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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,575

STATE OF FLORIDA,

Petitioner,

vs.

MILO WILSON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S REPLY BRIEF ON THE MERITS

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CASES

STATEMENT OF THE FACTS

Petitioner reasserts the statement of the facts as it appears at pages 11 through 15 of its Initial Brief. Petitioner takes issue with Respondent's comments at page 4 that Petitioner's statement of the facts are incomplete and done so by Petitioner "so as to be inclined most favorably to the verdict Petitioner wishes it had received ..." Petitioner presented this Court with the **facts** it considered relevant to the issues to be addressed by this Court on certiorari review. Identification of Respondent as the robber is not an issue before this Court. As stated by Respondent in his brief before the District Court, his defense was one of "reasonable doubt"; thus, the testimony regarding *identification* of Respondent was unnecessary at this stage of the proceedings.

The record is clear that the victim identified Respondent as the person who robbed him with a gun (R. 156-157); when apprehended by the police immediately after the robbery occurred, Respondent had the bracelet and money in his possession (R. 157); and the co-defendant testified that Respondent was the instigator and leader in the robbery (R. 320). The co-defendant also testified that Respondent had taken off the sweater between the robbery and being caught (R. 321-22, 324-25). Thus, it is clear that all the **identification** evidence related by Respondent and purposely left

out by Petitioner is not necessary for a determination of the issues presented to this Court.

SUMMARY OF THE ARGUMENT

POINT I - The challenged comments, which occurred only at the preliminary stage of trial, were made to the venire, prior to jury selection, and when considered in the entire context of the introduction, were accurate. Further, when the comments are taken together with the charge given to the **selected** jury just prior to deliberations, were not only proper, but any error was thereby cured. The challenged comment did not impermissibly reduce the reasonable doubt standard below the protection of the due process clause. Thus Respondent is not entitled to a new trial. Therefore, the certified questions should be answered in the **negative**; the District Court's opinion **quashed**, and the conviction affirmed.

POINT II - Where there was no argument at trial that the amount taken was not in excess of $300.00; where the defense was misidentification, and no objection to the wording of the information was made at trial, any error in the failure of the information to assert the value of the property taken was in excess of $300 was not fundamental error. Therefore, the District Court's opinion should be **quashed**; and the conviction for grand theft in count I should be **affirmed**.

POINT I

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN MAKING THE INTRODUCTORY COMMENTS TO THE JURY VENIRE PRIOR TO THE SELECTION OF THE JURY, WHEN THE APPROVED STANDARD JURY INSTRUCTION ON REASONABLE DOUBT WAS FULLY READ TO THE JURY DURING THE INSTRUCTIONS TO THE JURY IMMEDIATELY BEFORE THE JURY RETIRED TO DELIBERATE.

In reply to Respondent's arguments, Petitioner hereby reasserts the arguments made in the initial brief.

In his brief, Respondent urges this Court to take one line of the trial court's *comments* to the jury during its preliminary statement, and convert it into an **instruction** that the jury must have abided by, over and to exclusion of all instructions, including the standard jury instruction on reasonable doubt; and could not be corrected by any means. Respondent's position is faulty.

First, it is settled that a sentence or phrase cannot be considered in isolation; but it must be examined in context with the entire comments being made to the jury. Higginbotham v. State, 19 So. 2d 830 (Fla. 1944). The record is clear that the comment was made by the trial court as part of an overview he gives prospective jurors of a typical criminal trial (R. 5- 6-7, 10, 19-20, -30). As part of this overview, the trial judge told the jury

that the third cardinal rule "is that in order for you the jury to find the defendant guilty you must be satisfied, the State must convince you beyond and to the exclusion of every reasonable doubt that the defendant is guilty." (R. 21). In explaining "his" definition of reasonable doubt, the judge advised the panel, "[n]ow, I'll give you a more elaborate definition of what that phrase beyond to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of the trial." (R. 22). The judge then made the following statements:

> Suffice it to say it's a **very heavy burden** the State shoulders whenever it charges somebody with committing a crime. In order to secure a conviction that is it has to convince a jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt. But even though it's a heavy burden the State does, I repeat, stress, and emphasize, ***the State does not have to convince you to an absolute certainty of the defendant's guilt. Nothing is one hundred percent certain, nothing is absolutely certain in life*** other than death and taxes. So the point I'm trying to make is you can still have a doubt as to the defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to.
>
> If at the conclusion of this trial you have a doubt as to the defendant's guilt that you can attach a reason to, you must find the defendant **not** guilty. But if on the other hand at the conclusion of this trial the only kind of doubt you have as to the defendant's [] is a possible doubt, a speculative doubt,

> an imaginary doubt, a forced doubt, that's not a reasonable doubt. If all elements of the crime have been proved to you, you must find the defendant guilty.

(R. 22-23). To properly decide this case, the complete, approved, standard jury instructions on reasonable doubt which was read to the actual sworn jury must be reviewed. The instruction was given as follows:

> Remember, the defendant is never required to prove anything. Whenever you hear the words reasonable doubt you must consider the following: ***A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt, or a forced doubt.*** Such a doubt must not influence you to return a verdict of not guilty if in fact you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or, if having a conviction it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof.
>
> A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or lack of evidence.
>
> Bottom line is if you have a reasonable doubt you should find the defendant not guilty. If you have no reasonable doubt, you

should find the defendant guilty.

(R. 419-420). As can be seen, the trial court did not deviate from the standard instructions so as to create fundamental error.

The comments *sub judice* are not as strong as the instructions found to be constitutional in Victor v. Nebraska, 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583 (1994). In Victor, the United States Supreme Court found no error with the instruction that, "absolute or mathematical certainty is not required. You may be convinced of the truth of the fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon strong probabilities ... ." If the United States Supreme Court found no error with these comments, the challenged comments at bar cannot be error, much less fundamental error.

Respondent relying on several cases decided by this Court in the 1800's and prior to the approval of the standard jury instructions argues that the comments here were designed to ease the burden of conviction. The State maintains that "reasonable doubt" is a nebulous concept. Jury's all over the United States have to grapple with the concept. The trial court *sub judice* was simply defining the term for the prospective jurors as part of his overview of a *typical* criminal case. The trial court told the

prospective jurors this is what the terms means, but that the exact instruction or definition would be given to the chosen jurors at the appropriate part of the trial. For this reason, the preliminary comments at bar cannot be separated, or emphasized out of context, as Respondent suggests; instead the preliminary comments must be considered in accordance with the entire comments, and in conjunction with the standard jury instructions read to the jury just prior to retiring to deliberate. The trial court told the jury he was giving the venire panel an overview of a typical case, and that the law they were to consider in desiding the guilt of innocence of Respondent would be read to the petit jury at the conclusion of the evidence.

Further, as acknowledged by the District Court[1], the "instructions **were accurate**." Jones v. State, 656 So. 2d 489, 491 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995). Thus, when the challenged comment is considered in conjunction with the complete, approved, standard jury instructions on reasonable doubt, given at the end of the evidence, no reversible fundamental error

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[1]Respondent suggests that Petitioner stated "the instruction was correct as far as it went." (Respondent's Brief at page 11). This phrase should not be attributed to Petitioner. The phrase came from the Fourth District's opinion in Jones v. State, 656 So. 2d 489, 491 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995).

has been established. Consistent with this Court's recent decision in Archer v. State, 21 Fla. L. Weekly S119 (Fla. March 14, 1996), the decision of the District Court must be quashed.

As stated earlier Respondent relies in cases decided in the 1800's and prior to the adoption of the standard jury instruction by this Court to support its argument that a "moral certainty" is the **only** correct definition of "reasonable doubt." However, it must be noted that The Florida Bar's Criminal Rules committee who is considering amendment to the standard reasonable doubt instruction, has presented the following language be considered by the committee members to submit to this Court as an amendment to the instruction:

> A reasonable doubt is an actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with ABSOLUTE CERTAINTY, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you feel safe to act upon it in a matter of highest concern and importance to you.

(See attached Appendix). While Petitioner recognizes the appendix

is only a "working draft" or suggested changes still being considered by the committee, and are not ready to be presented to this Court for approval, Petitioner suggests the language is very telling. The very idea suggested by the trial court *sub judice*, is being considered to be included in the standard reasonable doubt instruction; that: "there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt." Thus, if the language is being considered by this Court's Committee charged with amendments to the standard jury instructions, the concept as stated by the trial court is not in error, and reasonable people believe this is correct definition of a "reasonable doubt."

Lastly, contrary to Respondent's allegations that because conflicting evidence was presented to the jury as to the initial identification of Respondent by one of the victims, the error, if any, could not be found harmless, Petitioner submits that the evidence was overwhelming that Petitioner was the person who held a gun to the two victims, and instructed the co-defendant to take the victim's property from them. The record is clear that the victim identified Respondent as the person who robbed him with a gun (R. 156-157); when apprehended by the police immediately after the robbery occurred, Respondent had the bracelet and money in his

possession (R. 157); and the co-defendant testified that Respondent was the instigator and leader in the robbery (R. 320). The co-defendant also testified that Respondent had taken off the sweater between the robbery and being caught (R. 321-22, 324-25). Thus, because the evidence was overwhelming establishing Respondent's guilt, the error, if any, did not contribute to the verdict; thus, it can be considered harmless.

In conclusion, and for all the above cited reasons, Petitioner states that there was no error, fundamental or otherwise, in the trial court's preliminary comments. This Court should therefore answer the question in the **negative**, disapprove Jones by quashing the District Court's opinion, and affirm the conviction.

POINT II

THE CONVICTION FOR GRAND THEFT CAN BE AFFIRMED WHERE THE INFORMATION DID NOT ALLEGE THE VALUE OF THE PROPERTY TAKEN, BUT THE JURY WAS INSTRUCTED ON THE PERMISSIVE LESSER INCLUDED OFFENSE OF GRAND THEFT WHERE THE INFORMATION AND THE EVIDENCE SUPPORT THE VERDICT REACHED BY THE JURY.

In this Reply Brief, Petitioner once again reasserts the arguments made in its initial brief as reply to Respondent's arguments on point II.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** and the conviction for grand theft in count one affirmed.

Respectfully submitted,

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FR James W Rogers

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by courier to: LOUIS G. CARRES, Assistant Public Defender, Attorney for Respondent, Criminal Justice Bldg./6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 20th day of May, 1996.

FR James W Rogers
Of Counsel

Appendix

CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

FREDRICKA G. SMITH
CIRCUIT JUDGE

METROPOLITAN JUSTICE BUILDING
1351 N.W. 12TH STREET
MIAMI, FLORIDA 33125

May 10, 1996

Florida Prosecuting Attorneys Association
Norman R. Wolfinger, President
700 South Park Avenue
Titusville, FL 32780

Dear Mr. Wolfinger:

The committee on standard jury instructions in criminal cases is currently considering a revision of the instruction on reasonable doubt. Because this instruction is so important, we invite your comments at this early stage in our discussion, so that we may consider your views before we vote on whether to recommend any changes to the Florida Supreme Court. Of course, if we do make a recommendation we will proceed to publish it in the Florida Bar News, soliciting comments from all of the members of the Bar.

I enclose herewith a "working draft" which we will discuss again at our meeting on June 19, 1996. I have included two forms, one which shows how this differs from the current standard instruction, and the other which states the draft instruction as it would read straight thrgugh.

I reiterate that this is a working draft only. The committee has taken no votes.

We look forward to receiving your written comments. Please send them to me by June 5, 1996 so that I can distribute them to the committee members before the meeting.

Sincerely,

Fredricka G. Smith

FGS:cl
Enclosures
facdl

(working draft)

Reasonable Doubt

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial ~~until~~ unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving ~~the following two elements~~:

1. ~~T~~ the crime with which the defendant is charged was committed, and the defendant is the person who committed the crime.

2. ~~T~~ the defendant is not required to present evidence or prove anything [except with respect to the defense of _____].

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is ~~not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.~~ an actual and logical doubt that arises in your mind after an impartial consideration of all the evidence and circumstances in the case. It should be a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you feel safe to act upon it in a matter of the highest concern and importance to you.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you ~~should~~ must find the defendant not guilty. If you have no reasonable doubt, you ~~should~~ must find the defendant guilty.

reason2

TOTAL P.04

(working draft)

Reasonable Doubt

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving: the crime with which the defendant is charged was committed, and the defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything [except with respect to the defense of_____].

A reasonable doubt is an actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense; and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you would feel safe to act upon it in a matter of the highest concern and importance to you.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you must find the defendant not guilty. If you have no reasonable doubt, you must find the defendant guilty.

reasonable

TOTAL P.02

Reasonable Doubt

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence the State has the burden of proving the following two elements:

1. The crime with which the defendant is charged was committed.

2. The defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything except with respect to the defense of _____.

A reasonable doubt is an actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation. However, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. Proof beyond and to the exclusion of every reasonable doubt is proof that convinces you of its truth, to such a degree of certainty that you feel safe to act upon it in a matter of highest concern and importance to you.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

May '96
Fla. Bar
Cr. Rules Cmte.