were clear, comprehensive and correct. No special instruction on the issue of identity was necessary or required. The issue was adequately covered in the standard jury instructions that were given.

Respondent further contends that the trial court erred in failing to give Standard Instruction 2.04 paragraphs 7 and 8. As stated in Standard Instruction 2.04, Note to Judge,

> The instructions covered under

> paragraphs numbered six through ten, inclusive, are not common to all cases. These numbered paragraphs should be included only as required by the evidence.

Regarding paragraph 7:

> 7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

The trial court determined, as maintained by the Petitioner, that the evidence as presented did not require said instruction (R 213-216), and that the Respondent's position was adequately covered within paragraph 2 (R 215-216). The evidence herein did not reveal any "threat" by the police officers to the victim-witness, and though the police officers might have been suggestive towards the victim-witness regarding the identification of her assailant, such action was properly not deemed "pressure", or coercion, as referred to in paragraph 7 (R 214-215). Regarding paragraph 8:

> 8. Did the witness at some other time make a statement that is inconsistent with the testimony he gave in court?

The trial court determined, as maintained by Petitioner, that the evidence presented did not reveal an inconsistency, or impeachment of a witness, as is referred to in paragraph 8 (R 209-213). The evidence revealed that in her deposition to perpetuate testimony, the victim testified that her assailant was "... <u>around</u> 165 pounds ..." (R 66), and when cross-examined stated:

> Q You stated that the individual who robbed you weighed 165 pounds; correct?
>
> A <u>Approximately</u>.
>
> Q And you say you told that to the police originally; correct?
>
> A Well, I told" -- "<u>I took a guess and gave them a range</u> from 150 to 165 because" --

MR. WRUBEL: Can you go back and read that. Start from a range.

A -- a range from 140 to 165 because I am not that good at guessing weight. (R 96).

And, when cross-examined regarding a statement given to Ewing previously, the victim testified:

Q Do you recall him asking you about quote how much do you think he weighed, unquote?

A Yes, I do, but I don't recall my answering to the question.

Q At that time, do you recall your answer after taking a look at it as being quote, oh about maybe 140, 150, unquote?

A Well, probably. We were hurrying through the statement itself because I was working.

Q At that time, you did give a description of, quote, on about mayby 140 to 150, unquote?

A Yes.

Q You never said anything about the 165 pounds?

A Not a definite weight, no. (R 97).

The victim never stated that her assailant weighed 165 pounds, only "around" or within "a range" of 165 pounds, and that she never was able to give a definite weight. As such, the victim's testimony or statements were not inconsistent at all.

Therefore, the trial court did not abuse its discretion in failing to give the paragraph 7 and 8 instructions.

POINT IV

THE FOURTH DISTRICT COURT OF APPEAL BELOW PROPERLY ADMONISHED AGAINST RETAINING JURISDICTION OVER A GUIDELINES SENTENCE UPON RESENTENCING. (Restated).

The Fourth District Court of Appeal below properly admonished the trial court against retaining jurisdiction over a guidelines sentence upon resentencing.

CONCLUSION

Pursuant to the aforementioned argument, and in light of this Court's very recent decision in Jackson, supra, Petitioner respectfully requests that the Fourth District Court of Appeal determination, affirming the Respondent's conviction, be affirmed, and that this cause be remanded for resentencing in accordance with Jackson.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida 32301

ROBERT L. TEITLER
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished, by courier delivery, to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, Public Defender's Office, 224 Datura Street, West Palm Beach, Florida 33401, this 12th day of November, 1985.

Of Counsel