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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 RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, RONICA **STEPHENS,** was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondents, **THE STATE OF FLORIDA,** was the prosecution in the trial court and the appellee before the Third District. The parties, in this brief, will be referred to as they appear before this Court.

The symbol "R" will be used, in this brief, to refer to the Record on appeal which was before the district court. The symbol "T" will identify the transcript of lower court proceedings and the symbol "App." will designate the appendix to Petitioner's Brief on Jurisdiction.[1] All emphasis is supplied unless otherwise indicated.

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[1] The Appellee has not received a copy of the Appendix to Petitioner's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Statement of the Facts contain a substantial number of references without record citations, argumentative statements and a significant number of material errors and omissions. It is therefore rejected by the Respondent, whose State of the Case and Facts follows:

The grand jury, on January 8, 1985, indicted the Petitioner for First Degree Murder (Count I) and Attempted First Degree Murder (Count 11). (R.l-2A). The Petitioner was arraigned and stood mute, and the court directed that a not guilty plea be entered in her behalf. (R.3).

As part of the pre-trial motions the State filed a motion for order in limine to prevent the testimony of two psychologists' opinions. (T.6; R.139). The defense intended to use the psychological opinions to show that the Petitioner was suffering from "clinical depression", which could have affected her ability to form specific intent regarding the two counts against her, but not to show that she was insane. (T.6, 36). The trial court granted the State's motion in limine thus preventing the psychologists from testifying at trial. (T.39). At the close of the State's case the Petitioner requested the court to accept an evidentiary proffer of testimony of the depositions of the two psychologists who were the subject of the State's motion in limine. (T.384). The trial court accepted the proffer and the depositions became part of the record. (T.385).

A jury trial commenced before the Honorable Gerald Kogan on April 29, 1986. At the close of the State's case and the defense case, defense counsel moved for a Judgment of Acquittal on both Counts and in both instances the Court denied the oral motions. (T.388, 480; 393, 493).

On May 2, 1986, the jury returned a verdict of guilty of first degree murder and attempted second degree murder, with a firearm. (T.636-637; R.478-479). The Petitioner waived her right to a pre-sentence investigation as to Count II (T.638-639). The Court adjudicated the Petitioner guilty of the charges and sentenced her to life imprisonment on Count I with a 25 year minimum mandatory and to 30 years for Count II of the indictment to run concurrently to the sentence imposed in Count I. (T.639-641; R.469-471). A Notice of Appeal was filed on May 30, 1986 (R.479-A).

The Third District, on appeal, affirmed the convictions, but remanded the case for resentencing on Count II (App. 1-3).

A timely Motion for Rehearing was filed and denied (App. 4-6) and the Petitioner invoked the discretionary jurisdiction of this court, which was accepted.

Ronica Stephens, on December 9, 1984, went to the Pub Steak House and Lounge, located at 3365 North Poinciana Boulevard,

Miami Springs, Dade County, Florida to surprise and confront her estranged husband, Elsworth Stephens **(T.417).** Mrs. Stephens had not seen or heard from her husband since June **22, 1984 (T.417).** Mrs. Stephens was armed with a **.25** caliber semi-automatic pistol when she entered the Pub Lounge on December **9 (T.440).** However, December **9,** was not the first time Ronica Stephens went to the Pub Lounge to find her husband **(T.436-438).**

Mrs. Stephens, on December **4, 1984,** had been informed by a friend that she could find her husband at the Pub Lounge **(T.431).** On December **5,** she drove to Miami Springs, from her home in Fort Myers, with two friends and her eldest daughter **(T.434).** While at the Pub Lounge she asked patrons and employees if they knew her husband Steve **(T.434-435).** Although she did not see her husband on that evening she did find out that he was a frequent customer in that bar, and he always came in with a woman **(T.434).** Mrs. Stephens, on December **7,** returned to the Pub Lounge by herself and was told by the manager the approximate time her husband customarily arrived **(T.438).**

Michele Jean and Elsworth Stephens, on December **9, 1984,** entered the Pub Lounge through the liquor store and traded greetings with the manager before entering the bar area (T.220). Mr. Stephens went to the rest room to clean up and Ms. Jean went straight to the bar **(T.124).** When **Ms.** Jean sat at the bar the barmaid placed two drinks down, one being a bourbon and soda. Ronica Stephens, seated only two stools away from Ms. Jean,

recognized the drink her husband of twenty nine years would be drinking, and knew he was in the bar. (T.124, 444). Mrs. Stephens left her place at the bar and went to the rest room area where she confronted her husband as he left the bathroom (T.128, 445).

Sylvia Johnson, a patron of the bar on the evening of the shooting, went to use the bathroom when Mrs. Stephens confronted her husband (T.242). Mrs. Johnson testified that Mr. and Mrs. Stephens appeared to be arguing and heard Mrs. Stephens call her husband a "son-of-a-bitch" (T.242). When Mrs. Johnson left the bathroom she saw Mr. Stephens heading for an exit, being pursued by Mrs. Stephens, who was dragging Ms. Jean (T.244). Mrs. Johnson was practically touching the two women when she heard Mrs. Stephens say, "I'm going to kill him" and heard Ms. Jean say "Oh my god, oh no" (T.245). As Mrs. Johnson returned to her seat at the bar she heard gun shots and a woman screaming (T.247). Mrs. Johnson testified that after the shooting the defendant walked towards the bar with the gun in her hand (T.251). Sylvia Johnson asked Mrs. Stephens, "Who did it?" and the defendant answered "I did it" (T.251).

Margaret Brockhaus was the barmaid working in the Pub Lounge on evening of December 9, 1984 (T.116). Ms. Brockhaus' testimony substantially agreed with Sylvia Johnson's recollection of the events leading up to the shooting. Mrs. Brockhaus stated that she saw Mr. and Mrs. Stephens talking in front of the

bathroom, heard the defendant say "I'm going to kill him" and heard Ms. Jean say "Oh my god, oh no" (T.128-133). Ms. Brockhaus testified that she heard Mrs. Johnson ask "Who did it? and the defendant answer "I did it" (T.137). Mario Mora, the manager of the lounge, testified that when the shooting was over he walked up to the defendant in the bar area (T.222). Mrs. Stephens attempted to hand him the gun and said "Hey, you want to take it?" (T.223). When the manager would not take the gun the defendant went to the pay telephone and made a call while still holding the gun (T.139). When the police arrived at the Pub Lounge Mrs. Stephens was sitting by herself at the bar and the gun was lying on the bar (T.75).

Mrs. Stephens testified, in essence, that the gun went off by accident during an attempt, by her, to kill herself (T.397-472).

The State reserves the right to set forth additional facts in the argument portion of its brief, as appropriate.

QUESTION PRESENTED

WHETHER THE TRIAL COURT DID NOT ERR IN EXCLUDING EXPERT TESTIMONY CONCERNING THE PETITIONER'S STATE OF MIND AT THE TIME OF THE CRIME IN THE ABSENCE OF A PLEA OF NOT GUILTY BY REASON OF INSANITY? (Restated).

SUMMARY OF THE ARGUMENT

The Petitioner, before the trial court, proffered the testimony of two (2) psychologists which she wanted to present for the purpose of showing that she, due to her mental condition at the time of the crime, could not have entertained the specific intent necessary commit the offenses with which she was charged. This testimony was excluded.

The Petitioner then argued on appeal that the real purpose of the psychologists testimony was to show that she was suicidal at the time of the crime in support of a suicide/accidental shooting defense.

First, the Petitioner is estopped from taking such radically inconsistent positions during the course of litigation.

Second, both the trial court record and the Petitioner's Brief on the Merits demonstrate that the true purpose of the excluded testimony was to support a "diminished capacity" defense, in direct contradiction to Chestnut v. State, 14 F.L.W. 9 (Fla. Jan. 5, 1989) and Zieqler v. State, 402 So.2d 365 (Fla. 1982).

Third, even if establishing suicidal tendencies were the true purpose, the excluded testimony would still have been in violation of Ziegler where insanity was not an issue.

Fourth, the issue concerned herein was not properly preserved from appeal where it was never presented to the trial court.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN EXCLUDING EXPERT TESTIMONY CONCERNING THE PETITIONER'S STATE OF MIND AT THE TIME OF THE CRIME IN THE ABSENCE OF A PLEA OF NOT GUILTY BY REASON OF INSANITY. (Restated).

The Petitioner, in the trial court, specifically alleged that the purpose of the expert testimony excluded was to show that she suffered from a condition which could affect her ability to form the specific intent required (T.7-8). They now allege that it was not the purpose (Petitioner's Brief on the Merits, 13-20). That was the purpose and the testimony was properly excluded.

First, there is certainly no question that the purpose of the excluded testimony was to show that the Petitioner could not or did not entertain the specific intent necessary to prove the offenses of which she was accused, as the defense counsel in the trial court specifically alleged, as follows:

> **MR. McDONALD:** Yes. We will introduce, I think, through direct testimony or through cross examination, other foundation evidence linking her mental state or describing her mental state from approximately February of 1984 through the date of the event and it is the way it changed over that course of time, Dr. Jones will fit in with his observations as of September, 1984, all of this material testing and personal

> examination by Dr. Haber will be the foundation for Dr. Haber's testimony which will be that at the time of the offense this lady was suffering from a severe depression disorder as defined in DSM-3 and will explain how that particular disorder could affect her abilitv to form the specific intent required in the two charges pending aqainst her.
>
> **THE COURT:** In other words, what you are saying here is that there is an insanity defense, per se, that she knew right from wrong, but rather you seek to introduce this testimony to show that this defendant was incapable of forming the specific intent? Although you are not telling me that that will be Dr. Haber's testimony, what you are telling me is that will raise some questions as to her ability to form the specific intent?
>
> MR. McDONALD: Exactly. Dr. Haber will not be allowed and we will not attempt to have her testify, "It is my psychological opinion with the relevant degrees that at the exact instant the shot was fired, this lady did not have the specific intent." She will get into what was going on, what her mental state was at the time based on her evaluations and it will be for the jury to decide whether or not that affected her ability to make the specific intent. (emphasis added).
>
> **(T.7-8).**

Even the Petitioner has admitted that, ". . . .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. . . ." (Petitioner's Brief on the Merits, 19). However, the

Petitioner, now on appeal, has deserted its position in the trial court and maintains that the only purpose for the testimony was to establish that Mrs. Stephens was suicidal, at the time (Appellant's Brief, 15-16). Parties, however, are not permitted to maintain such radically inconsistent positions during the course of litigation. **See:** McKee v. State, 450 So.2d 563, 564 (Fla. 3d DCA 1984).

Further, the Petitioner confirms the real purpose of the proffered testimony when she argues that, ". . . . 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 . . . .", clearly implying that "suicidal" is mutually exclusive of "intent to kill her husband." (Petitioner's Brief on the Merits, 18). This confirms, not only that the purpose was to present a "diminished capacity" defense, but that Dr. Haber's testimony would have been useless to the Petitioner, where it was opined that the Petitioner, ". . . certainly could have" formed the necessary premeditated intent to kill her husband (R.133, T.32-33), although Dr. Haber didn't think that she did. (R.133, T.33).

In Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984) the victim of the crime was a deputy sheriff who was shot while attempting to arrest the Defendant as a suspected bank robber. At trial, the Defendant testified that the deputy's service

revolver went off twice during the struggle with the deputy but denied that he intended to shoot the deputy. The defendant sought to introduce psychiatric evidence tending to show that, at the time of the murder, he was unable to control his impulses and was unable to premeditate. In holding the exclusion of the evidence offered to disprove premeditation did not violate the Constitution, the Eleventh Circuit stated that the defendant proffered the evidence in an attempt to prove what has become known as the "partial responsibility" defense. The Campbell court explained the "partial responsibility" defense as follows:

> "The defense of partial responsibility differs from the defense of insanity in that the evidence, admitted only to negate specific intent in a relevant case, does not exonerate the defendant; the partial responsibility defense simply reduces the severity of the offense. See generally LaFave & Scott. Criminal Law section 42 (1972), Psychiatric Evidence in Criminal Cases for Purposes other than the Defense of Insanity, 26 Syr.L.Rev. 1051 (1975). According to the best estimate of one commentator, in 1975 approximately 25 states had adopted the doctrine ... although Florida has not. See Zeigler v. State, 402 So.2d 365. 373 (Fla. 1981); Tremain v. State,' 336 So.2d 705, 706-708 (Fla. 2d DCA 1976); See also Admissibility of Expert Testimony as to Whether Accused had Specific Intent Necessary for Conviction, 16 A.L.R. 4th 666." (emphasis added) Id. at 1581.

The "partial responsibility" defense described in Campbell is being employed by the Petitioner in this case. As in Campbell,

Ronica Stephens claims that the gun went off during a struggle but denied she intended to kill her husband or Ms. Jean. Mrs. Stephens, in addition, sought to introduce psychiatric evidence tending to show that she was suffering from "clinical depression", which could have affected her ability to form specific intent regarding the two counts against her. The Campbell court explained, in relying on Zieqler and Tremain, that Florida has not adopted the "partial responsibility" defense. Psychiatric testimony is relevant when the issue is insanity but not, as in this case, where the Defendant is trying to claim "partial responsibility" as a defense.

In Tremain v. State, **336** So.2d **705** (Fla. 4th DCA **1976)** the Fourth District Court of Appeal of Florida dealt with the question of whether testimony regarding the mental state of a defendant in a criminal case is admissible in absence of a plea of not guilty by reason of insanity. In Tremain the court answered the question "no." The Tremain court stated the following:

> "Menta1 medical testimony is generally not admissible unless the defendant places his sanity in issue. The rationale is that the test for criminal responsibility is whether the defendant knows the difference between right and wrong; other evidence relating to defendant's mental state is immaterial (citations omitted) Id. at **706.**

In Tremain the court went on to say:

> "It is our opinion that to allow expert testimony as to the mental state in the absence of an insanity plea would confuse and create immaterial issues. If permitted, such experts could explain and justify criminal conduct. As lay people we could guess that almost everyone who commits crimes against society must have some psychiatric or psychological problem. However, the test continues to be legal insanity as defined and not otherwise, and the court and jury should not be subjected to testimony as to mental flaws and justifications where the defendant knew the difference between right and wrong at the time of the crime."
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> Id. at 707-709.

The Florida Supreme Court endorsed the Tremain court in Zieqler v. State, 402 So.2d **365** (Fla. 1982) when it stated:

> "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. Tremain v. State, **336** So.2d **705** (Fla. 4th **DCA** 1976)." Id. at 373.

Further, Tremain was, again, endorsed by this court in Chestnut v. State, 14 F.L.W. 9 (Fla. Jan. 5, 1989), in which the previously cited language is cited with approval. Id. at 10.

Further, the certified question in Chestnut, "Is evidence of an abnormal mental condition not constituting legal insanity

admissible for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense, in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed?" is precisely the issue in this case. The answer to that question in Chestnut, as it should be in this case, was no. Id. at 10.

The Petitioner asserts that the line of cases starting with Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA), review denied mem., 415 So.2d 1361 (Fla. 1982), followed by Borders v. State, 433 So.2d 1325 (Fla. 3d DCA 1983) and Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985) control in this case. In Hawthorne, Borders and Terry the defendants attempted to proffer the expert opinion of a psychologist as it related to the battered wife syndrome. In each case the court recognized expert testimony would have bearing on the defendant's claim that they were acting in self defense. In Terry the court explained:

> ". . . It does not appear that appellant was seeking to introduce evidence that she was unable at the time of the incident to distinguish between right and wrong or unable to understand the wrongness of the act committed; rather it appears that she was offering evidence to show that because of the prior conduct of the victim towards her, she reasonably believed that danger was imminent and that there was a real necessity for the taking of a life."
>
> Terry at 764.

The Petitioner's reliance on the Hawthorne line of cases is misplaced. In a case such as this, where the Petitioner claims her ability to form specific intent was impaired, it is totally inconsistent to rely on cases dealing specifically with the subject of the battered wife syndrome coupled with the defense of self defense.

The Petitioner looked, in the district court, to Gurganus v. State, **451** So.2d **817** (Fla. **1984)** for the authority that psychological testimony is admissible when insanity has not been raised as a defense. In Gurganus the defendant had ingested twenty-nine barbiturate capsules in a twenty-four hour period along with alcohol. The defendant attempted to introduce into evidence the testimony of two clinical psychologists who had examined his several times after his arrest. During the proffer of the psychologists' testimony, the defense made it clear that the testimony was intended to be considered as evidence on three issues relating to the defendant's state of mind at the time of the shooting: insanity; whether the defendant's actions more closely resembled a "depraved mind" as opposed to premeditated behavior; and whether the defendant was able to entertain the specific intent required to convict him of first degree murder taking into consideration the effects of the combined consumption of drugs and alcohol. After hearing the proffered testimony, the trial judge refused to allow it into evidence on the grounds that the testimony was irrelevant. The Gurganus Court agreed with the trial court on the first two issues

regarding expert testimony being properly excluded. However, the Court found the expert testimony relevant on the issue of his intoxication and resulting inability to entertain a specific intent at the time of the offense. The Gurganus Court stated the following:

> "When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant . . . As such it is proper for an expert to testify 'as to the effect of a given quantity of intoxicants' on the accused's mind when there is sufficient evidence in the record to show or support an inference of consumption of intoxicants."
>
> (citations omitted) Id. at 822-823.

The holding in Gurganus is limited to permitting expert testimony when the issue is voluntary intoxication and its effect on an individual's ability to form specific intent and not Petitioner's broad reading that psychological testimony is admissible when insanity has not been raised as a defense. In this case the Defendant has not presented any evidence to indicate that her ability to form specific intent was influenced by the use of drugs or alcohol; therefore Gurganus is totally inapplicable. See: Chestnut v. State, 14 F.L.W. 9, 10 (Fla. Jan. 5, 1989).

Petitioner has further argued on appeal that the psychological testimony should have been admitted for the purpose of corroborating her testimony that she was trying to commit suicide when her husband tried to intervene. Appellant never proffered the psychological testimony for this purpose in the trial court. During arguments at the pre-trial motion in limine, defense counsel argued only that the purpose of the testimony was to negate specific intent, and to show diminished ability to formulate a premeditated intent to kill (T.6-20, 30-41). Defense counsel never argued that the testimony should be admitted to corroborate the defendant's suicidal nature. Id. While the judge granted the pre-trial motion to exclude the evidence, he advised defense counsel that the defense was not foreclosed from revisiting the issue at trial after the court heard other evidence in the case. (T.40). After the State rested, defense counsel asked the judge to accept the experts' depositions as a proffer of what they would say and the judge accepted the depositions. (T.384-385). Defense counsel did not present any further argument at that time, and still did not assert that the purpose was to corroborate the "suicide-accident" defense theory, of which there was still no evidence. The defendant then took the stand and presented the "suicide/accidental shooting" defense. This was the first and only testimony related to that theory. Immediately after her testimony, the defense rested, without any effort to relate the psychological testimony as corroboration of the defendant's suicidal nature. (T.472).

It is therefore clear that Petitioner argued, for the first time, in the district court, that the testimony should have been admitted to corroborate the suicidal nature of the defendant. Theories in support of the admissibility of evidence cannot be raised for the first time on appeal. Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of the presentation if it is to be considered preserved."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 3d DCA 1982) (The Defendant, in the trial court, argued that a line of inquiry was calculated to impeach the credibility of a witness. On appeal, the defendant argued that the questions were for the purpose of developing a defense theory that two individuals sought to blame the murders on the defendant. The latter theory of admissibility, not having been presented to the trial court was not properly preserved for appeal.); United States v. Thompson, 710 F.2d 1500 (11th Cir. 1983); Rodriquez v. State, 436 So.2d 219 (Fla. 3d DCA 1983); Arqote v. State, 433 So.2d 1013 (Fla. 3d DCA 1982); Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1982); Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). These cases, which prohibit changing or adding arguments at the appellate level, are especially relevant here, as the trial judge could not be expected to read through 130 pages of proffered depositions to find a possible theory of relevancy which defense counsel had

not asserted, especially when the first evidence of "suicide/accidental shooting" came long after defense counsel's argument on other grounds had terminated. Thus, the argument related to corroboration of suicidal tendencies was not properly preserved.

The trial court did not err in excluding the proffered expert testimony, in this case.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the opinion of the Third District Court of Appeal should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **ROBERT KALTER,** Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125 on this 24 day of April, 1989.

CHARLES M. FAHLBUSCH
Assistant Attorney General

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