IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY GILBERT WRIGHT,

Petitioner,

v. Case No. 78,790

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENTS

This court has already held that the failure to instruct the jury in a capital case on the maximum and minimum penalties in the gulit phase is not error because "(m)ore than in any other criminal proceeding, the jury in a capital case knows the minimum and maximum penalties involved." Walsh v. State, infra. During the voir dire of petitioner's jury, they were repeatedly told by the court and counsel what the penalties were upon conviction of first degree murder. The district court correctly held that the bifurcated nature of a death case presupposes that the jury is concerned with the penalty only after the guilt phase. Any per se rule of reversal on a strictly procedural matter is in direct contravention of section 924.33, Florida Statutes, (1989). This issue was not preserved by timely objection. If preserved, it was not reversible error.

The testimony from Mary Williamson was presented during the state's rebuttal, not in its case in chief. The ground advanced on appeal was not presented below. The evidence was relevant to rebut Wright's portrayal of himself as an outstanding member of the church whith an excellent reputation for veracity. The bulk of her testimony was not hearsay. Even if preserved, and if not fair rebuttal, no reversible error is presented as there is no chance that the jury found Wright guilty of a contract murder for insurance proceeds because he mistreated a fellow churchgoer. Williamson's testimony was that she was ostracized by the churchmembers because the **believed** Wright, which only enhanced Wright's reputation before the jury.

POINT ONE

NO REVERSIBLE ERROR IS PRESENTED IN THE TRIAL COURT'S DECISION TO NOT INFORM THE JURY OF THE MAXIMUM AND MINIMUM PENALTIES FOR FIRST DEGREE MURDER.

The trial court did not instruct the jury in the closing jury charge on the maximum and minimum penalties for first degree murder despite the specific request from the defense. (R 1201-1203) Petitioner contends that omission is reversible error, citing Tascano v. State, 393 So.2d 540 (Fla. 1980) and Florida Rule of Criminal Procedure 3.390(a). The trial court based its denial of the request upon the fact that the standard instruction had deleted the instruction on the maximum and minimum penalties. Fla.Std. Jury Instr. Crim. 2.05(5). Respondent suggests that no reversible error has occurred.

Florida Rule of Criminal Procedure 3.390(d) states:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating the distinctly the matter to which he objects, and the grounds of his objection.

Defense counsel did not object as required by this rule. (R 1363-1364) This alleged error must be preserved by specific, timely objection before the jury retires. Craig v. State, 510 So.2d 851 (Fla. 1988). Therefore, this issue is not preserved for appellate review.

Even if preserved, no reversible error is presented. The jury was repeatedly told what exactly what the maximum and

minimum penalties for first degree murder were during voir dire, by the court (R 1691, 1741, 1744, 1745), and by the prosecutor (R 1767, 1769). The venire's views on capital punishment were addressed at length by both counsel. (R 1777-1795, 1826-1830) Contrary to petitioner's argument and selected excerpts of "some" of the instructions, the totality of the jury selection demonstrates that the venire was properly advised of the penaties. The jury was repeatedly told that there were only two possible penalties upon conviction of first degree murder, life in prison or death. There can be no doubt that the jury was well aware of the maximum and minimum penalties for first degree murder. Walsh, infra.

The per se reversible rule of Tascano has been criticized and was eventually "discredited". Wiley v. State, 508 So.2d 1336 (Fla. 1st DCA 1987). The Florida Bar, In Re: Amendment to Rules-Criminal Procedure, 462 So.2d 386 (Fla. 1984). The procedural rule carves out an exception for capital cases, and is the only portion of Tascano which survives.

The state respectfully suggests that any per se reversible rule is directly contrary to section 924.33, Florida Statutes, (1989), which forbids appellate courts from presuming that an error has injuriously affected the substantial rights of a defendant. In Kocsis v. State, 467 So.2d 384 (5th DCA), rev. denied, 475 So.2d 695 (Fla. 1985), the court held that rule 3.390 is procedural and does not affect the substantive rights of the defendant. Therefore, this per se reversible rule should not be applied to a mere procedural rule in direct contravention of the statute.

The lack of logical underpinnings for a per se reversible rule is especially apparent in this sort of case, where the only "error" is not permitting the jury to disregard the evidence and exercise its "pardon power". The purpose of instructing the jury on the maximum and minimum penalties is so that they can exercise this so-called "pardon power". Evans v. State, 452 So.2d 987 (Fla. 3d DCA 1984) In this case, the jury was instructed on the necessarily lesser included offenses of homicide, yet because the jury was not reminded in the closing charge that the minimum penalty for first degree murder was life in prison, this "pardon power" was somehow impuned. In this regard, the state notes that Wright was indeed sentenced to life imprisonment, and so cannot demonstrate any prejudice whatsoever.

The concept of jury pardon has been thoroughly discredited by the courts of this state. See, Jess v. State, 523 So.2d 1268, 1269 (Fla. 5th DCA 1988) "In the interest of justice and the law, the Florida Supreme Court should turn its face from the pernicious notion that a criminal defendant has some kind of right to have the jury given a verdict alternative so that it can compromise its oath and return a verdict of guilt as to some lesser included offense." Id. Former Justice Alderman, in addressing the exact rule at issue here, also maligned the "jury pardon" concept as a "deplorable phenomenon" which results in "a miscarriage of justice." The Florida Bar In Re: Amendment to Rules of Criminal Procedure 3.390(a), 416 So.2d 1126, 1127 (Fla. 1982).

The district court relied on this court's decision in Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982). In this case, the trial court refused to instruct the jury on the maximum and minimum penalties for first degree murder. This court flatly rejected the contention that this failure constituted error.

> More than in nay other criminal proceeding, the jury in a capital case knows the minimum and maximum penalties involved. At voir dire, the court or counsel inquires as to each juror's attitude toward the death penalty and each juror's ability to apply the law which may result in a death sentence. Additionally, in a death case, the trial and sentencing phases are bifurcated; each juror participates in the sentencing process and must affirmatively recommend whether life or death is appropriate. Because the jury in a death case clearly knows the maximum and minimum penalties, the reasoning behind the Tascano decision is not present. Welty v. State, 402 So.2d 1159 (Fla. 1981). Id.

Based upon this language in the Walsh case, the district court determined below that the penalty instruction in a first degree murder case is required only in the penalty phase of the trial. In the guilt phase, the jury is presumed to know the maximum and minimum penalties, and indeed, the penalty is not relevant until the penalty phase.

If the per se rule is inapplicable, the state suggests that any error in failing to instruct the jury on the maximum and minimum penalty was harmless in this case because the jury was repeatedly instructed on the penalties at other phases of the trial and because Wright received a sentence of life, not death.

Even petitioner agrees that the failure of the trial court to give the instruction in a capital case can be harmless error. (IB 29) Death may be different, as petitioner argues, but this is not a death case. Wright was sentenced to life, and so any discussion of the procedural rules and requirments in death cases is inapposite. Wright cannot demonstrate any prejudiced from the failure to repeat the maximum and minimum sentence yet again in the closing charge in the guilt phase because he was sentenced to life, not death.

POINT TWO

TESTIMONY FROM MARY WILLIAMSON WAS PROPERLY ADMITTED IN REBUTTAL. THIS ISSUE IS NOT PRESERVED FOR REVIEW BY SPECIFIC OBJECTION. EVEN IF PRESERVED, AND IF ERROR, NO REVERSIBLE ERROR IS PRESENTED.

During the defense, Wright presented several witnesses to testify that he was a law abiding, highly regarded member of the First Baptist Church of South Daytona, with a good reputation for truth and veracity. (R 1068; 1072-1079; 1084; 1086) The first witness called by the state in rebuttal was Mary Williamson, also a former member of the First Baptist Church in South Daytona. The substance of Williamson's testimony, which including cross examination spanned only twenty pages, was that Wright owed her husband money that he refused to repay. When she complained to other church members of Wright's refusal, she was ostracized by them and they sided with Wright. (R 1093-1113) Petitioner contends that this evidence had no relevance and was offered solely to impugn his character. The district court concluded that this issue, and the other four issues not reraised herein were "without merit, or constitute at best harmless error." Wright v. State, 585 So.2d 321 (Fla. 5th DCA 1991).

First, of all, the sole objection during Williamson's testimony was not the same as advanced on appeal. The hearsay objection was a "best evidence" objection when Williamson referred to promissory note which memorialized the debt. There was no objection that her testimony was irrelevant, or that it was nothing more than an improper attack on character. Therefore, the issue is not preserved for appellate review.

Even if preserved, the testimony was proper rebuttal. The respondent agrees that this testimony would have had dubious relevance in the state's case in chief, however, once Wright called a parade of witnesses to testify that he was an upstanding member of the church, with a good reputation for honesty and abiding the laws, he placed these character traits into issue. See, Atlantic C.L.R. Co. v. Watkins, 97 Fla. 350, 121 So. 95 (1927); Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1980); Watkins v. State, 342 So.2d 1057 (Fla. 1st DCA 1977). This evidence was not presented solely to show propensity to commit crime, but rather was in direct rebuttal to evidence presented by petitioner.

The petitioner, citing Williams v. State, 510 So.2d 656 (Fla. 2d DCA 1987), echoes the argument made below that Williamson's testimony was hearsay, as her knowledge of the debt came from the promissory note she found in her deceased husband's papers. The record reveals that the promissory note was produced, and Williamson was cross-examined about her purported signature of release on the reverse side of the note. The bulk of her testimony was the effects she suffered in the First Baptist Church when she complained to the pastor about Wright's treatment, which is not hearsay.

Even if preserved, and even if it was not fair rebuttal, any error was harmless beyond and to the exclusion of any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1987). There is no chance that the jury found Wright guilty of first degree murder because he mistreated Williamson. This is similar to

references to drug possession during an arrest of a murder suspect. See, e.g. Johnston v. State, 497 So.2d 863 (Fla. 1986)(Jury was not prejueiced in murder case because defendant possessed marijuana). Wright's conduct toward Williamson, the alleged failure to repay a debt, is not even a crime, but rather, a civil wrong. The chance that the jury was unfairly prejudiced is even more remote when the defendant is accused of a civil wrong than in most cases where the evidence is that the man indicted for murder committed a misdemeanor. The testimony is harmless. The reference to Wright's failure to repay a dubious debt is minimal compared to a contract murder for insurance proceeds.

There is no suggestion that this evidence became a feature of the trial. This testimony covered only twenty pages, about one percent of the record. See, Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989).

The overall effect of this testimony was not even harmful to Wright. Williamson testified that she was ostracized by the church members because they disbelieved her and believed Wright was of good character. By her own testimony, Wright was believed by other church members, which only enhanced his credibility before the jury. This was hardly harmful testimony, and certainly did not affect the verdict. No reversible error is presented.

The ground advance on appeal was not advanced below to preserve this issue for review. Even if preserved, the testimony from Williamson was proper rebuttal to Wright's portrayal of

himself as a person of good character. Any error is harmless because the effect of the testimony was beneficial to Wright, and because the suggestion that he committed a civil wrong pales in comparison to the crime he was being tried for: contract murder for insurance proceeds.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief of respondent has been furnished, by delivery to Assistant Public Defender Larry B. Henderson counsel for petitioner at 112 A Orange Avenue, Daytona Beach, FL 32114, this 20th day of December, 1991.

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