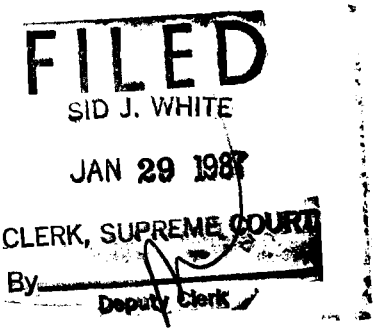
IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,715



HAROLD SMITH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner was the defendant in the trial court and appellant in the Third District Court of Appeals. Respondent was the prosecution in the trial court and appellee in the court of appeals. The parties will be referred to as they stand in this Court. References to the pleadings will be made by using the letter "R" followed by a page cite. References to the trial transcript will be made by use of the letters "Tr" followed by a page cite.

STATEMENT OF THE CASE

Respondent accepts petitioner's version of the procedural aspects of this case, viz., the first four paragraphs of his "STATEMENT OF THE CASE AND FACTS."

STATEMENT OF THE FACTS

Respondent objects to petitioner's version of the evidence adduced at trial. Accordingly, the following narrative is offered:

Petitioner shot his wife several times with a pistol from close range. There was never any doubt about his culpability. The only contested issue concerned is sanity at

the time the murder was committed (see defense's closing argument, Tr. 970-983).

The prosecution called thirteen witnesses in its case in chief. Petitioner then called seventeen witnesses, all of whom testified regarding petitioner's mental state. Only one of those witnesses was called upon to express an opinion as to petitioner's sanity at the time of the murder.

The prosecution then called five rebuttal witnesses. Two of those witnesses were psychiatrists, and they expresed their opinions as to petitioner's sanity.

A charge conference was held at the close of the testimony (Tr. 941 et seq.). Petitioner requested that Standard Jury Instruction 3.04(b) be read to the jury.

ANALYSIS OF PERTINENT TESTIMONY

This case deals with the jury instruction on sanity which was given to the jury. For that reason, no attempt will be made to discuss testimony which dealt with the murder itself. Instead, only that testimony relative to petitioner's mental state will be examined.

Thirteen of petitioner's seventeen witnesses were laymen. A brief summary of their testimony follows:

1.) Linda Barnhart (Tr. 483-495). Ms. Barnhart was a friend of petitioner and the victim, and had been for a number of years. She told of visiting petitioner two days before the murder took place. He was very nervous and claimed that someone was out to get him. (Tr. 487).

This witness went on to state that petitioner was "normal" when he was taking his medicine, but abnormal if he failed to do so (Tr. 490). To this witness' knowledge, petitioner had been off his medication for three days when last seen (Tr. 492). This witness did not see petitioner the day of the murder, and had no idea of his condition at that time. (Tr. 493-494).

2.) Karen Stewart (Tr. 523-531). Ms. Stewart was a therapist at the North Miami Community Health Center. She testified that petitioner called her to set up an appointment on January 25, 1984. [1] This was done, with petitioner due to come by on the 27th of January (Tr. 527). He failed to show up for that appointment and another date was made (February 1, 1984). Ms. Stewart did not recall exactly what appellant had said except that he requested an appointment (Tr. 531).

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[1] The murder took place six days later, on January 31, 1984.

3.) Thomas Patterson (Tr. 531-541). Mr. Patterson was a retired mechanic who had known petitioner for many years. He testified that petitioner believed that someone was after him (Tr. 534). His behavior was unusual during the period prior to the murder (Tr. 537).

4.) William Holley (Tr. 557-567) was petitioner's neighbor. He testified that he had seen petitioner one month before the murder (Tr. 559). He likened petitioner's house to a fort (Tr. 560), and he described petitioner as paranoid with sudden mood changes (Tr. 562).

5.) Lt. Steven Preston (Tr. 578-586) was a paramedic who saw petitioner in the jail a day after the murder. Petitioner was complaining of lower back pain (Tr. 581). Petitioner was observed moving around on his bench, but Lt. Preston did not believe that he needed to been seen by a psychiatrist (Tr. 586).

6.) Bertha Glover (Tr. 586-605) worked as a nurse at the jail. She "screened" petitioner the day after the murder (Tr. 588). Petitioner appeared depressed (Tr. 600), but could answer all the routine questions put to him (Tr. 602). Ms. Glover believed petitioner to be "under the influence of something" (Tr. 605).

7.) Carolyn Catanzaro (Tr. 614-626) was petitioner's neighbor. She said that petitioner was afraid that someone was after him (Tr. 619). This feeling arose after petitioner was arrested on drug charges [2] (Tr. 620-621). Petitioner had always had trouble relating to people, and he was mean to his dogs (Tr. 623). This witness last saw petitioner a week before the murder (Tr. 616).

8.) Joseph Catanzaro (Tr. 626-634). Mr. Catanzaro saw petitioner a few days before the murder (Tr. 627). Petitioner said that someone was going to kill him (Tr. 628).

9.) Jane Arganow (Tr. 634-652) was petitioner's neighbor. She had known him for a number of years (Tr. 635). Petitioner was distrustful of strangers and paranoid (Tr. 636). He became more withdrawn in the months preceding the murder (Tr. 637). This witness testified that she had very little contact with petitioner during the month of January (Tr. 637). Petitioner phoned her from jail two weeks after the murder and asked questions about the funeral and events surrounding the crime (Tr. 641).

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[2] Petitioner feared that other participants in the drug transaction were seeking revenge. Petitioner apparently caused the enterprise to fail, and people were arrested.

10.) Edward Smith (Tr. 654-663) was petitioner's brother. He had very little contact with petitioner during the past years (Tr. 655), but did see him a few days before the murder (Tr. 657). Petitioner seemed withdrawn (Tr. 658).

11.) Phillip Gargon (Tr. 678-691). Mr. Gargon shared a jail cell with petitioner. He told of petitioner's sleeplessness (Tr. 680) and incidents of petitioner's talking to the television set (Tr. 681).

12, 13.) Amy Brisco and Jimmy Davis (Tr. 691-730). These witnesses were prison guards at the Dade County Jail. They testified concerning petitioner's appearance (he seemed depressed) and that he improved once he was given medication (Tr. 723).

Petitioner called four doctors to testify. Only one (Dr. Stillman) was tendered as an expert witness. The other doctors testified as follows:

1. Dr. Eugenia Legorburu (Tr. 495-519). Dr. Legorburu was a psychiatrist who had brief contact with petitioner in December of 1982, just over two years prior to the murder (Tr. 501). Petitioner was examined, and tranquilizers were prescribed (Tr. 502). The diagnosis was that petitioner was depressed and paranoid (Tr. 503).

Petitioner returned to see Dr. Legorburu in January of 1983, at which time different drugs were prescribed for him. (Tr. 504). Petitioner was advised to take his medication and to continue with outpatient psychotherapy appointments (Tr. 505). Petitioner stopped visiting Dr. Legorburu's clinic in March of 1983 (Tr. 511).

On cross this witness stated that she had no idea of petitioner's mental state at the time he murdered his wife (Tr. 512). In fact, this witness had only met with petitioner for a total of fifteen to twenty minutes (Tr. 513) two years before the murder.

Dr. Legorburu also stated that petitioner told her that he had participated in an illegal drug transaction, was arrested, and that men had since been following him. Interestingly, petitioner's wife confirmed this (Tr. 516). The witness nevertheless concluded that petitioner was paranoid (Tr. 516).

2. Dr. Norman Blum (Tr. 543-557). Dr. Blum met petitioner because petitioner performed repair work on Dr. Blum's car. They became friends. Dr. Blum recalled that in mid-January petitioner appeared to be depressed and withdrawn (Tr. 545). Petitioner's overall condition had deteriorated since his arrest on drug trafficking charges (Tr. 546). Petitioner felt that people involved in the transaction were

out to get him. Dr. Blum did not feel that petitioner was dangerous (Tr. 553). [3]

3. Dr. Robert Brewer (Tr. 663-677). Dr. Brewer was a clinical psychologist who met appellant on the day following the murder (Tr. 665). Petitioner was very upset and depressed. He was not psychotic at that time (Tr. 665).

Petitioner was again seen on February 3. He was then diagnosed as having either organic brain syndrome (from alcohol abuse), a personality disorder, or reactive depression to events and surroundings (Tr. 667). Petitioner was moved to a "strip cell" for his own safety. He was confused and disoriented (Tr. 669), but gradually improved over the next week (Tr. 670). By the end of March petitioner appeared agitated. He was given tranquilizers, which succeeded in calming him down (Tr. 672).

Dr. Brewer testified that the depression exhibited by petitioner was a normal reaction to having killed his wife (Tr. 674), and that it indicated that petitioner knew it was wrong to do so.

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[3] Dr. Blum was not a psychiatrist. He only treated petitioner for physical ailments.

4. Dr. Stillman (Tr. 730-803). This was the only defense witness tendered as an expert, and the only one who examined petitioner concerning his sanity at the time of the murder.

Dr. Stillman interviewed petitioner a few months after the murder (Tr. 735). He believed that petitioner suffered from some brain damage (Tr. 740). Petitioner was able to do some things well (mechanical work, e.g.) and others not at all (reading, e.g.) (Tr. 744).

Petitioner was a heavy cocaine and alcohol user (Tr. 746). He was diagnosed as having elements of toxic psychosis, paranoia delusions, and some brain damage (Tr. 749-751). Petitioner had been poisoned by alcohol, cocaine, and prescribed drugs, and that drug use was the cause of his problems. According to Dr. Stillman, petitioner was insane intermittently during the period beginning one week before the murder and ending five days after the murder. This insanity was transitory. Petitioner fluctuated between psychotic and lucid moments (Tr. 802). Petitioner was insane when he killed his wife (Tr. 758).

STATE'S WITNESS

1. Dr. Jacobson (Tr. 812-871) saw petitioner in March of 1984 (Tr. 818). He believed that petitioner was

"suffering from something at the time of the offense" (Tr. 832), but that he was not insane.

> "So I think that at best as I could formulate a view of the defendant at the time of the offense was he was influenced by the drugs that he was taking and the alcohol. That he was a suspicious individual who was somewhat fearful, who was inclined to become angry, to react impulsively. But certainly the alcohol diminished his control.
>
> * * * *
>
> I would characterize [the alcohol] as giving [petitioner] less control. Not thinking about [his] actions. Flying off the handle, if you will."
>
> (Tr. 832-833)

Dr. Jacobson discussed petitioner's hallucinations (Tr. 835), his depression (Tr. 829), and paranoia (Tr. 822). In summary, Dr. Jacobson opined:

> "I think that as I would see the issue, that there is nothing to suggest that he didn't understand his acts and that they were wrong. Even if he was paranoid and suspicious and mistrustful and thought that people were out to get him, that doesn't really in my way of thinking establish that he was not aware of his behavior and what he was doing." (Tr. 869).

2. George Freeman (Tr. 873-880) testified that he interviewed petitioner on the day following the murder, and that petitioner discussed his mood, mentioning that he felt "like an ass-hole." (Tr. 875). Petitioner was placed in a safety cell because he was so depressed (Tr. 875).

3. Detective William Craig (Tr. 881-888) received a phone call from petitioner in April of 1984 (Tr. 883). Petitioner wanted information concerning his property which had been confiscated (Tr. 884).

4. Ruth Gonzalez (Tr. 889-890) testified that petitioner (her son-in-law) had given her the names of the people he thought were after him (Tr. 889).

5. Dr. Lloyd Miller (Tr. 890-941). Dr. Miller was the second psychiatrist to testify on behalf of the prosecution. He told the jury of petitioner's version of the killing:

> "He said that at the end he felt that his wife was trying to get him out of the house. For example, she had come home with money and wouldn't say where the money had come from. She had lied about things. She was using drugs.
>
> His recollection for the time of the offense was that he remembered her threatening him with something. He remembered they were--he remembered there were people outside. Subsequently, he

> said, I got up, I don't remember, something happened, I just snapped." (Tr. 895).

Dr. Miller diagnosed petitioner as suffering from alcoholism (Tr. 898). He also discussed petitioner's drug use (Tr. 899). In Dr. Miller's opinion, petitioner was sane when he killed his wife (Tr. 900).

> "It was my opinion that there was nothing else other than he was a heavy drinker, he also had been involved in other drug usage. It was my opinion that he had been drinking at the time of the offense, that the drinks wouldn't necessarily have prevented him from knowing what he was doing or knowing that what he was doing was against the law or wrong." (Tr. 902-903).

ISSUE ON APPEAL

I

WHETHER THE JURY INSTRUCTION ON INSANITY DISAPPROVED IN YOHN V. STATE, 476 SO.2d 123 (FLA. 1985) IS FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF AN OBJECTION?

SUMMARY OF THE ARGUMENT

Petitioner specifically requested that the trial court instruct the jury with an instruction since disapproved by this Court. Since that is the case, there is more involved here than a simple failure to object. Petitioner not only has to overcome a waiver argument (due to a lack of contemporaneous objection); he has to overcome an estoppel argument as well. Petitioner induced the trial court into giving an improper instruction. He should not be allowed to benefit from his own acts now. This Court should reject petitioner's argument before going to the merits of his claim.

Petitioner's claim is worthless even if viewed on the merits. This Court has already held this exact same error not to be fundamental, and the United States Supreme Court has as well. The District Court of Appeal's concern that the law in this area is unsettled is not borne out by careful analysis.

Finally, the evidence of sanity presented below clearly established beyond any reasonable doubt that petitioner was sane when he murdered his wife. This Court can confidently state that any "error" in the jury instructions was harmless.

ARGUMENT

I

THE JURY INSTRUCTION ON INSANITY DISAPPROVED IN YOHN V. STATE, 476 SO.2d 123 (FLA. 1985) IS NOT FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF AN OBJECTION.

A. WAIVER VS. ESTOPPEL

It is the respondent's position that petitioner induced the trial court into error by actively requesting that the then Standard Jury Instruction 3.04(b) be read to the jury (Tr. 947-950). Petitioner requested that jury instruction and engaged in extended dialogue with the court concerning how that instruction would be presented.

As this Court has repeatedly stated, a party may not take advantage on appeal of a situation which he has created at trial. McCrae v. State, 395 So.2d 1145 (Fla. 1980); Jackson v. State, 359 So.2d 1190 (Fla. 1978) ("Appellant cannot initiate error and then seek reversal based on that error."); Pope v. State, 441 So.2d 1073 (Fla. 1983) ("A party may not invite error and then be heard to complain of that error on appeal."); White v. State, 446 So.2d 1031 (Fla. 1984) (appellant cannot agree to admission of evidence, e.g., and then complain that said evidence was inadmissible).

This case represents more than simply the failure to interpose a contemporaneous objection. This is a case where petitioner has actively sought an instruction from the trial court and later seeks to win reversal because that instruction was improper. The case law of this State precludes relief here.

B. "FUNDAMENTAL ERROR"

Even if one assumes that this instruction was not requested by petitioner, and that petitioner simply failed to lodge his objection, there was no error.

The complained-of instruction dealt with the burden of proof and insanity. This Court has already decided, in Roman v. State, 475 So.2d 1228 (Fla. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986), that the precise error alleged to have taken place here is not fundamental.

> "As appellant's last point relating to the guilt phase, he contends that the trial court erred in failing to instruct the jury that the state had the burden of proving beyond a reasonable doubt that appellant was legally sane at the time of the commission of the offense. Appellant did not preserve this point, as he did not request the trial court to give this instruction. We find no error."

475 So.2d at 1234.

This Court's holding in Roman was in conformity with the recent United States Supreme Court case of Rose v. Clark, ___ U.S. ___, 92 L.Ed.2d 460 (1986). Respondent believes that had the Third District Court of Appeal considered either Roman or Rose it would not have found any doubt to exist concerning the validity of its Snook v. State, 478 So.2d 403 (Fla. 3d DCA 1985) decision. As Rose made clear, Sandstrom [4] error is not fundamental.

Rose is also in harmony with this Court's definition of fundamental error as enunciated in Ray v. State, 403 So.2d 956 (Fla. 1981):

> "Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly." Id. We agree with Judge Hubbart's observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Porter v. State, 356 So.2d 1268 (Fla. 3d DCA) (Hubbart, J., dissenting), remanded, 364 So.2d 892 (Fla. 1978), rev'd. on remand, 367 So.2d 705 (Fla. 3d DCA 1979)."

403 So.2d at 960.

[4] Sandstrom v. Montana, 442 U.S. 510 (1979).

Ray also made it clear that where a pary requests an instruction, error in that instruction will not be held fundamental. (See Ray at page 961, headnotes 7-12). Based on that holding, the petitioner waived error below. See also State v. Lancia, 11 F.L.W. 2536 (Fla. 5th DCA 1986).

Going beyond the waiver and viewing this case as involving possible fundamental error, there is no doubt that this error has nothing to do with jurisdiction. Nor can it be said that "the interests of justice present a compelling demand" for the application of the fundamental error doctrine. The reason for that lies in the strength of the evidence indicating that petitioner was sane when he murdered his wife. Behold this analysis:

Petitioner only presented one expert witness. That witness (Dr. Stillman) opined that petitioner was suffering from the toxic effects of alcohol and drugs, causing petitioner to lapse in and out of sanity. According to Dr. Stillman, petitioner was temporarily insane when he killed his wife.

The prosecution countered with two expert witnesses. Their diagnoses of petitioner's condition were almost identical to Dr. Stillman's. They also attributed petitioner's problems to the effects of drugs and alcohol.

They simply believed that petitioner was nonetheless sane when he killed his wife.

One of those experts, Dr. Miller, made a rather important factual revelation which must be viewed as having a strong influence on the jury: he stated that petitioner had admitted that the killing arose out of an ordinary domestic dispute with his wife (Tr. 895).

The detailed testimony of two highly qualified psychiatrists on behalf of the prosecution established, beyond any reasonable doubt, that petitioner was sane.

The numerous lay witnesses who testified on petitioner's behalf must be viewed as bringing very little of value to the jury. Everyone agreed that petitioner was not a completely normal individual. He believed people were after him, and he never got along very well with people. However, those traits do not say very much about his sanity at the time of the crime. The prosecution's experts were able to explain petitioner's conduct, his hallucinations, and his paranoia.

One must also look at the testimony of Dr. Brewer, the psychologist who examined petitioner shortly after the crime. [5] Dr. Brewer found petitioner not to have been

[5] Dr. Brewer was called as a defense witness.

psychotic, and he attributed petitioner's depression to his realization of having committed a wrongful act.

In sum, the evidence of sanity is quite strong. The jury definitely would have so found even if the jury instruction may have been misleading regarding the burden of proving that element. As pointed out in Rose, an appellate court should not find error if it is of the belief that the record as a whole indicates that the error was harmless. That is the case here.

C. SUMMARY

Petitioner invited this "error," and relief is precluded on that ground.

This Court has already found a failure to object to a jury instruction not to be fundamental error in Roman v. State, supra. This error is not fundamental.

The United States Supreme Court holding in Rose v. Clark, supra, supports Roman, and demonstrates that the Third District's fears were unfounded.

If viewed on the basis of the evidence submitted, the record demonstrates that there was ample and forceful evidence of sanity. There is no reasonable doubt that the

jury would have so found regardless of who had the burden of proving this element.

CONCLUSION

Based on the foregoing the certified question should be answered in the negative.

Respectfully submitted,

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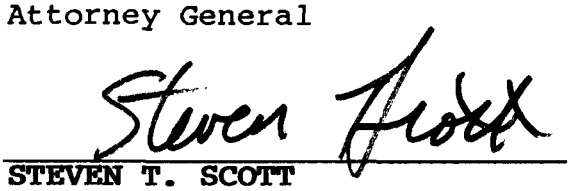

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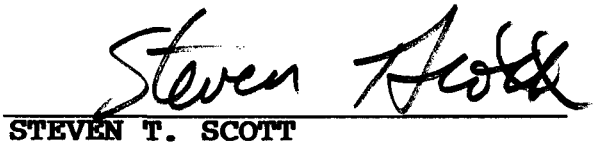
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **SHARON JACOBS** Coconut Grove Bank Building, 2701 S. Bayshore Drive, Suite 305, Miami, Florida 33133 on this 28 th day of January, 1987.



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