

IN THE SUPREME COURT OF FLORIDA

ROBERT FENNELL, )  
)  
Petitioner, )  
)  
v. )  
)  
STATE OF FLORIDA, )  
)  
Respondent. )  
\_\_\_\_\_ )

CASE NO. 72,841

FILED  
SEP 26 1990

SUPREME COURT  
BY \_\_\_\_\_  
Clerk

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RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the additional facts:

The conviction for attempted second-degree murder arose out of the following facts. Tish Fennell, Petitioner's estranged wife was dating Harmon L. Tolbert (R 35). One night while Fennell and Tolbert were in bed together, Petitioner gained entry to the home and stabbed both victims while they slept (R 7, 61, 39-40).

Appellant testified that he saw Fennell wiping off Tolbert's penis with a towel which shocked him (R 135). Appellant testified that a fight ensued and Fennell grabbed a knife (R 136). Appellant grabbed the knife (R 137). At this point, he "snapped" and the next thing he recalled was seeing the knife in his wife's back (R 160).

When the police arrived, Fennell was laying on the floor on her stomach with a knife sticking out of her back (R 61). Tolbert was laying on the bedroom floor (R 60).

Fennell had been stabbed a total of twelve times (R 39-43). Eight of the wounds required stitches (R 41). Fennell underwent surgery, suffered from a collapsed lung and was hospitalized for thirteen days (R 40). Due to recurring lung problems, Fennell went back to the hospital seven times (R 40).

Harmon L. Tolbert was stabbed four times in the left arm, twice in the chest, once in the abdomen, and once in the left leg which fractured the fibula bone and caused a nerve problem requiring the aid of crutches for walking (R 53-54).

POINT INVOLVED

WHETHER IT WAS ERROR TO SCORE POINTS FOR  
VICTIM INJURY WHERE VICTIM INJURY IS AN  
ELEMENT OF ATTEMPTED SECOND-DEGREE MURDER  
AS CHARGED?

SUMMARY OF THE ARGUMENT

Victim's injury is an element of attempted second-degree murder in the instant case. The information charged attempted murder by stabbing. Since attempted second-degree murder was proven to have been committed by the act of stabbing, victim injury was an element of the offense herein. Consequently, points for victim injury were properly computed in the guidelines' scoresheet.

ARGUMENT

IT WAS NOT ERROR TO SCORE POINTS FOR VICTIM  
INJURY WHERE VICTIM INJURY IS AN ELEMENT OF  
ATTEMPTED SECOND-DEGREE MURDER AS CHARGED.

Petitioner argues it was error to score points for victim injury in the instant case, consequently the sentence must be reversed and remanded for recomputation of the scoresheet. Respondent submits that no error was committed under the facts and circumstances of this case.

Respondent submits that the resolution of this issue centers around an interpretation of Florida Rules of Criminal Procedure 3.701(d)(7):

Victim injury shall be scored if it is an  
element of any offenses at conviction.

Specifically, the question is whether victim injury must be a statutory element of the offense or an element of the particular offense as charged in the information.

Court rules are construed in the same manner as statutes. Syndicated Properties v. Hotel Floridian, 94 Fla. 899, 114 So. 441 (1927); Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). The primary guide to statute interpretation is the determination of its legislative purpose. Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976). Furthermore, the word 'statutory' does not appear anywhere in the rule itself or its Committee Note. Courts should be reluctant to add words to a statute. Armstrong v. Edgewater, 157 So.2d 422 (Fla. 1963); Rebich v. Burdines, 417 So.2d 284 (Fla. 1st DCA 1982).

The most recent Committee Note to Rule 3.701(d)(7) is that of



December 19, 1985 which states:

This provision implements the intention of the commission that points for victim injury be added only when the defendant is convicted of an offense ... which includes physical impact or contact.

A straightforward reading of the rule and its Committee Note indicates that the Committee's concern was that victim injury be scored if it was committed as part of the offense. Application of that intent to the instant case warrants the inclusion of victim injury as an element of this offense.

Although charged with two counts of attempted first-degree murder (R 159), Petitioner was convicted of two counts of attempted second-degree murder (R 281-282). The primary case relied on by Petitioner, Smith v. State, 301 So.2d 139 (Fla. 2nd DCA 1987), held that victim injury is not an element of attempted first-degree murder. Respondent submits that under the intent of the Rule 3.701(d)(7) and the offense as charged in this case, victim injury is an element of attempted first-degree or second-degree murder.

The gravamen of this issue centers around the elements of attempt and not murder since death, the ultimate victim injury, is required for murder. An attempt requires a specific intent to commit the crime and a separate overt act done towards its commission. Fleming v. State, 374 So.2d 954 (Fla. 1979). Applied to the instant case, the jury believed that Petitioner without premeditation intended to kill his wife and her lover by repeatedly stabbing them. Evidence adduced at trial established that Petitioner stabbed his estranged wife Tish Finnell twelve (12) times (R 39-43) and stabbed Harmon L. Tolbert eight

times (R 53-54). Ms. Fennell underwent surgery and was hospitalized for thirteen days (R 40). Harmon L. Tolbert, hospitalized for twelve (12) days, received stab wounds to the arm, leg, chest and abdomen (R 53-54).

The information sub judice charged Appellant with attempted first-degree murder by stabbing (R 259). The State's case centered around proving that Petitioner stabbed his victim in order to kill them. The State was therefore required to prove the element of stabbing (the overt act) since it was alleged in the information. State v. Mars, 498 So.2d 402 (Fla. 1986). Since attempted murder may be committed in countless ways, many of which involve physical trauma, victim injury can be scored if the charging document alleges and the evidence demonstrates physical contact. Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985), quashed on other grounds, 489 So.2d 1130 (Fla. 1986).

Petitioner incorrectly characterizes the holding in Moore as supporting the proposition that victim injury must be a statutory element of an offense in order to score points for victim injury. The importance of Moore is that it stands for the proposition that the elements of the offense, as charged in the information is what is important and not the isolated statutory elements listed in the statute. Simply put, one of the elements of attempt, i.e., overt act was charged in the information as stabbing. The State was required to prove the stabbing, as an element of the offense. Mars, supra.

Other cases, which support Respondent's position, include Worling v. State, 484 So.2d 94 (Fla. 5th DCA 1986). In that case, the

defendant was convicted of lewd and lascivious assault upon a child. The State charged the defendant in the information with the offense by the act of touching or fondling her pubic area. Id. (emphasis included). The First District Court of Appeal has taken the same approach as the Fifth District and the Fourth District. O'Bright v. State, 508 So.2d 385 (Fla. 1st DCA 1987); Mackey v. State, 516 So.2d 330 (Fla. 1st DCA 1987).

In O'Bright, supra, the information charged the defendant with lewd and lascivious assault through the act of fondling her genitals and having her fondle his genitals. Id. at 368. Victim injury resulted from that fondling. Id.

In Mackey, supra, the information charged lewd and lascivious assault by touching the victim about the crotch. Id. at 330. Victim injury resulted from that fondling. Id.

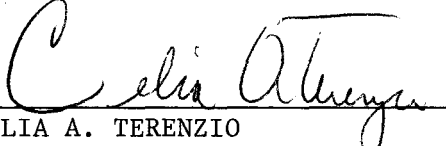
Respondent submits that victim injury is an element of the offense of attempted second-degree murder in the instant case. The intent of Rule 3.701(d)(7) as it existed at the time of the offense, would be thwarted if victim injury is not viewed as an element of the offense in the instant case.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Respondent would request this Honorable Court to AFFIRM the decision of the Fourth District Court of Appeal.

Respectfully submitted,

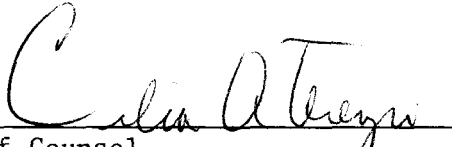
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished, by courier, to JEFFREY L. ANDERSON, ESQUIRE, counsel for Petitioner, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 23rd day of September, 1988.

  
Of Counsel