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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 70,882

SYLVESTER O'NEAL LEE

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Sylvester O'Neal Lee, was the defendant below, and will be referred to herein as respondent or Lee. The State of Florida, was the prosecution below, and will be referred to herein as petitioner. Record on appeal consists of seven volumes which will be referred to by the symbol "R" followed by the appropriate page number in parenthesis.

The opinion below is reported as Lee v. State, 12 F.L.W. 1498 (Fla. 1st DCA June 17, 1987).

STATEMENT OF THE CASE

Sylvester O'Neal Lee was charged by an amended information with separate counts of armed kidnapping, armed sexual battery, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony.

Lee was tried by a jury in the circuit court for Bay County Judge Don T. Sirmons and convicted on all five counts. (R 449). Lee was adjudicated guilty and sentenced to consecutive life sentences on counts I, II and III, consecutive 30 year terms on counts IV and V. (R 528-533, 81-88).

On appeal the First District Court of Appeal per Judge Zehmer reversed Lee's convictions and certified the following question as one of great public importance:

> Does the erroneous admission of evidence of collateral crimes require reversal of appellant's conviction where the error has not resulted in a miscarriage of justice but the state has failed to demonstate beyond a reasonable doubt that there is no reasonable possibility that the error effected the jury verdict?

Respondent filed a notice to invoke the discretionary jurisdiction of this court to review the decision below on July 17, 1987.

STATEMENT OF THE FACTS

State witness F[redacted]M[redacted] testified that around 3:00 a.m. on December 15, 1983, she, [redacted] and [redacted] were seated in W[redacted] J[redacted]'s car in the parking lot of the Midnight Lounge when respondent approached them with a black hand gun and after a stuggle drove the car away, with Mrs. M[redacted] still in it. (R 194-198, 202, 205, 214, 217). After driving 30 or 40 minutes, respondent made M[redacted] leave the car and perform oral sex upon him and then sexual intercourse. (R 200-202). Respondent left M[redacted] in the wooded area. (R 202-205). Mrs. M[redacted] was able to select respondent's photograph from a six-person photo spread. (R 209-210, 222-223).

W[redacted] J[redacted] identified photographs of his 1976 blue Camero and his check book. He denied giving respondent permission to take either. (R 225-227).

[redacted] also identified respondent in a photo spread and in court as the man who abducted Mrs. M[redacted] and her car. (R 228-234).

Comparison of respondent's head hair sample with debris from a brown towel found in the 1976 Camero revealed they were microscopically the same. (R 332-338). Examination and testing of the rape kit obtained from Mrs. M[redacted] as well as the Seminal stains upon her clothing revealed the presence of semine of the

blood group O, PGM type 1, which was consistent with respondent's. (R 261-265, 306-308, 327-331, 348-357).

The state then presented over respondent's objection, the testimony of Anita Boardman, Susan Balitza and Susan Vandenburg concerning a bank robbery committed by respondent in Tallahassee later on the same day. Ms. Boardman, an employee of the Security First Federal Saving and Loan testified that around 2:00 p.m. the bank was robbed by two men, one of whom had a gun. She identified respondent as the armed robber disguised with a fake mustache and rose-colored glasses. (R 270, 272-273). Ms. Boardman identified several photographs as bank camera shots of the robbers. (R 268-270). Mrs. Balitza, a teller at Security First Federal, also identified photographs taken by the bank's surveilance camera. (R 277-278). Ms. Balitza identified respondent as the armed robber wearing the dark glasses, hat and mustache. (R 279). Ms. Vandenburg, another teller at Security First, also identified appellant as one of the robbers. (R 283-285).

Rickey Maxey, a crime laboratory analyst with the Florida Department of Law Enforcement testified that a 1976 Camaro was found about one mile from the bank. (R 288-292). Latent fingerprints were lifted from the car and from a checkbook found inside the car which were subsequently matched to respondent's. (R 294-296, 313-314, 321-322, 368-382).

SUMMARY OF ARGUMENT

This court should quash the opinion of the district court below with directions to reinstate respondent's judgments and sentences for three reasons. The first reason is that the trial court did not err in admitting evidence of respondent's participation in a bank robbery within hours of the armed robbery and sexual battery involved herein. Evidence which is logically and legally relevant and tends to prove a matter at issue should be presented to the jury. Evidence that respondent used a hand gun to commit an armed bank robbery within hours of the charged conduct was relevant as it tended to prove that respondent may have carried a gun during the assault on Mrs. M[redacted] and carried a gun in the commission of a felony and that respondent, a convicted felon, possessed a firearm.

Moreover, this evidence corroborated the testimony of state witnesses whose credibility was being attacked and tended to rebut any possible defense that respondent was not carrying a gun. There was no error in admitting the evidence of the bank robbery.

Secondly, an examination of the record below demonstrates the fact finder would have found the defendant guilty beyond a reasonable doubt as required under the decisions of this court.

Finally, the record below demonstrates that a rational trier of fact would have convicted appellant of all crimes charged with or without benefit of the evidence of the bank robbery.

ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE OF COLLATERAL CRIMES AND ANY ALLEGED ERR SHOULD BE DEEMED HARMLESS UNDER ANY STANDARD OF APPELLATE REVIEW.

The district court below concluded that the evidence of Sylvester Lee's participation in an armed bank robbery in Tallahassee hours after committing the instant rape and robbery was not admissible under any standard of admissibility of collateral crime evidence. Petitioner maintains that the evidence was admissible under the standards set forth in Williams v. State, 110 So.2d 654 (Fla. 1959) and subsequent decisions of this court which consistently look to relevancy as the lynchpin upon which the trial court's decision to admit such evidence must turn, for it is the trial court who must make the initial determination to admit or suppress evidence. This court has long recognized that the trial judge is to be afforded broad discretion in ruling on the admissibility of evidence and his ruling will not be disturbed absent a clear abuse of discretion. Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987).

The evidence of Lee's participation in an armed robbery carrying a hand gun in Tallahassee after participating in the armed criminal conduct in Bay County earlier that morning was relevant to establish the entire context out of which the

criminal episode occurred and in order to present a rational account of the criminal episode to the jury. Smith v. State, 365 So.2d 704, 707 (Fla. 1978); Heiney v. State, 447 So.2d 210 (Fla. 1984). In Heiney, this court proved the admission of collateral crime evidence:

> It was relevant to show motive for the subsequent crimes and to establish the "entire context of the crimes charged".
>
> This evidence is relevant to show that Heiney's desire to avoid apprehention for the shooting in Texas motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas.

Id. at 214. See also Tumulty v. State, 489 So.2d 150, 153 (Fla. 4th DCA 1986) where the court upheld admission at collateral crime evidence stating:

> "It was relevant because it was "inextricably intertwined" in the scenario of the fourth trip to show the context of the crime. It was "inseparable crime" evidence that explains or throws light upon the crime being prosecuted."

Here, Sylvester Lee stole a car at gun point at 3:00 a.m. on December 15, 1983 in Panama City. Later that same day Lee is in Tallahassee robbing a bank, carrying a hand gun and the stolen car is found in Tallahassee within a mile of the same bank with Lee's fingerprints on it. (R 289). The jury acting as a rational trier of fact now had the complete picture including Lee's motive

for the Panama City crimes. Lee stole the car to use it in a bank robbery so he would not have to use his car as a get away vehicle. This clearly is a logical inference from the bank robbery and fingerprint evidence. Moreover, the testimony was admissible as corroborative evidence as to Lee's criminal intent and his use of a hand gun. This court should bare in mind that the state never recovered the alleged hand gun used in either crime and the sole evidence of Lee's possession of a hand gun in the rape episode was the testimony of a black woman who was sitting in her finance's car in the parking lot of a night club at 3:00 a.m. with two men one of whom had a criminal record and neither of which were her finance. The defense claimed Mrs. M was smoking pot with and and may have invented the rape charge to cover up her infidelity to her finance W J Indeed, was no sterling character-he admitted he knew Sylvester Lee after spending time in prison with him. (R 233). It would not be that far fetched for Lee to argue to the jury that and M conspired to frame him because had known him in prison.

However, the three women from the bank were not under suspicion or of questionable virtue. Their testimony clearly established Sylvester Lee as a man who liked to use a gun to persuade women to give him what he wants, be it an automobile, sex, or bank funds. Lee might make a more compelling argument against admissibility of this evidence if he had carried a knife

in the rape episode and a gun in the bank robbery. The state was also attempting to prove Lee, a previously convicted felon had possessed a firearm and also that he had carried a firearm during the commission of the rape/robbery. In Williams v. State, 383 So.2d 722 (Fla. 1st DCA 1980) the court approved admission of evidence of a defendant's participation in a conspiracy because that evidence showed he carried a gun. The defendant in Williams was also charged with possession of a firearm by a convicted felon.

Sub judice, the state presented legally sufficient evidence to convict Lee on all counts but successfully sought to present the collateral crime evidence to corroborate the testimony. The evidence of the armed bank robbery went not to sufficiency but to the weight of Mrs. M[redacted] testimony. Thus, an appellate court reading of the record might suggest the evidence was unnecessary as to sufficiency but a cold record is a poor guide to measuring what may have been necessary as to the weight of the evidence before the jury. This principle underlies Tibbs v. State, 397 So.2d 1120 (Fla. 1981) and this court's recent opinion in Craig v. State, 12 F.L.W. 269 (Fla. 1st DCA May 28, 1987) reiterating the court's view that relevancy and not necessity is the test of admissibility of collateral crime evidence. It did not escape notice of the undersigned Assistant Attorney General that the tone of the opinion below suggests the state did not need this evidence yet the author of the opinion below has a consistent

track record of chastising the state for obtaining convictions based on insufficient evidence. See Fox v. State, 469 So.2d ___ (Fla. 1st DCA 1985); Rita v. State, 470 So.2d 80 (Fla. 1st DCA 1985) and Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986). In fact in Rita, supra, the court reweighed the sufficiency of the underlined conviction in a rule 3.850 proceeding in direct contravention of this court's ruling in Matera v. State, 266 So.2d 661 (Fla. 1972).

Petitioner readily admits that the above argument has little to answer the certified question in the opinion below but clings to the position that the evidence was properly admitted. Petitioner asks this court to quash the opinion below and refrain from answering the certified question which raises nothing more than an academic question and certainly nothing of great "public" importance.

However, this is not to say that the question involved is of no importance what so ever. Certainly, F[redacted]M[redacted] would prefer not to be subjected to further assaults on her privacy and be forced to appear before a jury and recount the details of her intimate life. Counsel for petitioner is well aware of the general criticism that this office attempts to bring to many cases to this court's docket but suggests that in this particular case there is more than simply winning and loosing an appeal involved. The needless sacrifice of F[redacted] M[redacted] privacy by

the reopening of old wounds to accomplish what even Judge Zehmer below admitted to would be a useless act is motivation enough to pursue certiorari in this case. Even if this conviction were overturned Sylvester Lee will never see the light of day based on his numerous life sentences which have already been affirmed by other panels of the First District Court of Appeal. Lee v. State, 502 So.2d 429 (Fla. 1st DCA 1987). In Morris v. Slappy, 461 U.S. 1, 75 L.Ed.2d 610, 103 S.Ct. 1610 (1983) Chief Justice Warren Burger wrote an opinion which specifically addressed the impact of ordering a retrial in a rape case such as this:

> In its haste to creat a novel Sixth Amendment right, the court wholly failed to take into account the interest of the victim in these crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses can not justify failing to enforce constitutional rights of an accused: When prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be born by the prosecution, the court's and the witnesses; the Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is esspecially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the

> courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.
>
> Over 75 years ago, Rosco Pound condemned American courts for ignoring "substitive law and justice", and treating trials as sporting contests in which the "inquiry is, have the rules of the game been carried out strickly?" . . . a criminal trial is not a "game", and nothing in the record of respondent's two trials gives any support for the conclusion that it was constitutionally entitled to a new trial.

Id. at 461 U.S. 14-15.

In a case such as this where the admission of the evidence goes to the "fairness" of the proceeding which will vary from case to case and not the more explicit violation of a specific constitutional guarantee such as comment on the right to remain silent, the reviewing court should be less severe in upholding the judicial act below. Fairness is a state of mind. The opinion below agrees that there was no miscarriage of justice involved in this trial. The record adequately reflects that the trier of fact convicted this man for precisely what he was guilty of and should satisfy the collective conscience of this court that the conviction should stand.

* * *

Nevertheless, this court may agree there was error below and choose to address the certified question. The question certified implicitly rejects the tests stated in State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986) as unworkable. This is understandable and are jurisprudence would probably be better off if the district court below had merely entered a per curium affirmance without an opinion. However, such is not the case. Petitioner is at a loss to show that "there is no reasonable possibility that the error affected the jury verdict". Once again, as in the Albritton v. State, 476 So.2d 158 (Fla. 1985) scenario, the state is required to prove something beyond a reasonable doubt which involves nothing less than a resort to mind reading of the jurors in this context or the sentencing judge in the departure context. See Casteel v. State, 498 So.2d 1249 (Fla. 1986).

Petitioner relies on the established principle that errors which affect a defendant's constitutional rights may be considered harmless in the face of overwhelming evidence of guilt. See Schneble v. Florida, 405 U.S. 427 (1972) where the court held a violation of the Bruton Rule[1] may be rendered harmless by overwhelming evidence of guilt. Justice Grimes has applied the same principle in Adams v. State, 445 So.2d 1132 (Fla. 2d DCA 1984) noting the evidence was so great the Bruton

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[1] Bruton v. United States, 391 U.S. 123 (1968)

violation committed by the prosecutor constituted no more than harmless error. Id. at 1134. See also Tobey v. State, 486 So.2d 54, 55 (Fla. 2d DCA 1986). In Holland v. State, 503 So.2d 1250 (Fla. 1987) this court recognized that the harmless error doctrine must be properly applied to prevent the "needless reversal and retrial of cases which should have been affirmed". Id. at 1252. In Holland this court also described the competing interests as affirming a conviction of someone who would not have been convicted in the absence of error as weighed against the needless expense of retrying the case to reach the same result. The court emphasized that uncertainty should be resolved in favor of the defendant. The court below has already expressly found that there is no "uncertainty" to be resolved in favor of the defendant. Put another way, to state the question posed by the district court below is to answer with an affirmance of the judgment. There is no doubt of Lee's guilt of the crimes for which he has been convicted. See Delaware v. Van Arsdall, 89 L.Ed.2d 674 (1986) where the court stated:

> The harmless error doctrine recognizes the principle at the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [Citations ommitted], and premotes public respect for the criminal [justice] process by focusing on the underlined fairness of the trial rather than the virtually inevitable presence immaterial error. Id. at 684-685.

Premoting public respect for the criminal trial process is a consideration which should not be ignored. See Traynor, The Riddle Of Harmless Error (1970) where justice Traynor warned that reversal for error regardless of its effect on the judgment "encourages litigants to abuse the judicial process and bestirs the public to ridicule it".

Moreover, as stated in Clark v. State, 376 So.2d 1350 (Fla. 3d DCA 1980) introduction of collateral crimes in violation of the Williams Rule may constitute harmless error where the proof of guilt is clear and convincing so that even without the collateral evidence introduced the defendant would clearly have been found guilty. Id. at 1360.

In conclusion in Schneble, supra, the Supreme Court stated that "judicious application of the harmless error rule does not require that we indulge assumptions of irrational jury behavior. Id. at 431-432. The state urges the court quash the district's courts holding and reinstate the defendant's conviction without the necessity of a useless retrial.

CONCLUSION

This court should quash the decision of the district court below and reinstate the respondent's convictions. Alternatively this court should hold that the petitioner has satisfied the burden of proving beyond a reasonable doubt that the error was harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 21st day of August, 1987.

Gary L Printy

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