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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 86,956

STATE OF FLORIDA

Petitioner,

vs.

ROBERT LEE DOZIER

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent, Robert Lee Dozier, was the Defendant and Petitioner, the State of Florida, was the prosecution in the trial on criminal charges filed in the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Respondent, Dozier, was the Appellant, and Petitioner, the State of Florida, was the Appellee, in the appeal filed with the District Court of Appeal, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to herein as "the State."

In this brief, the symbol "A" will be used to denote the appendix attached to the initial brief. The Symbol "RB" will be used to denote Respondent's Brief.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner makes the following additions to its Statement of the Case and Facts in the Initial Brief:

1. Donald Abernathy described the trailer as a "big box... fully enclosed with two doors on back" (R 35).

2. Tracy Barrett described the trailer as "big enclosed... with swinging doors on back" (R 38).

3. Fred Vanzonneveld testified that the enclosed trailer had its ramp down (R 52).

4. On his motion for judgment of acquittal, defense counsel conceded, "I realize the State's burden has been met" (R 148)

5. When the jury sent out its question during deliberations, defense counsel contended that the jury should be informed as to what a structure is not, i.e. a conveyance (R 207-208). When the trial court suggested that it tell the jury to rely on "the normal every day common sense definition of what a building is," defense counsel responded "Well subject to our request that conveyance be explained to them, we go along with what --" (R 209-210). He then stated that the "only problem with the proposed instruction was that it gave the jury "some" discretion and that structure could be defined in terms of what it is not (R 210-211).

Defense counsel wanted the trial court to clarify with the

jury what it really wanted to know (R 212-213). Ultimately, the trial court gave its proposed instruction, to which defense counsel did not object (R 214-215). Later, defense counsel agreed that his objection on the record was that he had wanted the definition of conveyance to be given to the jury (R 216).

SUMMARY OF ARGUMENT

Point I

The Fourth District erred in holding unconstitutional the administrative order by the chief judge for the Nineteenth Judicial Circuit, dated September 28, 1993, which permitted Judge Wild to sit on the instant case. This court's recent decision in The Honorable Joe A. Wild v. Dozier, 21 Fla. L. Weekly S57 (Fla. Feb. 2, 1996)) makes clear that the Fourth District neither had the authority to review the order, nor correctly determined that it was invalid.

Point II

Respondent failed to preserve for review his argument concerning variance between the allegation in the information and the proof at trial. Regardless, any variance did not mislead Respondent. The State presented evidence in support of the conviction.

Point III

Respondent failed to preserve for review his claim in regard to the reinstruction on the definition of a structure. The instruction was not improper.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN HOLDING UNCONSTITUTIONAL THE ADMINISTRATIVE ORDER OF SEPTEMBER 28, 1993, WHICH WAS ISSUED BY THE CHIEF JUDGE PURSUANT TO SECTION 2(b)(d), ARTICLE V OF THE FLORIDA CONSTITUTION AND RULE 2.050 (b) (3) (4), RULES OF JUDICIAL ADMINISTRATION.

The instant case is a "pipeline" case. Hence, this court's decision in The Honorable Joe Wild v. Dozier, 21 Fla. L. Weekly D557 (Fla. Feb. 8, 1996) applies to this case without any need for the retroactivity analysis discussed by Respondent in his brief (RB. 7-9). See Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992)(any decisions announcing new rule of law must be given retrospective application in every case pending on direct review or not yet final).

Contrary to Respondent's claim otherwise (RB. 12-15), upon applying Wild to the case before this Court, the Fourth District's decision on the jurisdictional issue must be quashed. The Fourth District expressly relied on its en banc decision in Dozier v. Wild, 659 So. 2d 1103 (Fla. 4th DCA 1995), which this Court quashed in Wild. 21 Fla. L. Weekly at 558. Moreover, the assignment order in this case is the same order that this court in Wild deemed "permissible." Id.

Finally, although this court directed the chief judge of Indian River County to make reassignments, it explicitly cautioned: "This directive shall not be construed to mean that they have been without jurisdiction to hear these cases." Id. Therefore, Judge Wild had jurisdiction to hear the instant case pursuant to the assignment order in question. Thus, the Respondent's argument that he is entitled to a new trial once the reassignments are in effect so "to be tried by a duly constituted Circuit Court Judge" and to remedy "the recognized jurisdictional deficiency" is erroneous (RB 14, 15).

Respondent is not in the same position as the respondent in Wild. The respondent in Wild is not proceeding to trial as a "remedy" in that case (RB 13-15), but is doing so only because that was the posture of the case upon this Court's resolution of the pretrial matter. Respondent sub judice was already tried by a judge of competent jurisdiction. Unlike the respondent in Wild, therefore, he is not entitled to a new trial. Instead, this court should uphold the conviction and sentence.

ISSUE II

THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT PROPERLY ADJUDICATED RESPONDENT GUILTY OF BURGLARY OF A STRUCTURE

This court should decline considering this point. In Savoie v. State, 422 So.2d 308, 310 (Fla. 1982), this court stated that it may, in its discretion, consider other issues "properly raised and argued before this court." (emphasis supplied). Respondents additional points were not properly raised, for he did not file a cross-notice to invoke this court's discretionary jurisdiction. Hence, he is only a respondent, not a petitioner, and, therefore, is only entitled to respond to the argument raised by Petitioner, not make new argument. See generally Lopez v. State, 638 So. 2d 931 (Fla. 1994).[1] After all, the purpose of this Court accepting review in this case was to maintain uniformity in decisions on the jurisdictional issue, and not to address the merits of this case.

Respondent failed to preserve this issue for review because at trial he only made a boiler-plate motion for judgment of acquittal (R 141, 148-149, 164). See State v. Barber, 301 So. 2d 7 (Fla. 1974); Williams v. State, 531 So. 2d 212 (Fla. 1st DCA 1988):

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[1] Notably, in each of the criminal cases relied on by Respondent in arguing for jurisdiction over this issue, the defendant was the petitioner, See, e.g. Feller v. State, 637 So. 2d 911 (Fla. 1994); Jacobson v. State, 476 So. 2d 1282 (Fla. 1985); Savoie, 422 So. 2d 308, and in the one civil case relied on by Respondent, the petitioner requested additional review, Zirin v. Charles Pfizer V. & Co., Inc, 128 So. 2d 594, 596 (Fla. 1961).

Johnson v. State, 478 So. 2d 885 Fla. R. App. 9.Fla. 3d DCA 1985); Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984). He never specifically contended, as he does on appeal, that there is a variance between the allegation in the information and the proof presented at trial. Rather, defense counsel said, "I realize the State's burden has been met" (R 148).

While Respondent moved in arrest of judgment, alleging a variance, his motion was not sufficient to preserve the issue for appeal. A motion in arrest of judgment does not reach a question of variance between the allegation and proof. Hurst v. State, 160 So. 355 (Fla. 1935); Clifton v. State, 78 So. 707, 709-710 (Fla. 1918); Freeman v. State, 39 So. 785 (Fla. 1905). Such a motion is simply not the proper remedy to assert a wrong verdict. Id. If a question of variance, then, is not raised at trial, it will not be subject to review on appeal. Hagy v. State, 347 So. 2d 773, 774 (Fla. 3d DCA 1977). See also Sharp v. State, 328 So. 2d 503, 504 (Fla. 1976). The validity of the allegation in the information, aside from the proof, did not warrant an arrest of judgment because it properly charges a burglary offense. See DuBoise v. State, 520 So. 2d 260, 264 (Fla. 1988). (arrest of judgment shall not be granted unless the indictment is so defective that it will not support a judgment).

A variance between allegations and proof in connection with a

criminal proceeding is fatal to conviction only if the record reveals a possibility that the defendant may have been misled or embarrassed in the preparation or presentation of his defense. Grissim v. State, 405 So. 2d 291, 292 (Fla. 1st DCA 1981); Marshall v. State, 381 So. 2d 276, 278 (Fla. 5th DCA 1980); Fitzgerald v. State, 227 So. 2d 45, 46 (Fla. 3d DCA 1969). In this case, Respondent was not so misled or embarrassed. He was fully aware that a trailer belonging to the victim was entered, and has not claimed otherwise. See Grissom, 405 So. 2d at 292. Indeed, he never bothered to request a bill of particulars.

Respondent risked prosecution for burglary, regardless of whether a structure or conveyance was involved. See Section 810.02(1), Florida Statutes. In Fitzgerald, the variance was not fatal where the defendant was charged with burglarizing a designated building, but the evidence showed that he burglarized an office inside the building, 227 So. 2d at 46. And, in Davis v. State, 87 So. 2d 416, 417-418 (Fla. 1956), the court held that the information sufficiently alleged misdemeanor burglary, where it charged breaking and entering a housing facility, although the statute provided for breaking and entering a building or dwelling. See also Grissom, 405 So. 2d at 292 (information called for taking of cow, but proof established taking a male calf); Barber v. State, 243 So. 2d (Fla. 2d DCA 1971) (information charged breaking and

entering a building in the 600 block of 10th Street when building was actually in 700 block). Similarly, the State submits that here, the trailer described by the witnesses could have legitimately been considered a structure by the jury.

It is well established that a motion for judgment of acquittal should only be granted when it is apparent that no legally sufficient evidence has been submitted under which a jury could find a verdict of guilty. Toole v. State, 472 So. 2d 1174 (Fla. 1985); Lynch v. State, 239 So. 2d 44, 45 (Fla. 1974). In moving for a judgment of acquittal, the defendant admits all facts in the evidence adduced and every conclusion favorable to the prosecution that a jury might fairly and reasonably infer from the evidence. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975); Lynch, 293 So. 2d at 45. In the instant case, the trailer was described as being a "big box...fully enclosed with two doors on the back," "big enclosed..with swinging doors on back," and "closed with its ramp down (R 35, 38, 52). Those descriptions support a finding of structure, "a building of any kind, either temporary or permanent, which has a roof over it." Section 810.011(1) Florida Statutes. (emphasis supplied).

ISSUE III

THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT DID NOT REVERSIBLY ERR IN REINSTRUCTING THE JURY.

This court should decline considering this point for the same reasons given under Point II.

Respondent also failed to preserve this issue for review. When the jury asked, "Is a mobil shed a structure?", defense counsel contended that the jury should be informed as to what a structure is not, i.e. a conveyance (R 207-208). Upon the trial court stating that it thought it should define structure and then tell the jury that it should rely on "the normal everyday common sense definition of what a building is," defense counsel responded, "well, subject to our request that conveyance be explained to them, we go along with what ..."(R 209-210). He then stated that the "only" problem with the proposed instruction was that it gives the jury "some" discretion, and then again suggested that structure could be defined in terms of what it is not (R 210-211). Ultimately, the trial court gave its proposed instruction, to which Respondent did not object (R 214-215). Later, the trial court stated that it had preserved for the record defense counsel's objection "as far as wanting to give the definition of conveyance," and defense counsel agreed that was his objection (R 216).

Hence, below, Respondent did not expressly object to the instruction given, but only requested that structure be defined in terms of not being within the definition of conveyance. If anything, defense counsel's "only" objection was that the given instruction gave the jury "some" discretion. That objection is a far cry from Respondent's argument that the given instruction relieved the State of its burden as to structure and that the jury was left to its own speculation. Significantly, defense counsel never contended, as Respondent now does, that the standard jury instruction on structure should have been reread without elaboration. In fact, defense counsel wanted the trial court to ask the jury if it really wanted to know what a building is (R 212-213).

Alleged errors in the giving of jury instructions must be timely asserted below, subject only to the limited exception which arises in cases of fundamental error. Ray v. State, 403 So. 2d 956, 960-961 (Fla. 1981); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). In Castor, defense counsel failed to properly object to the trial court not rereading to the jury the instruction on justifiable and excusable homicide, when it reread instructions on second degree and third degree murder and manslaughter. The court held that the trial court's error in not again giving the instruction on justifiable and excusable homicide was not

fundamental. Id. at 704. See also Ray, 403 So. 2d at 961 (it is not fundamental error to convict by way of an erroneous lesser included charge where the defendant fails to object to it).

Castor is fully applicable here. The jury had already been given a full set of instructions. It's obvious that it narrowed its consideration to a point where it needed further guidance on what a structure is.

The instruction given by the trial court was not improper. There is no statutory definition as to building, and the jury made it clear that it needed more input as to structure (R 213). A standard jury instruction should be amplified or modified to the extent required by the facts of a case. Foster v. State, 603 So. 2d 1312, 1315 (Fla. 1st DCA 1992). Here, the trial court merely directed the jury to the obvious, to use common sense. With or without the given instruction, the jury would have been left to apply an everyday meaning to the word "building." Certainly, the trial court's instruction did not suggest to the jury, in any way, that the trailer in this case is a building.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** only in regard to the holding on Judge Wild's authority to sit on this court. The decision should otherwise be affirmed on the merits.

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 courier to: Ellen Morris, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 25th day of March, 1996.

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