IN THE SUPREME COURT OF FLORIDA

JERRY GILBERT WRIGHT,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

CASE NO. 78,790

DISCRETIONARY REVIEW OF
QUESTION CERTIFIED TO BE OF
GREAT PUBLIC IMPORTANCE BY THE
FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

POINT I

WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.390(a) REQUIRES THAT A TRIAL JUDGE INSTRUCT THE JURY ON THE POSSIBLE PENALTIES THAT ATTEND A CONVICTION FOR FIRST DEGREE MURDER AT THE CONCLUSION OF THE GUILT PHASE OF THE TRIAL UPON TIMELY REQUEST?

The State first suggests that this issue is not preserved by timely objection below. (Answer Brief at Page 2). The undersigned respectfully disagrees, as did the Fifth District Court of Appeal. Here, a timely request for an instruction was made prior to jury deliberations. (R1202). The sole purpose of an objection is to put the trial court on notice of putative error and to give the court the opportunity to timely correct the problem. It is clear that this trial judge was aware of defense counsel's request. He denied the request for an instruction on penalties, stating "since the model charge approved by the Florida Supreme Court deletes restating to the jury death and/or live, I will not give it." (R1202). Further objection would have been a useless act and a waste of the trial court's time. See Thomas v. State, 419 So.2d 634 (Fla. 1982) (an attorney is not required to do a useless act).

The State reads Florida Rule of Criminal Procedure 3.390(d) as requiring that the defendant renew a request for a jury instruction prior to the jury retiring for deliberations. (Answer Brief at 2). Rule 3.390(d) simply requires that the defendant object to the court's failure to give an omitted instruction prior to the jury retiring to consider its verdict.

Here, defense counsel's request for an omitted instruction during the charge conference was tantamount to an objection, occurring well before the jury retired to consider its verdict. Exceptions to trial court's rulings are no longer required to preserve errors for appeal. The requirements of Rule 3.390(d) have been met.

As its backup position, the State asserts that no reversible error occurred because, "the jury was repeatedly told what exactly what (sic) the maximum and minimum penalties for first degree murder were during voir dire, by the court (R1691, 1741,1744,1745), and by the prosecutor (R1767,1769)." (Answer Brief at 2-3). Appellant has attached those pages as an Appendix to his Initial Brief. Appellant respectfully maintains that the instructions found on those pages are not complete and that they are ambiguous. The instructions reasonably could have left confusion in the minds of the jurors, and defense counsel was entitled to an accurate instruction from the court as to precisely what the maximum and minimum penalties were.

The State concentrates primarily on the per se reversible error rule set forth in Tascano v. State, 393 So.2d 540 (Fla. 1980). The undersigned is not arguing that a per se rule should apply. Rather, the undersigned submits that the error here was prejudicial because the jury reasonably was confused about the penalties that would be available to them to recommend if a verdict of guilty was returned.

Further, the undersigned respectfully submits that the State has misread the holding in Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982). The State asserts, "this court flatly rejected the contention that this failure constituted error." (Answer Brief at 5). A fair reading of this court's reasoning in Walsh is that any error that occurred in the trial court's refusal to provide a formal instruction at the conclusion of trial was cured by the preceding instructions from the court and arguments and comments of counsel during voir dire. The facts here are different. The instructions given by the court were ambiguous and the comments of counsel were grossly misleading. The error here was not harmless. Accordingly, the conviction should be reversed and the matter remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT THE TESTIMONY OF MARY WILLIAMSON CONCERNING AN ALLEGED $24,500.00 DEBT THAT WRIGHT OWED MS. WILLIAMSON'S DECEASED HUSBAND BECAUSE HER TESTIMONY WAS NOT BASED ON PERSONAL KNOWLEDGE BUT INSTEAD ON A PROMISSORY NOTE SHE FOUND IN HER HUSBAND'S BELONGINGS.

The State contends that this error was not preserved because, "the hearsay objection was a 'best evidence' objection when Williamson referred to promissory (sic) 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 was not preserved for appellate review." (Answer Brief at 7). In reply, Wright respectfully submits that at the inception of Ms. Williamson's testimony defense counsel objected on the grounds of hearsay. (R1094). At trial, the State argued, "well, your Honor, I think that she has documentary proof that she found in her possession." (R1094). The hearsay objection was overruled. On appeal, Wright argued that Ms. Williamson's testimony was hearsay. Wright maintains that claim here. The fact that the testimony is objectionable on several grounds does not mean that the error should be ignored because defense counsel voiced only one valid objection rather than four or five. The testimony was clearly hearsay, and it was prejudicial.

The State asserts, "Wright's conduct towards Williamson, the alleged failure to repay a debt, is not even a

crime, but rather, a civil wrong." (Answer Brief at 9). The State now glosses over the very reasons it really sought to present such testimony. Specifically, Wright's moral character would be severely impugned by the testimony of a bereaved widow who was being cheated out of her direly needed funds by a person who was capable of hoodwinking church goers into ostracizing the widow. Theft is a crime, not a civil wrong. The prosecutor used this testimony by unfairly arguing in closing argument that the jurors should not be fooled by "blind faith" as were the church goers. To say that the improperly presented evidence did not become a feature of trial is a feeble disclaimer, where the circumstances are as egregious as these. As a matter of trial strategy, the State would want to present its most damaging witness last:

> The opening and closing witnesses have positions of special prominence. The jury is usually more alert at these times, and especially so at the time the opening witness testifies. Most observers agree that first impressions tend to last; once an impression is formed in the mind of a juror, the burden is on the one who seeks to change it. For these reasons, it is desirable to present a strong and favorable witness as the first witness in a case. <u>At the other extreme, the last witness occupies a special position because the memory of what he says is freshest in the minds of the jurors during their formal deliberations. It is especially damaging if that freshest memory is one of a weak witness, and helpful if it is the memory of a strong and favorable witness.</u> Accordingly, it is usually advisable to use a strong witness first and a strong witness last, allowing

> other factors to govern the particular order of the witnesses in between.

Trial Tactics and Methods, Keeton, Page 23. (Emphasis added)

The State closes by arguing, "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 is being tried for: contract murder for insurance proceeds." (Answer Brief at 10). Wright fails to see how Ms. Williamson's testimony was favorable to him. It unfairly impugned his character. It unfairly distracted the jury from considering the credibility of the witnesses on the basis of properly admitted testimony and evidence. It unfairly provided the prosecutor with the opportunity to implore the jurors not to suffer from the blind faith that Wright's fellow church members suffered from. The improper testimony was distracting, unfairly prejudicial and, most importantly, it was properly objected to! It cannot be reasonably claimed that this timely objected-to error was harmless beyond a reasonable doubt. Accordingly, the conviction should be reversed and the matter remanded for a new trial.

CONCLUSION

The certified question should be answered in the affirmative because an unequivocal instruction by the court to the jury as to what penalties attend a conviction for first degree murder is relevant, prudent and necessary during the guilt phase of a capital trial; Wright's conviction should be reversed and the matter remanded for retrial with directions that Ms. Williamson's testimony concerning Wright's alleged indebtedness to her be excluded unless a proper predicate is established.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Fl., 32114, in his basket at the Fifth District Court of Appeal and mailed to Jerry Wright, #119313, 3950 Tiger Bay Road, Daytona Beach, FL 32114, this 7th day of January, 1992.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER