IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,578

RONICA STEPHENS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The petitioner, Ronica Stephens, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the plaintiff in the trial court. The parties will be referred to as they stand in this Court. The symbols "R" and "TR" will be used to refer to the record on appeal and trial transcripts. The symbol "A" will be used to refer to portions of the appendix attached to this brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

On January 9, 1985 the grand jury returned an indictment charging Petitioner with one Count of first degree murder and one count of attempted first degree murder. The victim of the first degree murder was Petitioner's husband, and the victim of the attempted first degree murder was Petitioner's husband's girlfriend. (R. 1). On January 10, 1985, Petitioner was arraigned and stood mute. The Court entered a plea of not guilty on her behalf. (R. 3).

Prior to the trial, the State of Florida filed a Motion in Limine to prevent the petitioner from introducing testimony from a psychologist concerning the fact that in the psychologist's opinion at the time of the shooting Petitioner was suicidal. (R. 183). Petitioner sought to introduce this testimony to support her defense that at the time of the shooting she was attempting to shoot herself and when her husband grabbed the gun, it accidentally discharged. The testimony was not being introduced to establish a diminished capacity defense. The trial court granted the state's motion and prevented any testimony from the psychologist. (TR. 39).

A jury trial commenced in this case on April 29, 1986. At the conclusion of the State's case and after all the evidence, counsel for Petitioner moved for a Judgment of Acquittal since the shooting was accidental, and therefore the State failed to prove beyond a reasonable doubt that Petitioner intended to kill either her husband or his girlfriend. (TR. 385). This motion was denied by the trial court.

On May 2, 1986, the jury returned verdicts of guilty as to both Count I and Count II of the indictment. (R. 478-479). Immediately after the jury verdict the trial court sentenced Petitioner to life imprisonment with a twenty-five (25) year mandatory minimum as to Count I and thirty (30) years as to Count 11. (R. 469). The Court sentenced Petitioner to the maximum sentence as to Count II despite the fact that the Court did not have a sentencing guidelines sheet. Furthermore, the Court failed to give any written reasons why it deviated from the recommended sentence.

A timely Notice of Appeal was f led on May 30, 1986 along with a Statement of Judicial Acts to be Reviewed. (R. 472, 499-A). The Third District Court of Appeal affirmed Petitioner's conviction and ruled that the psychiatric testimony was inadmissible since Petitioner had not entered a plea of not guilty by reason of insanity. The court reversed Petitioner's sentence in count two (2) since there was no guideline sheet prepared.

A notice to invoke jurisdiction was filed with this court on December 4, 1987. This court accepted jurisdiction. This appeal follows.

STATEMENT OF THE FACTS

On December 9, 1984, Officer Frank Marion was dispatched to a shooting which had occurred at the Pub Steakhouse and Bar in Miami Springs, Florida. (TR. 71). When Officer Marion arrived at the scene, he went into the bar and found two persons lying on the floor who had been injured from gunshot wounds. (R. 72) After attending to the victims Officer Marion spoke to Petitioner, Ronica Stephens, who told him that the gun used in the shooting was lying on the top of the bar. (TR. 74). Petitioner was subsequently placed under arrest and charged with the murder of Ellsworth Cole Stephens and the attempted murder of Michelle Jean. (R. 1).

In order to fully understand the events of December 9, 1984 it is necessary to examine the lives of Petitioner and her husband, Ellsworth Cole Stephens. Petitioner met her husband in a nightclub in Arkansas in 1955. They married the same year and shortly after moved to California. While living in California they had three children. (TR. 398-400). As time went on Mr. Stephens could not handle the responsibility of supporting his children and asked his wife to become a prostitute in order to earn more money for the family. The idea of becoming a prostitute was degrading to Petitioner. However, under duress, and based on her love for her husband as well as her financial need, she agreed to prostitute herself. (TR. 401). After being engaged in prostitution for some time, Petitioner became fed up with the entire situation. She couldn't convey her feelings to her husband and concluded that she would gain a tremendous amount

of weight thereby making herself unappealing to men. Over a period of several years she gained approximately 150 pounds. (TR. 402). After giving up prostitution, Petitioner went to college where she successfully obtained a degree. She then became a public safety officer for the State of California. (TR. 403-404).

In August, 1978, the Stephens moved to Ft. Myers, Florida. When the family arrived in Ft. Myers, Petitioner immediately obtained employment with H.R.S. Her husband was unable to find work and the burden of supporting the family rested with Petitioner. (TR. 405). In 1981, Mr. Stephens obtained employment with the Metro Rail in Miami. (TR. 410). He went to work on Sunday nights, remained in Miami during the week, and went home on Fridays. This arrangement lasted until June, 1984 when Mr. Stephens started having an affair with a girl named Michelle Jean. (TR. 413). At that point he stopped going home and no longer supported his family. (TR. 337).

Petitioner had a heart attack in July, 1984. She was unable to work, thereby producing no income to support the family. (TR. 415). After she suffered the heart attack, Petitioner decided to investigate the whereabouts of her husband. Through contact with Mrs. Green, the wife of her husband's employer, she found out that her husband was having an affair with another woman. Despite this news, Petitioner fervently believed that their marriage could be saved, and if she confronted her husband she would convince him to come back to Ft. Myers. (TR. 418). If unsuccessful in her attempts Petitioner decided she would kill herself. (TR. 419).

Petitioner received information from Mrs. Green that her husband spent most of his time at a bar in Miami Springs. Prior to December 9th, Petitioner went to this bar on two separate occasions but did not see him there. (TR. 429). On December 9, 1984, Petitioner once again drove to the Pub Steakhouse and Bar. This time she brought a loaded gun intending to kill herself in front of her husband if he refused to come back to Ft. Myers. (TR. 438). Before entering the bar, Petitioner placed the gun in her pocket. (TR. 440). There were five individuals in the bar: Margaret Brochous: an employee, and four customers: Michael Johnson, Richard Bowser, Donald Waltz, and Sylvia Johnson. All were present when the shooting took place, however, their accounts of the shooting were substantially different.

Margaret Brochous testified that on December 9, 1984 she was working as a bartender at the Pub Steakhouse and Bar. (TR. 115). She stated that at approximately 6:30 p.m. she saw Petitioner enter the bar and sit next to Donald Waltz. (TR. 120). Approximately a half hour later, Mr. Stephens and Michelle Jean entered the bar from the dining room entrance. She saw Mr. Stephens go to the back room. Michelle Jean sat at the bar near Petitioner. (TR. 122). Ms. Brochous subsequently noticed Mr. Stephens and Petitioner having a conversation. (TR. 127). Some time later, she saw Petitioner walking back towards her husband. Michelle Jean was trying to grab Petitioner's arm. At that time she heard Petitioner say "she was going to kill him". (TR. 132-133). Eventually, Petitioner and Michelle Jean entered a room out of the sight of Ms, Brochous. While they were in this

room she heard two shots but was unable to see how the shooting occurred. (TR. **134).**

Michael Johnson testified that he arrived at the bar at approximately 4:00 p.m. Later that evening he met Sylvia Johnson and Richard Bowser and they sat together to watch a football game. (TR. **157).** Mr. Johnson saw Petitioner enter the bar and sit next to Donald Waltz. At approximately **7:00** p.m. he heard two shots. (TR. **163).** He testified that prior to the shooting he never saw Petitioner drag Michelle Jean into the back room, and never heard Petitioner say that she was going to kill anybody. (TR. **171).** He further testified that he was sitting in the seat closest to the door separating the bar from the back room where the shooting had occurred. (TR. **169).**

Richard Bowser arrived at the bar at approximately 5:00 p.m. (TR. **174).** He sat with Michael and Sylvia Johnson and started to watch the football game. Eventually he saw Petitioner at the bar. Later that evening he saw Petitioner and her husband talking to each other. He testified that he never heard Petitioner say she was going to kill her husband, nor did he see Petitioner drag Michelle Jean into the back room. (TR. **189).** Similar to the other witnesses, he heard two shots but did not see the actual shooting. (TR. **181).**

Donald Waltz arrived at the bar at approximately 5:00 p.m. Approximately one hour later, Petitioner sat down next to him and they had a brief conversation. (TR. **194).** At **7:00** p.m. Donald Waltz went to the rest room. On his way he saw Petitioner and her husband having a conversation. Michelle Jean was still

sitting at the bar. While in the rest room Mr. Waltz heard two shots fired and was unable to see how the shooting occurred. (TR. 199).

Sylvia Johnson arrived at the bar at approximately 5:30 p.m. She sat at the bar with Michael Johnson and Richard Bowser. (TR. 232). She testified that she saw Mr. Stephens in the back room and Michelle Jean sitting at the bar. (TR. 238). Eventually Sylvia Johnson went to the bathroom and on her way saw Petitioner and Mr. Stephens arguing with each other. (TR. 239). On her way back to the bar, she saw Petitioner and Michelle Jean heading towards Mr. Stephens and heard Petitioner say "she was going to kill him". (TR. 242). Sylvia Johnson went back to the bar with her male companions and subsequently heard two shots fired. She did not see how the shooting occurred. (TR. 244).

At the trial, Petitioner testified on her behalf. She stated that on December 9, 1984 she went to the Pub Steakhouse and Bar in Miami Springs at approximately 6:30 p.m. The purpose of her trip was to meet her husband and try to convince him into moving back with his family. If she was unable to accomplish this, she intended to kill herself in front of her husband. (TR. 436). After ordering a drink at the bar she eventually noticed her husband in the back room. When Petitioner met her husband he asked her what she was doing there. (TR. 442). He then asked her how she had found him. Petitioner told her husband about her heart attack and the fact that she was unable to work. She told him that her daughter was trying to support the family. In response to this Mr. Stephens told her that he left because he

couldn't take the pressure any longer. (TR. **443).** It was then that Petitioner began to realize there was no way her husband was ever going to come home and attempt to reconcile their marriage. (TR. **444).**

Mr. Stephens began to walk away from Petitioner, but she proceeded to follow him. After another brief discussion, Petitioner told her husband "that he was killing her by degrees and why didn't he just go ahead and kill her once and for all." Petitioner then started to raise the gun to her head. (TR. **445).** Mr. Stephens tried to grab the gun from her hand and a struggle ensued. Eventually the gun was fired twice. Petitioner never saw Michelle Jean nor did she have any idea where the bullets went after the gun was fired. (TR. **447).** After the shooting, Petitioner attempted to help her husband. When the police came she told them where she had placed the gun. Petitioner was subsequently arrested and charged wit the murder of her husband and the attempted murder of Michelle Jean.

QUESTION PRESENTED

THE TRIAL COURT ERRED IN EXCLUDING PSYCHOLOGICAL TESTIMONY WHICH WAS RELEVANT TO PETITIONER'S DEFENSE THAT THE SHOOTING WAS ACCIDENTAL AND WAS NOT OFFERED TO ESTABLISH A DIMINISHED CAPACITY DEFENSE.

SUMMARY OF THE ARGUMENT

Prior to the trial the State of Florida filed a motion in limine to prevent Petitioner from introducing any psychological testimony since Petitioner had not filed a plea of not guilty by reason of insanity. Petitioner intended to introduce testimony that she was suicidal at the time of the homicide. The purpose of this testimony was to support Petitioner's defense which was that at the time of the shooting she was attempting to kill herself and when her husband grabbed the gun it accidentally discharged. Petitioner did not intend to introduce the testimony to establish a diminished capacity defense.

The Third District Court of Appeals ruled that the trial court was correct in excluding the psychologist's testimony since there was no plea of not guilty by reason of insanity. It is Petitioner's position that the mere fact that a defendant does not entered an insanity defense does not mean that no pyschological testimony can ever be admitted into evidence.

In determining the admissibilty of the evidence the court must examine the purpose of the evidence. If the psychological evidence is being offered to establish that the defendant could not have formed the specific intent to commit the crime then the evidence is not admissible. Chestnut v. State, 14 F.L.W. 9 (Fla. Jan. 6, 1989). However if the psychological testimony is being offered to resolve a crucial factual issue in the case then the evidence should be treated like any other expert testimony and if the testimony meets the requirements of Florida Evidence Code 90.702 concerning expert testimony the testimony should be allowed.

Since the psychological testimony in this case was being offered to establish a crucial factual issue in the case and not to establish that Petitioner was unable to form the specific intent to commit the crimes, the trial court erred in excluding this highly relevant testimony from the jury. Therefore, a new trial is warranted.

ARGUMENT

THE TRIAL COURT ERRED IN EXCLUDING PSYCHOLOGICAL TESTIMONY WHICH WAS RELEVANT TO PETITIONER'S DEFENSE THAT THE SHOOTING WAS ACCIDENTAL AND WAS NOT OFFERED TO ESTABLISH A DIMINISHED CAPACITY DEFENSE.

The issue this court must decide in this case is whether psychological testimony which is relevant to a defendant's defense should be admissible even when no plea of not guilty by reason of insanity has been entered. In Chestnut v. State, 14 F.L.W. 9 (Fla. Jan. 6, 1989) this court reaffirmed the law in Florida that psychological testimony is inadmissible if the purpose of the testimony is to establish that the defendant had a psychological condition which prevented him from forming the specific intent to commit the crime charged. This court held this type of testimony was inadmissible since it would result in a diminished capacity defense.

In this case the court must decide whether to expand the holding in Chestnut to also exclude all psychological testimony unless a plea of not guity by reason of insanity has been entered no matter how relevant that testimony may be. It is Petitioner's contention that this court did not intend to hold that psychological testimony which is relevant to a defendant's defense and is not being offered to establish a diminished capacity defense is not admissible unless a plea of insanity is entered. If a defendant intends to offer psychological testimony which is relevant to his defense and is not being offered to establish a diminished capacity defense the same standard that is applied to any expert testimony should apply.

In the instant case the State of Florida filed a motion in limine to prevent any psychological testimony since Petitioner had not filed a plea of not guilty by reason of insanity. It was Petitioner's position that the shooting in this case was accidental. Petitioner intended to establish this by arguing to the jury that at the time of the shooting she was attempting to kill herself and that when her husband grabbed the gun it accidentally discharged. Therefore, Petitioner intended to call the pschologist to support her contention that she was suicidal at the time of the shooting. It is Petitioner's position that this testimony was relevant and should have been admitted into evidence despite the fact that no plea of insanity was entered.

The Florida Evidence Code, Section 90.702 states the following:

> 90.702. Testimony by experts.
> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

In determining whether an expert's testimony is admissible, the Court must look to see what issue the testimony would resolve at trial. If the issue involves a matter of common knowledge about which an ordinary lay man would be capable of forming a correct judgment, expert testimony is not admissible. If the triers of fact have a general knowledge of a matter, but an expert's testimony would aid their understanding of the issue, it would be admissible. See, Johnson v. State, 393 So.2d 1069 (Fla.

1980); Gulf Coast Motor Line, Inc. v. Hawkins, 381 So.2d 227 (Fla. 1980); Seaboard Coast Line Railroad v. Hill, 250 So.2d 311 (Fla. 4th DCA 1971); and Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961).

In Gulf Coast Motor Line, Inc. v. Hawkins, supra, this Court held the following:

> "There are two elements to be considered when admitting expert testimony. First, the subject must be beyond the common understanding of the average layman. Second, the witness must have such knowledge as 'will properly aid the trier of facts in its search for truth' *Mills* v. *Redwing, 127 So.2d 453, 456 (Fla. 2d DCA 1961)*."

In making a determination as to whether expert testimony is admissible the following three criteria must be examined by the Court:

1. Is the expert qualified to give an opinion on the subject matter.

2. Does the state of the art or scientific knowledge permit a reasonable opinion to be given by the expert.

3. Is the subject matter of the expert opinion so related to some science, profession, business, or occupation as to be beyond the understanding of the average layman. See, Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982); Dyas v. United States, 376 Atlantic 2d. 827 (D.C. App. 1977); and Johnson v. State, supra.

In this case it was Petitioner's intention to call a clinical psychologist to the witness stand so as to enlighten the jury as to whether Petitioner was suicidal at the time the shooting occurred. An analysis of the criteria established by

the Courts in Florida reveals that this type of testimony was admissible expert testimony. The witness was a clinical psychologist. Clinical psychologists are trained in making determinations as to whether individuals are suicidal and are able to give reasonable opinions concerning this area. Finally, the subject matter of suicide is an area in which an expert has more experience and knowledge than a layman, and their opinion on this matter would greatly aid a jury. For these reasons the trial court should have allowed the expert to testify in this case.

In making its determination that the evidence was improper, the trial court relied on the holdings of Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976) and Zeigler v. State, 402 So.2d 365 (Fla. 1981). In both Zeigler and Tremain similar to this court's holding in Chestnut v. State, supra, the courts held that psychological testimony is inadmissible when a defendant does not enter a plea of not guilty by reason of insanity. In Zeigler, Tremain, and Chestnut the defendants attempted to assert as part of their defense a diminished capacity which did not rise to the level of insanity. Since diminished capacity is not a defense in Florida, the Courts excluded the expert testimony which would have established a diminished capacity defense.

However, the courts in Florida have recognized that the mere fact that no plea of insanity was filed does not automatically exclude the right to introduce psychological testimony. The courts have held that psychological testimony is admissible as long as the defense is not diminished capacity and the testimony

is being offered to aid the jury in making a determination of one of the relevant issues in the case. See, Hawthorne v. State, supra; Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985); and Borders v. State, 433 So.2d 1325 (Fla. 3d DCA 1983).

In Hawthorne v. State, supra, the defendant was charged with second degree murder. In that case, the defendant raised the defense of self-defense. At the trial, defense counsel attempted to introduce testimony from a psychologist concerning the battered wife syndrome. The trial court excluded this testimony since the defendant did not enter a plea of not guilty by reason of insanity. In reversing the trial court's order, the First District Court of Appeals held the following:

> ". . . We think there is a difference between offering expert testimony as to the mental state of an accused in order to directly 'explain and justify criminal conduct,' Tremain at 706, and the purpose for which the expert testimony was offered in the instant case. In this case, a defective mental state on the part of the accused is not offered as a defense as such. Rather, the specific defense is self-defense which requires a showing that the accused reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm to herself or her children. The expert testimony would have been offered in order to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief. The factor upon which the expert testimony would be offered was secondary to the defense asserted. (Emphasis added).

The Court went on to hold:

> Appellant did not seek to show through the expert testimony that the mental and physical mistreatment of her affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that because she suffered from the syndrome, it was reasonable for her to

> have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger. It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case."

Similarly, in the instant case, Petitioner did not seek to show through expert testimony that the fact that she was suicidal affected her mental state so that she would not have been responsible for her acts. Instead the testimony was going to be introduced to help the jury decide a crucial issue in the case which was whether Petitioner was suicidal at the time of the shooting.

The only factual issue the jury had to decide in this case was whether the shooting was accidental or premeditated. The State of Florida took the position that Petitioner left Ft. Myers with the intention of killing her husband. Petitioner's position was that she left Ft. Myers with the intention of trying to talk her husband into moving back with the family, and if she was unsuccessful she would kill herself. The crucial issue the jury had to decide therefore, was whether Petitioner was suicidal at the time she went to the bar in Miami Springs or whether she intended to kill her husband. Expert testimony concerning whether Petitioner was suicidal was therefore relevant.

The Fourth District Court of Appeals has also recognized that psychological testimony may be admissible even when a defendant does not plead not guilty by reason of insanity. In Terry v. State, supra, the Court recognized that Tremain and Zeigler do not require the exclusion of psychological testimony

when there is not a plea of not guilty by reason of insanity when the Court held:

> "The state asserts that Hawthorne and Borders conflict with *Zeigler* **v.** *State* **402** *So.2d 365 (Fla. 1981)* and *Tremain* **v.** *State, 336* **So.2d** *705 (Fla.* **4th** *DCA 1976),* which stand for the proposition that during the guilt phase of the trial, testimony regarding the mental state of a defendant in a criminal case is inadmissible in the absence of a plea of not guilty by reason of insanity. Here, Terry did not plead insanity, but sought instead to establish that she acted in self-defense. For the same reasons articulated by the First District in *Hawthorne,* we reject the state's contention that *Tremain* and *Zeigler* control."

In conclusion it is Petitioner's position that the mere fact that a defendant fails to plea not guilty by reason of insanity should not result in a blanket rule that all psychological testimony is inadmissible. If the psychological testimony is being offered to establish that the defendant was unable to form the specific intent to commit a crime then under Chestnut, supra, the testimony is inadmissible. However, if the testimony is being introduced to enlighten the jury on a crucial part of the defendant's defense and that defense is not a diminished capacity then the court should determine whether the evidence is admissible the same way it would any other expert testimony.

In the instant case the psychological testimony was not being offered to establish a diminished capacity defense but instead was being offered to explain petitioner's defense that the shooting was accidental. Since the topic of suicide is a proper area for expert opinion, the trial court erred in excluding this relevant testimony. Therefore, a new trial is warranted.

CONCLUSION

Based upon the foregoing cases and authorities the petitioner respectfully requests this Court to reverse the decision of the Third District Court of Appeal.

Respectfully submitted,

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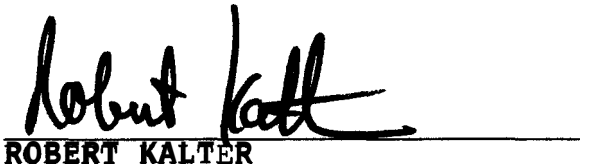
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail CHARLES M. FAHLBUSCH, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 6th day of April, 1989.



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