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IN THE SUPREME COURT OF FLORIDA

DONALD RHUE HEIDBREDER,

Petitioner

v.

CASE NO.: 80,439

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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______________________________/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, DONALD RHUE HEIDBREDER, defendant/appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred herein as either "Respondent" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts.

SUMMARY OF ARGUMENT

Issue I:

A category one guidelines scoresheet was properly used in sentencing Petitioner far attempted first degree murder where inchoate offenses, such as attempts, are included within the category of the principal offense.

Issue 11:

The trial court properly sustained the State's objection to the introduction of Petitioner's testimony regarding alleged prior bad acts of the shooting victim in this case where such evidence is only relevant and admissible when self defense is asserted.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT USING A CATEGORY 1, RATHER THAN A CATEGORY 9, SCORESHEET.

Petitioner was charged with and convicted of attempted first degree murder (R 228, 237). Petitioner contends that the trial court erred in using a category 1 guidelines scoresheet instead of a category 9 scoresheet. The appellate court rejected this contention and certified conflict with Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991), *rev.* den. case no. 79,195 (Fla. Feb. 17, 1992).

Rule 3.701(c), Fla.R.Crim.P. specifically lists murder as a category 1 crime. The Committee Note to subsection C states:

> (c) Only one category is proper in any particular case. Category 9, "All Other Felony Offenses." should be used only when the primary offense at conviction is not included in another more specific category. The guidelines do not apply to capital felonies.
>
> Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by Ch. 777.

(emphasis supplied).

Historically, an attempt must be classified as a lesser included offense of the crime charged. Lewis v. State, 269 So.2d 692 (Fla. 4th DCA 1972); Brown v. State, 206 So.2d 377

(Fla. 1968). Under the Committee Note to Rule 3.701(c), a sentence for the primary offense of attempted murder, as an inchoate offense, must be calculated using a category 1 scoresheet.[1]

This Court recently ruled in Hayles v. State, case no. 79,743 (Fla. October 1, 1992), that the use of the category 1 scoresheet is proper in a case such as that at bar. See Hayles, attached hereto. This Court disapproved Tarawneh to the extent that it conflicts with Hayles.

Petitioner's conviction and sentence must consequently be affirmed.

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1 See also Rule 3.701(d)(3)(b), Fla.R.Crim.P.:

> The guidelines scoresheet which recommends the most severe sentence range shall be the scoresheet to be utilized by the sentencing judge pursuant to these guidelines.

ISSUE 11

WHETHER THE LOWER COURT ERRED IN NOT ALLOWING PETITIONER TO PRESENT EVIDENCE OF OTHER ACTS OF THE VICTIM WHICH ALLEGEDLY CONTRIBUTED TO PETITIONER'S STATE OF MIND AT THE TIME OF THE CRIME.

It should be noted that this issue is not encompassed within the scope of the interdistrict conflict which conferred jurisdiction upon this Court to review the instant case. In the event that this Court decides to address this "bootstrap" issue, Respondent will show that the court below properly determined that this issue presents no reversible error.

At trial in this case, Petitioner began to testify as to past acts of the victim which Petitioner alleged had made him so angry that he went to the victim's residence and shot him. The State objected to this testimony. (R 163). A proffer of the testimony was heard outside of the presence of the jury. Petitioner testified on proffer, inter alia, that he had seen bruises on the victim's children and they told that the victim had beaten them, that he heard that the victim had had sexual relations with his own sister, that he had heard that a social service agency in Alabama removed one of the victim's children from the victim's home, and that the victim's ex-wife told him that the victim had beaten her. (R 164-166).

In disallowing the testimony, the trial court stated:

> THE COURT: I'm going to sustain the objection, Mr. Koran, and prohibit you, Mr. Heidbredes, from testifying as to those specific instances of misconduct that you believe occurred as a result of what people have told you. Find that, Mr. Koran, you're able to get into testimony and evidence that you feel is relevant by virtue of his own testimony, that he has strong dislike or hatred or whatever, that emotion is towards Mr. Murphy. The State is not disputing that, and I don't believe it's necessary. I think it's unduly prejudicial to the State to allow you to bring in such inflammatory evidence as relates to Mr. Murphy and would just go to the jury to color their impression of Mr. Murphy in an improper fashion. So I'll sustain the objection,
>
> * * * * * *
>
> I believe that you can have Mr. Heidbreder testify as to his feelings toward Mr. Murphy. You've admitted yourself that those feelings may be based on inaccurate information. The reason he feels that way is irrelevant. What may be relevant is the fact that he feels that way. So you're going to be able to do that through his testimony without going into specific acts that you feel relate to what Mr. Murphy may or may not have done. That's my ruling.

(R 166-18).

Petitioner contends that he was denied the right to present evidence of his state of mind at the time of the shooting, arguing that the jury had no basis upon which to evaluate Petitioner's state of mind to determine if Petitioner could have formulated the specific intent and premeditation necessary to support an attempted first-degree murder charge. The State disagrees.

As a preliminary matter, the standard of review is that a trial court's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Blanco v. State, 452 So.2d 520 (Fla. 1984), *cert. denied,* 469 U.S. 1181 (1985).

The State recognizes that a defendant's mental state at the time of a shooting is relevant. However, such evidence is only relevant as it concerns a witness' factual observations of a defendant's mental state at the time the crime occurs. Shivers v. State, 364 So.2d 1158 (Fla. 1st DCA 1990).

Petitioner relies on Araujo v. State, 452 So.2d 54 (Fla. 3d DCA 1984). In Araujo, the prosecutor objected on hearsay grounds to the defendant's testimony that he was at the residence where a drug raid was conducted because a third party told the defendant to meet him there to discuss a business deal. The appellate court held that the testimony was not hearsay because it was not offered to prove the truth of the matter asserted by the third party, but to show its effect upon the defendant.

In the instant case, the prosecutor objected on the grounds that the testimony was irrelevant and an improper attack on the victim's character, not that the evidence was hearsay. (R 163). Further, the evidence presented by the defendant in Araujo was exculpatory as it was presented to show that the defendant was not at the scene for an illegal purpose but that he was there to

discuss a legitimate business deal. Here, Petitioner sought to introduce evidence of alleged prior bad acts of the victim in an attempt to legitimatize the illegal act of shooting the victim, not to show that the illegal act did not occur. As such, the evidence was simply not relevant and thus inadmissible.

It has long been the law in Florida that prior bad acts of a shooting victim are admissible only to show that the defendant had a reasonable fear of the victim when self-defense is asserted. In Williams v. State, 238 So.2d 137, 139 (Fla. 1st DCA 1970), the court stated:

> Point V of appellant was that it was error not to permit the defense to show the vicious nature of the deceased and quarrelsome, violent and dangerous proclivities as evidenced by other and prior altercations. We cannot agree with the defendant on this point. Such evidence is admissible where the plea of self-defense is interposed, but until the defendant shows some evidence that he acted in self-defense, such is improper.

Accord, Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), *approved and quashed in part*, 472 So.2d 730 (Fla. 1985); Smith v. State, 410 So.2d 579 (Fla. 4th DCA 1984); Roten v. State, 31 Fla. 514, 12 So. 910 (Fla. 1892). A5 self-defense was not asserted in this case, evidence of alleged prior bad acts of the victim was properly excluded.

None of the acts which Petitioner sought to testify about occurred close to the time of the shooting, and some of them

allegedly took place years before. It is difficult to understand Petitioner's contention that such evidence would have showed that Petitioner had no premeditated design to go to the victim's trailer and shoot him in the chest. On the contrary, such evidence supports the State's contention that the shooting was premeditated.

Even so, Petitioner testified at length as to his state of mind on the night of the shooting. (R 169-73). The jury was thus able to adequately evaluate Petitioner's mental state without the introduction of the irrelevant evidence of the victim's alleged prior bad acts. Any perceived error is thus clearly harmless.

The State would note parenthetically that Petitioner's alleged concern for these children was belied by the fact that several of the children were present in the room when Petitioner shot the victim (R 26-33).

The cases cited by Petitioner, E.B. v. State, 531 So.2d 1053 (Fla. 3d DCA 1988), and Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1978), both involve an asserted defense on the theory of self-defense, and for reasons developed above, are inapplicable to the instant case.

The decision of the district court of appeal must therefore be affirmed.

CONCLUSION

Based on the above arguments and citations of legal authority, Respondent respectfully urges this Honorable Court to affirm the decision rendered in this case.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. **DOUGLAS** BRINKMEYER, Assistant Public Defender, **Leon** County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, **Florida** 32301, this 5th day of October, 1992.

Bradley R. Bischoff
Assistant Attorney General

Supreme Court of Florida

No. 79,743

LEE ROBERTSON HAYLES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

[October 1, 1992]

KOGAN, J.

We have for review Hayles v. State, 596 So.2d 1236 (Fla. 1st DCA 1992), which certified conflict with Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Lee Robertson Hayles was convicted and sentenced for solicitation of first-degree murder in violation of section 777.04(2), Florida Statutes (1989). The trial court used a category 1 scoresheet under Florida's sentencing guidelines, resulting in a sentence of seventeen years' imprisonment followed by thirteen years' probation. The district court affirmed, but noted that Tarawneh had held that a category 9 scoresheet should be used in such situations.

The guidelines provide that a category 1 scoresheet must be used *in* all cases of murder or manslaughter except *first* degree murder and alcohol-related manslaughter charges. Fla. R. Crim. P. 3.701(c). A category 9 scoresheet is used for any felony not placed in any other category. Id. Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to. Id. (committee note).

The offense actually committed here was a violation of Florida's inchoate offense statute, because Hayles solicited a first-degree murder. We thus do not consider it dispositive that the guidelines expressly exclude first-degree murder from category 1. There is an obvious purpose underlying the exclusion. Under Florida law, the only possible penalties for first-degree murder are death and life imprisonment. Applying the guidelines to this context would serve no purpose.

The same is not true in the present case. Here, Hayles committed a solicitation *in* violation of section 777.04(2), Florida Statutes. Strictly speaking, he committed no offense

under section 782.04(1)(a). His penalty could be less than life imprisonment, and 'the guidelines thus serve a function here. Because section 777.04(2) is not excluded from category 1, a solicitation falls under category 1 whenever the object is to commit a murder or manslaughter of any kind. The solicitation was intended to effectuate a murder here, and so Hayles falls under category 1 of the guidelines.

The result reached below is approved. We disapprove Tarawneh to the extent it is inconsistent with our views here.

'It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

First District - Case No. 91-1014

(Escambia County)

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