

067 D.A. 1-8-92

**FILED**

SIDJ. WHITE

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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MAX FENELON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,765

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the circuit court. Respondent was the appellee in the appellate court and the prosecution in the circuit court. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R"                      Record on Appeal

STATEMENT OF THE CASE AND FACTS

Mr. Fenelon relies on the statement of the case and facts contained in his initial brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY  
ON FLIGHT OVER APPELLANT'S OBJECTION WHERE THE  
EVIDENCE DID NOT SUPPORT SUCH AN INSTRUCTION.

The State argues that Mr. Fenelon's objection to the flight instruction was not sufficient to preserve this issue for appeal. Respondent is mistaken. No terms of art are necessary to preserve an issue for appeal. "Magic words are not needed to make a proper objection." Williams v. State, 414 So.2d 509 (Fla. 1982). Where it is clear from the context of the charge conference that the objection was made and understood by opposing counsel and the trial court, it has been adequately stated. Thus, in Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988), the appellate court addressed the merits of the defendant's attack on the sufficiency of the evidence to prove penetration in his prosecution for sexual battery of a child, although defense counsel had urged below only that the State had failed to establish a "prima facie case." It was clear from the record in that case that the trial judge and the prosecutor understood the issue. See also, Wright v. State, 573 So.2d 998 (Fla. 1st DCA 1991). And in Anderson v. State, 546 So.2d 65 (Fla. 5th DCA 1989), the defendant had objected on the grounds of "relevancy" and improper impeachment, which was held sufficient to preserve an appellate challenge to cross examination of the witness as to whether he would possess cocaine. The entire context of the cross examination made it clear that the trial court was reasonably apprised of the nature of the defense counsel's objection.

Even where defense counsel made no formal objection as such to a trial court's failure to instruct the jury on an element of possession of drug paraphernalia, where the manner in which the issue was developed at trial clearly brought the error to the attention of the trial judge and afforded him the opportunity to correct or avoid the error, the appellate court would review the issue. Steele v. State, 561 So.2d 638 (Fla. 1st DCA 1990). These cases appear to recognize the principle stated in Walker v. State, 573 So.2d 415 (Fla. 5th DCA 1991), that the focus of legal argument is largely controlled by counsel, but that trial judges nevertheless have some responsibility to see that the case is decided on correct legal grounds.

In the present case, defense counsel's objection was in response to the following request by the prosecutor:

MR. MORTON [prosecutor]:... And probably before we get started with the closing arguments and the instructions I forgot to make one request Friday and that was a request for flight instruction. And I do believe in this case there's plenty of evidence of flight from the independent witnesses and from the Defendant, himself. And he admitted he ran from the scene.

MR. GAUDIOSI [defense counsel]: I, of course, object to that flight instruction.

THE COURT: I will give that instruction.

(R 588-589). Clearly, both the prosecutor and the trial court knew that, before an instruction on flight could be given, the State was required to present sufficient evidence of flight. Equally clearly, defense counsel's objection was based on the contention that insufficient evidence of flight had been presented to satisfy

the requirements of law. No other interpretation of the exchange which took place between counsel and the court makes sense.

Defense counsel's objection thus made the trial court aware that an objection had been made, presented specific grounds, and gave the trial judge the clear opportunity to rule. This met the test announced by this Court in Thomas v. State, 419 So.2d 634 (Fla. 1982). See also, Anderson v. State, supra, which observed that the purpose of the rule requiring a specific objection is to permit the judge to understand the issue raised and to give the adverse party sufficient notice of the alleged defect. Both of these considerations were satisfied below.

Respondent's contention that the issue was not preserved below is, therefore, without foundation.