IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 84,215

ALLAN GILMAN IACOVONE,

Defendant.
_____/

MANDATORY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER/CROSS-ANSWER BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

ISSUE I: Sections 784.07(3) and 775.0825 withstand constitutional scrutiny. The Defendant failed to preserve the constitutional challenges relating to due process and cruel and unusual punishment. Moreover, these challenges incorrectly treat the statutes as enhancement provisions rather than as a new substantive offense. The equal protection argument must also fail since the legislative intent provides a reasonable basis for the sentencing classification.

ISSUE II: The trial court properly admitted evidence of the Defendant's prior threats against and abuse of members of the Cuervo family. This evidence was relevant to material issues in dispute at trial and was not offered solely to show the Defendant's propensity towards violence. Any possible error related to the admission of this evidence was harmless in light of the other overwhelming evidence of the Defendant's guilt.

ISSUE III: The Defendant's 911 call was properly excluded as inadmissible hearsay not within any exception. The recorded statements could not be considered to be a verbal act in any way related to the charged offense. The trial court's determination of the lack of trustworthiness of the Defendant's exculpatory statements should be affirmed.

ARGUMENT

ISSUE I

SECTIONS 784.07(3) AND 775.0825, FLORIDA STATUTES, AS APPLIED, FAIL TO VIOLATE EQUAL PROTECTION.

The Defendant was charged with and convicted of attempted murder of a law enforcement officer in violation of Section 784.07(3), Fla. Stat. (1991). Although Section 784.07(3) has been specifically construed as creating a new substantive offense, the Defendant bases several constitutional challenges on the use of this statute as an enhancement provision. Of these challenges, only the alleged equal protection violation was raised at trial.

Constitutional errors which are not of a fundamental character are waived unless timely and properly objected to in the trial court. Gibson v. State, 533 So. 2d 338, 339 (Fla. 5th DCA 1988), post-conviction relief denied, 557 So. 2d 929, citing Ray v. State, 403 So. 2d 956, 960 (Fla. 1981); Clark v. State, 363 So. 2d 331, 333 (Fla. 1978). Consequently, the Defendant waived the arguments concerning due process and cruel and unusual punishment as applied to the instant statutes by not specifically

objecting on these grounds below.[1] Gibson, 533 So. 2d 338, 339, citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

According to the Defendant this statute created a sentencing enhancement provision, not a separate substantive offense, while existing precedent holds otherwise. Section 784.07(3) "creates a separate substantive offense," consisting of the elements of murder (in any degree), found in Section 782.04, Fla. Stat. (1991), plus the elements of criminal attempt and that the victim was a law enforcement officer. Isaac v. State, 626 So. 2d 1082, 1083 (Fla. 1st DCA 1993). Despite this clear statement, the Defendant claims that Section 784.07(3) cannot be interpreted to encompass the elements of third degree murder. According to the Defendant, the challenged statute may only be used to enhance attempted first degree murder of a law enforcement officer to a life felony.

To the contrary, the majority opinion in Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991), specifically addresses the Defendant's argument concerning third degree murder. "From the fact that the Legislature chose to use the term 'murder,' it appears obvious that the Legislature concluded that one who attempts to murder a law enforcement officer should be subject to the same penalties, irrespective of the circumstances under which the attempted murder was committed."

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[1] Even if these arguments were not waived, they are inapplicable since these statutes create a new substantive offense, rather than an enhancement provision as suggested by Appellant.

Carpentier, 587 So. 2d 1355, 1358. The Legislature's purposeful disregard of the circumstances is further illustrated by the statute's failure to require that the offender know the victim was a law enforcement officer. Carpentier, 587 So. 2d at 1357. The legislative intent was to provide law enforcement officers with the "greatest protection which can be provided through the laws of this state." Carpentier, at 1357, quoting Chapter 89-100, section 2, Laws of Florida. Toward that end, a conviction of attempted murder of a law enforcement officer, of whatever degree, will be treated as a life felony and punished accordingly. Nephew v. State, 580 So. 2d 305, 306 (Fla. 1st DCA 1991).

If the legislature defines a crime in specific terms, courts are without authority to define it differently. Watkins v. State, 622 So. 2d 1148, 1150 (Fla. 1st DCA 1993), citing State v. Jackson, 526 So. 2d 58, 59 (Fla. 1988). However, the statute in question does not specifically define the term "murder," nor does it enumerate the types of murder to which it applies. Cf. Watkins, 622 So. 2d 1148, 1150. In cases such as this, resort may properly be had to the related statutory provisions which define "murder," i.e., Sections 782.04(1)-(4). Nephew, 580 So. 2d 305, 306, citing State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980). Consequently, no constitutional infirmity results from defining the generic term "murder" according to the statutory definition provided by the legislature.

Accepting that Section 784.07(3) creates a new substantive offense, the Defendant next argues for discharge, claiming he was charged with a nonexistent lesser offense. Without objection from either side and with specific reliance by both counsel in closing arguments, the jury was instructed that the lesser included offenses of attempted first degree murder of a law enforcement officer included, among others, attempted second degree murder of a law enforcement officer, attempted second degree murder, attempted third degree murder of a law enforcement officer, and attempted third degree murder. (R 563-564). Based on this statement, the Defendant claims that the jury was instructed on the non-existent crime of attempted third degree murder of a law enforcement officer.

A closer inspection of the full instructions on Count III, attempted murder of a law enforcement officer, and Count IV, attempted first degree murder, as well as the verdict form, reveals that no error occurred. To avoid redundance, the instructions applicable to both Counts III and IV, such as attempted first, second, and third degree murder, were combined. (R 568-573). The jury was then separately instructed on the elements relating to whether Hogsten was a law enforcement officer. (R 576-577). Furthermore, the verdict form illustrates that no non-existent crime was presented to the jury. (R 754-757). The form required the jury to determine whether a first, second, or third degree attempt was made on Hogsten's life. Any of these degrees would stand alone as a lesser included if the

jury then determined that Hogsten was not a law enforcement officer. The form further required a finding of whether Hogsten was a law enforcement officer. Making this finding also did not create a non-existent crime since attempted murder of a law enforcement officer includes all degrees of murder. See Carpentier, supra.

The laundry list of lessers, quoted above, was the sole reference to any different degrees of attempted murder of a law enforcement officer. Although this error in instruction may have been misleading, it cannot be said with a reasonable probability that it erroneously contributed to the verdict. Willis v. State, 583 So. 2d 699 (Fla. 1st DCA 1991); Tollefson v. State, 525 So. 2d 957 (Fla. 1st DCA 1988). An instruction on a non-existent crime constitutes reversible error because the jury is led to believe in the criminality of a set of circumstances that were not in fact criminal. Murray v. State, 471 So. 2d 70, 72 (Fla. 4th DCA 1984). The challenged instruction did not have this improper affect. Attempted murder of a law enforcement officer is a criminal act regardless of the applicable degree of murder. Consequently, this jury was not misled by the challenged instruction.

Moreover, the Defendant failed to object to the instructions given by the trial court. Without a contemporaneous objection, Daniels v. State, 587 So. 2d 460, 461 (Fla. 1991), reversal would be inappropriate since the evidence of the Defendant's guilt was clear. Waters v. State, 298 So. 2d 208 (Fla. 2d DCA 1974).

Finally, even if this Court agrees that the Defendant was erroneously convicted of a non-existent crime, the remedy suggested is improper. According to the Defendant, the appropriate remedy is to discharge him for the attempted third degree murder of a law enforcement officer conviction. See Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). As explained in Achin v. State, 436 So. 2d 30, 32 (Fla. 1986), although the Defendant was convicted of a crime which could be construed as technically non-existent, since it was in all elements equivalent to the main offense, Isaac, supra, double jeopardy does not bar reprosecution. But see Adams v. Murphy, 653 F.2d 224 (5th Cir. 1981). Consequently, if necessary, this case can be reversed and remanded on the conviction of attempted murder of a law enforcement officer without fear of violating principles of double jeopardy.

ISSUE II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DEFENDANT'S PRIOR MISCONDUCT TOWARDS TWO OF THE VICTIMS AND THEIR FAMILY.

The Defendant complains that the trial court improperly admitted evidence of his prior threats against and abuse of members of the Cuervo family. These prior bad acts included physical abuse of the Defendant's former girlfriend, Lori Cuervo, and death threats against the entire Cuervo family, including two of the victims -- Eddie Cuervo, Lori's father, and Cindy Cuervo, Lori's sister. Despite the Defendant's objections to the admission of this evidence, the trial court ruled this prior conduct was relevant to the charge of aggravated assault of which Eddie Cuervo was the victim.

The test for determining whether a defendant's prior misconduct is admissible is relevancy, and, as long as the evidence of prior bad acts is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. Sireci v. State, 399 So. 2d 964, 968 (Fla. 1981), cert. denied, 456 U.S. 982, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The Defendant's prior threats against and violence toward the Cuervo family were unquestionably related to the criminal episode which included direct attacks against both Eddie and Cindy Cuervo.

Evidence of previous misconduct is admissible if it casts light on the character of the act under investigation. Sireci, 399 So. 2d 964, 968 (citations omitted). The Defendant's prior

bad acts, directed specifically toward the entire Cuervo family (including Lori), properly demonstrated his motive, intent, absence of mistake, and a system or general pattern of criminality. Sireci, 399 So. 2d at 968 (citations omitted). Premeditation in the attempted murder of Cindy Cuervo could also be inferred from this evidence of previous difficulties between the parties. Id. at 967. See also Trepal v. State, 621 So. 2d 1361, 1363-1364 (Fla. 1993); and Dupree v. State, 615 So. 2d 713, 715 (Fla. 1st DCA 1993).

Although the Defendant argues that any misconduct directed toward Lori Cuervo was irrelevant, those bad acts set the stage for the crimes perpetrated on December 25, 1991, against the Cuervos. The Defendant's abuse of Lori Cuervo demonstrated his motive, intent, and absence of mistake in the attacks against her father and sister just as equally as did his threats towards the entire family. His difficulties with the Cuervo family stemmed solely and directly from his problems with Lori.

Simply put, these prior bad acts were relevant to material issues disputed at trial: 1) whether Eddie Cuervo was placed in fear by the Defendant's actions, and 2) whether the Defendant intended to run over Cindy Cuervo. This evidence was not offered merely to show the Defendant's propensity toward violence. Cf. Fulton v. State, 523 So. 2d 1197, 1198 (Fla. 2d DCA 1988)(collateral crimes evidence used to establish defendant's attempt to prevent victim from testifying irrelevant to prove a material fact in issue); King v. State, 545 So. 2d 375

(Fla. 4th DCA 1989)(prior bad acts showing only defendant's propensity to fight with women with whom he had a relationship improperly admitted). The Defendant's prior misconduct was directly relevant to the disputed issues of the case.

Even if this Court finds error in the admission of any of the Defendant's prior misconduct toward the Cuervo family, the overwhelming evidence of the Defendant's guilt would render any error harmless. Colwell v. State, 448 So. 2d 540, 541 (Fla. 5th DCA 1984), citing State v. Murray, 443 So. 2d 461 (Fla. 4th DCA 1984); McKinney v. State, 462 So. 2d 46, 47-48 (Fla. 1st DCA 1984), quoting Clark v. State, 378 So. 2d 1315, 1316 (Fla. 3d DCA 1980). There was no question of identity and the eyewitness accounts of the events clearly and convincingly proved the Defendant's guilt even without the evidence of his previous bad acts. The ruling of the trial court should stand.

ISSUE III

THE TRIAL COURT PROPERLY EXCLUDED THE DEFENDANT'S 911 CALL.

The Defendant challenges the trial court's exclusion of the 911 call which he placed following the episode which gave rise to these charges. In addition to the statements quoted in the Defendant's brief, the Defendant told the 911 operator "I hope you've recorded this because this is the truth, but as hysterical as I am this is probably going to be the only testimony I've got, because I'm facing some major charges here, you know?" (R 779). After listening to this tape, the trial court ruled that the call did not fall within any hearsay exception cited to the court and, therefore, was inadmissible. (R 516). The extreme exculpatory nature of this call is apparent from the trial court's comment, "Very interesting theory of defense. Call 911, record your statement and then offer it at trial." (R 516).

The Defendant claims this call was improperly excluded, arguing that it falls under the excited utterance or existing state of mind hearsay exception.[2] See Sections 90.803(2) and (3)(a), Fla. Stat. (1991). However, exculpatory statements made by a defendant, such as the Defendant, who chooses not to testify at trial constitute inadmissible hearsay not within any exception. Moore v. State, 530 So. 2d 61, 63 (Fla. 1st DCA 1988)(citations omitted). Although the Defendant's statements

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[2] Appellant also claimed the business record exception at trial, but this argument is not made on appeal.

were made on the heels of the crime and could be considered part of the res gestae, they were so self-serving and made under circumstances indicating a such a lack of trustworthiness that they were properly excluded. Overton v. State, 429 So. 2d 722, 723 (Fla. 1st DCA 1983).

It is true that the mere fact that statements are self-serving is not, in and of itself, a sufficient evidentiary basis for their exclusion from evidence. Alexander v. State, 627 So. 2d 35, 43 (Fla. 1st DCA 1993). The exculpatory statements made by the Defendant were, nonetheless, readily distinguishable from the statements improperly excluded in the Alexander case.

In Alexander, 627 So. 2d 35, 43-44, the defendant's self-serving statements were made almost simultaneously with the act of shooting, a period of time too short to support a finding of fabrication. The statements were considered part of the defendant's conduct at the time of the commission of the alleged offense and thus were not merely hearsay statements but amounted to conduct in the nature of a verbal act. Alexander, at 44.

The Defendant's statements were completely disconnected from the criminal episode. Following the Defendant's flight from the scene of the crime, his decision to call 911 with his explanation of the events cannot be considered a verbal act in any way related to the charged offenses.

More importantly, after hearing the tape, the trial court, charged with making determinations of fact on matters of the admissibility of evidence, found that the proffered hearsay

testimony was not trustworthy. Alexander, at 45 (Barfield, J., concurs in part and dissents in part). The State would agree with the Honorable Judge Barfield's conclusion that the trial judge failed to abuse her discretion in excluding this type of evidence and that an appellate court is not in a better position to make such a determination. Id. at 45. See also Pride v. State, 151 Fla. 473, 10 So. 2d 806 (Fla. 1943)(determination of matters constituting the res gestae is largely in the trial court's discretion). The decision of the trial court to exclude the Defendant's 911 call should be affirmed.

CONCLUSION

Based upon the foregoing arguments and citations of authority, the State urges this Court to affirm the judgment and sentence rendered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Karen Kinney, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33830, this 13th day of October, 1994.

COUNSEL FOR PETITIONER