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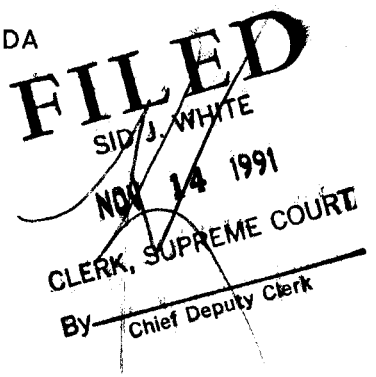
IN THE SUPREME COURT OF FLORIDA



12-9

CASE NO. 77,765

MAX FENELON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, CRIMINAL DIVISION

****

RESPONDENT'S BRIEF ON THE MERITS

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CASES

PRELIMINARY STATEMENT

Max Fenelon was the defendant below and will be referred to as "petitioner" in this brief. The State of Florida will be referred to as "respondent." References to the record will be preceded by "R."

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts, with the following additions, clarifications or exceptions.

Rally's restaurant is approximately three blocks from the murder scene (R 370). Both interviewing detectives testified that defendant was not threatened, beaten or brutalized (R 366, 437, 603). Petitioner stated that he was making the taped confession voluntarily (R 388). He was not promised anything or tricked into making the statement (R 388, 389).

In his statement to the police, petitioner said that the plan was to kidnap the victim, force her to reveal the location of the money, and rob her (R 372, 394).

In his brief, petitioner states that "The police again expressed their dissatisfaction with this story. (R 374)." The officer actually testified that he told petitioner that what petitioner said was not consistent with information they had learned in their investigation. The officer also said that he confronted petitioner with the inconsistencies in his story (R 373-74).

Petitioner stated that he was holding the gun and the victim grabbed the gun and it discharged into the victim's neck (R 374). Detective Mangifesta told petitioner that his story was inconsistent with the evidence because there were no powder burns or marks on the victim's hands (R 375). Petitioner then said that someone else came up behind him and

pushed his hand toward the victim's neck causing the gun to discharge. This occurred while Paul Jerome was in the passenger seat of the victim's car placing a plastic bag over the victim's head (R 376-77). Petitioner then ran away (R 377).

In petitioner's taped statement, petitioner said that he had the gun (R 399). He went up to the car and told the victim, "Stay right there don't move." (R 399). The victim grabbed at his hand and the gun discharged (R 399). The plan was to kidnap the victim (R 394, 402). After the shooting, he ran toward Rally's (R 400, 403). Petitioner told his cousin that he shot the victim (R 404).

In each of the versions he gave police, petitioner started with the initial plan of petitioner and Jerome Paul robbing the victim (R 374). In each of the versions petitioner said that he ran away (R 377).

A photograph taken after petitioner had confessed indicated no injuries (R 426-31). Petitioner was arrested and confessed on August 17, 1988 (R 358). The photographs showing bruises were taken on August 23, 1988 (R 464).

Respondent reserves the right to include additional facts in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

I

There was more than adequate evidence to instruct on flight. Petitioner admitted to the crimes and told many others of his plans and actions. He was seen running from the location of the murder with a gun. Additionally, this issue was not preserved for review and any error was harmless.

POINT I

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT.

At trial, defense counsel made a general objection to the flight instruction ("I, of course, object to that flight instruction.")(R 588). After the instruction was given, he made another general objection ("And I re-raise all of my prior objections to the jury instructions.")(R 720). He never stated the specific grounds for the objection. Accordingly, this issue was not preserved for review. See Fla. R. Crim. P. 3.390(d) (party may not assign as error on appeal the giving of a jury instruction unless before the jury retires he objects, stating distinctly the matter to which he objects and the grounds of his objection); Craig v. State, 510 So.2d 857, 865 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988) ("objections to instructions and the legal grounds therefore must be specifically stated before the jury retires in order for the objection to be reviewable on appeal. . ."); Thomas v. State, 419 So.2d 634, 636 (Fla. 1982) (Rule 3.390(d) satisfied if trial judge is fully aware that an objection has been made and the specific grounds for the objection are presented to the trial judge); State v. Heathcoat, 442 So.2d 955, 956-57 (Fla. 1983) (same) See also Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (in order for issue to be cognizable on appeal it must be the specific contention asserted below as the ground for objection); Castor v. State, 365 So.2d 701, 703

(Fla. 1978) (objection must be sufficiently specific to apprise the trial judge of the putative error) and Hamilton v. State, 458 So.2d 863, 865 (Fla. 4th DCA 1984) (grounds for objection presented to the trial court must be specific so that the trial judge can appreciate the problem being presented).

Assuming arguendo that this issue was preserved for review, there was no error. Petitioner argues that the record establishes nothing more than his departure from the scene of the murder (initial brief p. 11). This is incorrect. Herard Martelus testified that on the morning of the murder, petitioner came in his business and said he was going to "jack" someone (R 219). Martelus took that to mean that petitioner was planning to rob someone (R 219). Petitioner had a gun at the time (R 220-22).

Betty George testified that on the day of the murder she saw petitioner run past Rally's restaurant where she was working (R 313). He was coming from 4th Avenue (R 315). She was certain that she saw the handle of a gun sticking out from his pocket (R 315, 323).

Later that day petitioner told her about the murder (R 318). He said that he and some other men were trying to rob the victim (R 318). Petitioner had the gun pointed at the victim (R 318). He and another man started fighting over the gun and it went off (R 318-19).

Betty George testified that petitioner apologized to her for saying she was too fat." She accepted the apology and

they were friends again that day (R 327).

Mona Lisa Rolle testified that the day of the murder she was working at Rally's (R 343). Petitioner called her across the street to tell her he was in trouble (R 343). He said that a lady had been shot (R 343). He was holding a gun and it went off (R 344). Petitioner gave her a slip and asked her to pick up some photographs for him at a nearby business (R 345). Petitioner looked very scared when Rolle saw him (R 354). She did not have anything against petitioner (R 354).

Petitioner stated that two weeks before the murder, a man asked him to help rob the victim (R 371). Part of the plan was to kidnap the victim (R 372, 402). Paul Jerome was putting a plastic bag over the victim's head when the gun was fired (R 374-75). Petitioner admitted holding the gun when it fired and then running away (R 376-77, 399-400). He gave at least three different stories why the gun discharged (answer brief pp. 2-3). He was scared and crying when he was running (R 403). He ran past Rally's (R 313, 400, 403). He ran home (R 410). He then said, "I never stop (Unintelligible) I say, God, I don't want to hide. The police, I go to jail. How am I going to get out of this thing.[sic]" (R 410).

From the above, it is clear that there was more than enough evidence to instruct on flight. See Whitfield v. State, 452 So.2d 548, 549-50 (Fla. 1984) (flight instruction proper "where there is significantly more evidence against defendant than flight standing alone.") and

Proffitt v. State, 315 So.2d 461, 466 (Fla. 1975), affirmed, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (same).

In Proffitt, the defendant was charged with the murder of Joel Ronnie Medgebow. Medgebow's wife was awakened and saw her husband propped up on one elbow with a knife in his hand. Suddenly, a man jumped up and struck her in the face and fled through the sliding glass doors. The defendant's fingerprints were not found at the scene. The decedent's wife gave a description of her attacker similar to the defendant, but could not identify the defendant at trial. A tenant at the defendant's mobile home was awakened that morning, overhearing a conversation between the defendant and his wife. The tenant testified that she heard the defendant say that he had stabbed a man during an attempted robbery and had beaten a woman. Id. at 463. This Court found sufficient evidence to support the flight instruction, citing the testimony of the tenant, a phone call made by the defendant's wife to the police, and the flight itself. Id. at 466.

Jackson v. State, 575 So.2d 181 (Fla. 1991), relied on by petitioner, is inapposite. In Jackson, there was no evidence that the defendant ran from the store that was the scene of crime. He was only observed driving from the general direction of the crime, possibly in excess of the speed limit. Id. at 188-89.

Finally, assuming arguendo that there was error, it was harmless. See Rhoades v. State, 547 So.2d 1201, 1203 (Fla. 1989) (incorrectly giving jury instruction on flight in death

penalty case, harmless error); Schaefer v. State, 537 So.2d 988, 991 (Fla. 1989) (incorrectly giving objected to instruction on flight in first degree murder and robbery case, harmless error) and Self v. State, 528 So.2d 526 (Fla. 2d DCA 1988) (same). The evidence against petitioner was overwhelming. He confessed to the crimes. Petitioner even admits in his brief that he fled the scene of a murder (initial brief p. 11).

The jury instruction merely stated that if the jury members found that petitioner fled the scene, they may give it as much weight as they deem appropriate (R 707-08). If anything, the instruction benefitted petitioner. See Haywood v. State, 466 So.2d 424, 426 (Fla. 4th DCA 1985), approved, 482 So.2d 1377 (Fla. 1986).

CONCLUSION

Based on the preceding argument and authorities, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Tanja Ostapoff, Assistant Public Defender, Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 13 day of November, 1991.

Of Counsel