IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 88,076

JEFFREY A. HUNTER, :

Respondent. :

_____ :

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN C. FISHER
Assistant Public Defender
FLORIDA BAR NUMBER 999865

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR RESPONDENT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

STATEMENT OF THE CASE AND FACTS

Respondent adopts Petitioner's Statement of the Case as substantially correct for purposes of this appeal, with the following additions and clarifications.

At the onset of the trial, defense counsel requested the witnesses be sequestered (T112). The trial court agreed (T112). Despite the sequestration ruling, and over defense objection, the trial court allowed State's witness, Terry Hardy, to sit in the courtroom while her daughter, eight-year-old Antricia Holmes, testified for the State (T152-153).

The trial court also granted, over the defense's objection, the State's motion in limine to prevent the defense from establishing Gwendolyn Hardy had been arrested for aggravated battery of her boyfriend earlier on the evening of the incident (T164-167).

During charge conferences, the court stated the verdict form required a finding of theft of a firearm to support a conviction for grand theft (T209-210, 327-328). The jury instruction and the verdict form provided for grand theft to be based on finding proof of the theft of a firearm, not proof of value (T387, 408).

Mr. Hunter was found to be a habitual violent felony offender and was sentenced as such on all counts (R110-114, 121, 133-139). At trial, the State had argued that these offenses were a "crime spree", motivated by Mr. Hunter's jealousy of Ms. Hardy (T40-42, 113-124, 350-377). The trial court held that two separate criminal episodes occurred, supporting the imposition of consecutive habitual violent felony offender sentences (R105-107, 113-114).

SUMMARY OF THE ARGUMENT

Double jeopardy bars conviction for both armed burglary and grand theft of a firearm where the act of stealing a firearm converts the burglary into an armed burglary conviction. The vacation of the conviction by the Second District Court of Appeal should be affirmed.

The trial court improperly allowed an exception to the sequestration of witnesses. The trial court allowed a State's witness to remain in the courtroom during the testimony of another State's witness (her daughter), despite protestations from the defense that the mother's presence might have an influence on the testimony of the daughter and with no reasons asserted as to why the mother's presence was required. The trial court erred by failing to conduct a hearing to determine whether the witness' exclusion from the sequestration rule would result in prejudice to Mr. Hunter. The defense assertions of prejudice relate to credibility determinations that were crucial in this case. The trial court's abuse of discretion in allowing the witness to remain in the court room and his failure to hold a hearing on this matter require reversal for a new trial.

The trial court erred in granting the State's motion in limine which prevented the defense from establishing that State's witness and alleged victim Gwendolyn Hardy had been arrested for aggravated battery of her boyfriend earlier on the evening of the incident. The excluded testimony was relevant to give the jury the complete picture of the entire inseparable course of events. The excluded

testimony was relevant to Appellant's account of the incident and could have provided corroboration to his testimony about the invitation he received to visit the alleged victims and how that visit turned into an argument. The relevance of this evidence outweighed the prejudice.

The trial court erred in imposing consecutive habitual offender sentences for offenses that occurred in one criminal episode or continuous course of conduct. The consecutive habitual offender sentences should be reversed.

ARGUMENT

ISSUE I

DOES DOUBLE JEOPARDY BAR THE CONVICTION FOR BOTH ARMED BURGLARY AND GRAND THEFT OF A FIREARM WHERE THE ACT OF STEALING THE FIREARM CONVERTS THE BURGLARY INTO AN ARMED BURGLARY? (Restated by Respondent[1])

The Second District Court of Appeal discharged Mr. Hunter's grand theft conviction. Hunter v. State, 21 Fla. L. Weekly D900 (Fla. 2d DCA April 12, 1996). The court held that "Double jeopardy bars conviction for armed burglary and grand theft of a firearm when, as here, the act of stealing the firearm converts the burglary into an armed burglary." Id. The Court relied on Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), review denied 664 So. 2d 249 (Fla. 1995).

In Marrow, 656 So. 2d at 579, the First District Court of Appeal held, "Double jeopardy however bars convicting Marrow of both armed burglary and grand theft of a firearm, where the single act of stealing a firearm is the act which converts his burglary into an armed burglary."

Both Courts relied on State v. Stearns, 645 So. 2d 417 (Fla. 1994), in which this Court reviewed Stearns v. State, 626 So. 2d 254 (Fla. 5th DCA 1993). Stearns entered a guilty plea to armed burglary, grand theft, and carrying a concealed weapon while

---

[1] Restated by Respondent as stated originally as Issue IV of Respondents Initial Brief on direct appeal to the Second District Court of Appeal.

committing a felony. Stearns v. State, 626 So. 2d at 255. The issue on appeal was "whether a defendant who commits armed burglary of a structure, grand theft of property found therein, can also be convicted of carrying a concealed weapon." Id. The conviction and sentence for carrying a concealed weapon while committing a felony was reversed. Id.[2]

This Court approved the decision below, stating, "armed burglary is a continuing offense," a defendant cannot "be sentenced for two crimes involving a firearm that arose out of the same criminal episode," "therefore, double jeopardy bars the State from convicting and sentencing Stearns for two offenses involving a firearm that arose out of the same criminal episode". State v. Stearns, 645 So. 2d at 418.

In the case at hand, the grand theft charge involved a hand gun and other personal property (R2-6). No value was established for the items at trial. During charge conferences, the trial court stated the verdict form required a finding of theft of a firearm to support a conviction for grand theft (T209-210, 327-328). The jury instruction and the verdict form provided for grand theft to be based on finding proof of the theft of a firearm and not through a finding proof of sufficient value (T387, 408).

The State argues double jeopardy was not violated, relying on Gaber v. State, 20 Fla. L. Weekly D2492 (Fla. 3d DCA Nov. 8, 1995).

---

[2] The precise issue in the instant case was not presented in Stearns. Stearns was convicted of grand theft of property found in a structure he burgled, not of grand theft premised on theft of a firearm.

The Gaber court held "that armed burglary and grand theft of a firearm are completely separate offenses, and the appellant's convictions for both offenses do not violate double jeopardy." Gaber, 20 Fla. L. Weekly at D2492. The Gaber court also held:

> Clearly, if you commit a burglary, and while committing that burglary you steal the original manuscript of Gabriel Garcia Marquez' Love in the Time of Cholera, then you can be convicted of burglary and grand theft. It logically flows that if you commit a burglary, and while committing that burglary you steal a fire arm, then you can be convicted of armed burglary and grand theft.

Id. at 423. There is no logic to this analogy. The burglary of a valuable manuscript does not lead to enhancement of burglary to armed burglary and would presumably establish value for grand theft without relying on the alternative method of establishing grand theft through proof of theft of a firearm. The Gaber opinion is inconsistent with this Court's opinion in State v. Stearns, 645 So. 2d 417 (Fla. 1994).

Mr. Hunter was convicted of both armed burglary and grand theft of a firearm which occurred in the course of one criminal transaction or episode. Both offenses were enhanced through the same firearm in the same episode. The theft of a firearm is the basis for the armed burglary conviction and the firearm was the basis for the grand theft conviction, which results in cumulative punishment for the use of the firearm. See Cleveland v. State, 587 So. 2d 1145 (Fla. 1991) ("when a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission

of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felon"). The Second District Court of Appeal's finding that double jeopardy was violated should be affirmed.

ISSUE II

DID THE TRIAL COURT ERR IN ALLOWING AN EXCEPTION TO THE SEQUESTRATION OF WITNESSES[3]?

Generally, once the witness sequestration rule has been invoked, a trial court should not permit a witness to remain in the courtroom during proceedings when he or she is not on the witness stand. Randolph v. State, 463 So. 2d 186, 191-92 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L. Ed. 2d 656 (1985); Goodman v. West Coast Brace & Limb, Inc., 580 So. 2d 193 (Fla. 2d DCA 1991).

A jury trial was held on July 11-13, 1994 (T1-423). A jury was selected on July 11, 1994 (T1-103). At the onset of the jury trial, defense counsel requested that the witnesses be sequestered (T112). The trial court agreed (T112). After Terry Hardy testified for the State, the prosecutor requested that she be allowed to remain in the courtroom while her eight-year-old daughter, Antricia Holmes testified for the State (T152). No reason was articulated in support of this request. Defense counsel

---

[3] This issue was originally presented as Issue I of Respondents Initial Brief on direct appeal to the Second District Court of Appeal. The State sought, and was granted, review of this case based upon conflict with another district court of appeal on the preceding issue. This issue, and the ones that follow, were affirmed without discussion.

This Court may consider these issues. Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974) ("In acquiring jurisdiction of a case, our Court has appropriate authority to dispose of all contested issues."); Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 685 (Fla. 1969) (Florida Supreme Court has the power "to explore the entire record to see if the proper result has been reached in both the trial and District Courts.").

objected that there was insufficient predicate submitted for the request (T152). Defense counsel also objected because he was concerned that the child might be influenced by her mother sitting there (T152). Despite the sequestration ruling and over defense objection, the trial court allowed Terry Hardy to sit in the courtroom while Antricia Holmes testified for the State (T152-153).

"When it is shown that the presence will not harm the party requesting exclusion and it is shown that it will be beneficial to the opposing party to have the witness available to give advice and information, it is within the trial court's discretion to allow the witness to remain." Goodman, 580 So. 2d at 195. No reason was asserted on the record as to why it was beneficial to have Terry Hardy remain in the courtroom. It was error to permit the witness to remain in the courtroom with no showing of benefit to be derived from her presence. The defense assertions that Terry Hardy's presence in the room would have an influence on the testimony of Antricia should not have been dismissed without further inquiry. The trial court abused its discretion to allow the witness to remain in the courtroom.

> In our opinion a trial court should not, as a matter of course, permit a witness to remain in the courtroom during the trial when he or she is not on the stand, unless it is shown that it is necessary for the witness to assist counsel in trial and that no prejudice will result to the accused. A hearing to determine these matters should be conducted if the rule excluding and sequestering witnesses has been invoked.

Randolph, 463 So.2d 186, 191-192 (Fla. 1988); Gore v. State, 599 So. 2d 978, 986 (Fla. 1992) ("Of course, should the witness'

presence cause some prejudice to the accused, the witness should not be allowed to remain in the courtroom. Where the rule has been invoked, a hearing should be conducted to determine whether a witness' exclusion from the rule will result in prejudice to the accused."); Thomas v. State, 372 So. 2d 997, 999 (Fla. 4th DCA 1979) (trial court should not permit witness to remain in courtroom during trial when she is not on stand, unless it is shown that it is necessary for witness to assist counsel in trial and that no prejudice will result to accused and a hearing to determine those matters is conducted if rule sequestering witnesses was invoked -- "To have it otherwise would be to emasculate the rule of exclusion and sequestration of witnesses and subject the trial courts to attack alleging collusion among witnesses."). The trial court in the instant case erred by failing to conduct a hearing to determine whether the witness' exclusion from the sequestration rule would result in prejudice to Mr. Hunter.

Mr. Hunter testified he did not commit the offenses at Terry Hardy's home (T304). The theory of the defense was that the Hardy family was angry at Mr. Hunter and they testified as they did, motivated by that anger (T345). The testimony of Terry Hardy established Mr. Hunter knew where a gun was kept in her home and had threatened Terry because he would not let him talk to Jacqueline (T135, 140, 147). Terry testified Mr. Hunter threatened her and impliedly threatened her daughter Antricia (T135). Mr. Hunter denied calling Terry, denied asking to speak to Jacqueline, and denied making threats to Terry (T302).

The prejudice to Mr. Hunter established by the testimony of Antricia was stated succinctly by the prosecutor in closing argument:

> Second of all, the defendant had made the threat just the week before that I'll get you. Terry Hardy, Terry Hardy says you can't get me. Then I'll get the thing you love the most. And what happens during the burglary? Somebody shoots into the little eight-year-old girl's bed. Who would commit a crime like that? That makes no sense except when someone that's so full of hatred, someone that's so full of jealousy that they're going to run over anyone that gets into their way, just as the defendant was. No other burglar is going to do that.

(T361). The jury was likely to see the testimony of Antricia as confirmation that Mr. Hunter committed a heinous terrifying symbolic attack on an innocent child and the prejudice of seeing Mr. Hunter in this light would affect the credibility determinations as to all the charged offenses.

This case turned on credibility. In closing, the prosecutor told the jury "You've got Jacqueline Hardy, Gwendolyn Hardy, and Terry Hardy telling you one thing and on the other end of the spectrum is Jeffrey Allen Hunter, the defendant. So, you've got to use your common sense in figuring out who's telling you the truth." (T355). The lack of a proper inquiry as to the prejudice leaves unknown what Antricia's testimony would have been had her mother not remained in the courtroom.

The trial court's abuse of discretion in allowing the witness to remain in the court room and the failure to hold a hearing on this matter require reversal for a new trial.

ISSUE III

DID THE TRIAL COURT ERR IN PREVENTING THE DEFENSE FROM ESTABLISHING RELEVANT EVIDENCE[4]?

The trial court granted the State's motion in limine to prevent the defense from establishing Gwendolyn Hardy, a key State's witness, had been arrested for aggravated battery of her boyfriend earlier on the evening of the incident, despite defense counsel's objection that it was relevant to Mr. Hunter's account of the incident (T164-167). The court held the prejudice would outweigh the relevance (T166-167).

The excluded testimony was relevant to give the jury the complete picture of the entire inseparable course of events. The excluded evidence would have substantiated Mr. Hunter's account of the events -- that Gwendolyn Hardy showed him paperwork concerning her release on those charges and talked to Mr. Hunter about her arrest. It would be relevant as corroboration of Mr. Hunter's assertion that the sisters invited him to visit and were very friendly to him at the onset of the incident (T165-166).

"[W]here relevant evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Story v. State, 589 So. 2d 939, 943 (Fla. 2d DCA 1991). The evidence would be relevant for impeachment purposes. Reversal is required by improper limitation of cross-

---

[4] This issue was originally presented as Issue II of Respondents Initial Brief on direct appeal to the Second District Court of Appeal. As was presented in footnote 3, this Court has the authority and power to reach this issue.

examination which relates directly to the credibility of a key prosecution witness. Kimble v. State, 537 So. 2d 1094 (Fla. 2d DCA 1989). "It is error for a trial court to prohibit cross-examination when the facts sought are `germane to that witness' testimony and plausibly relevant to the theory of the defense." Bertram v. State, 637 So. 2d 258 (Fla. 2d DCA 1994), quoting Pace v. State, 596 So. 2d 1034, 1035 (Fla. 1992), cert. denied, __ U.S. __, 113 S. Ct. 244, 121 L. Ed. 2d 178 (1992).

The jury had two accounts of the incident at 1240 Ninth Street in Lakeland -- that of Mr. Hunter and that of Gwendolyn and Jacqueline Hardy. The determination of which account to believe necessarily turned on credibility. Reversal is required by improper limitation of cross-examination which relates directly to the credibility of a key prosecution witness. Kimble v. State, 537 So. 2d 1094 (Fla. 2d DCA 1989).

"A defendant has a fundamental constitutionally protected right to present a defense. Story, 589 So. 2d at 943, citing Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Mr. Hunter's convictions should be reversed.

ISSUE IV

DID THE TRIAL COURT ERR IN SENTENCING THE APPELLANT TO CONSECUTIVE HABITUAL SENTENCES WHEN THE CRIMINAL ACTS WERE PART OF ONE CRIMINAL EPISODE[5]?

"The task of determining when a criminal episode can be denominated `single' or `separate' for purposes of consecutive minimum mandatory sentencing is not an easy one. There is no `bright line' rule to which we can refer." Willis v. State, 640 So. 2d 220, 221 (Fla. 2d DCA 1994), quoting Parker v. State, 633 So. 2d 72, 75 (Fla. 1st DCA 1994). "Whether a prisoner's consecutive sentences arise from a single criminal episode is not a pure question of law. Resolution of this issue depends upon factual evidence involving the times, places, and circumstances of the offenses." Callaway v. State, 642 So. 2d 636, 639 (Fla. 2d DCA 1994), affirmed 20 Fla. L. Weekly S358 (Fla. July 20, 1995). "Obviously, in determining whether a series of criminal events constitutes a single criminal episode or separate criminal episodes, the focus must be directed to the facts of each individual case." Willis, 640 So. 2d at 221, quoting Parker, 633 So. 2d at 75.

The State argued that these offenses were a "crime spree", motivated by Mr. Hunter's jealousy of Jacqueline Hardy (T40-42,

---

[5] This issue was originally presented as Issue III of Respondents Initial Brief on direct appeal to the Second District Court of Appeal. As was presented in footnote 3, this Court has the authority and power to reach this issue.

113-124, 350-377). Mr. Hunter denied being involved in the incident at Terry Hardy's home. Mr. Hunter admitted being present at the subsequent incident involving Jacqueline and Gwendolyn Hardy, but explained that the Hardy sisters asked him to come there, that Jacqueline Hardy then possessed the firearm, and that he acted in self defense when she attacked him (T291-312). The State should be estopped from seeking consecutive habitual offender sentences for what it presented at trial as a "crime spree" motivated by Mr. Hunter's jealousy, for purpose of convincing the jury to disbelieve Mr. Hunter's account of the events of that night.

The trial court found that two separate criminal episodes occurred (R105-107, 113-114). A separation in time and location was established by testimony. Terry Hardy's testimony established that offenses at her home in Lakeland occurred before 12:30 or 12:45 (T138). The testimony of Jacqueline and Gwendolyn Hardy established that offenses at their home in Lakeland occurred at 1:30 and 2:00 A.M. (T173-174, 191, 197). The circumstances and the facts indicate inseparable incidents. The State's theory of the case was that all of the offenses occurred on the same night, were a "crime spree", and were all motivated by Mr. Hunter's jealousy (T40-42, 113-124, 350-377). That Mr. Hunter may have committed offenses at Terry Hardy's residence relies on the testimony of Jacqueline and Gwendolyn Hardy that he arrived at their residence while possessing a gun which was missing from Terry Hardy's home. The motive for stealing the gun was asserted to be for use in

confronting Jacqueline Hardy. The motive for shooting Antricia's bed was asserted to be anger also stemming from that jealousy. The offenses allegedly committed at Jacqueline and Gwendolyn Hardy's residence were asserted to be motivated by Mr. Hunter's jealousy.

In cases dealing with departure from the guidelines, courts have found offenses with separation in times, places, and circumstances to be single criminal episodes that could not be proper reason for departure. See McIntyre v. State, 539 So. 2d 603 (Fla. 3d DCA 1989) (defendant's conduct in stealing car and then using it shortly thereafter to commit theft offenses was not a "crime wave or binge" justifying departure from guidelines sentence because events were the result of one criminal episode); Campos v. State, 515 So. 2d 1358 (Fla. 4th DCA 1987) (departure reason of "crime binge" was not established by evidence of participation in continuous episode -- bank robbery and subsequent high-speed chase, during which defendant fired shots at police vehicles with semiautomatic rifle). Had the offenses charged in counts one through three been severed from the offenses charged in counts four through seven, the evidence of the severed offenses would have been admissible as "inseparable crime evidence." See Griffin v. State, 639 So. 2d 966 (Fla. 1994) (evidence of crimes which are inseparable from crime charged, or evidence which is inextricably intertwined with crime charged is admissible because it is relevant and inseparable part of act which is in issue); Padilla v. State, 618 So. 2d 165 (Fla. 1993) (evidence that, shortly before shooting victim's death, murder defendant had fired several times at former

girlfriend's former apartment was relevant inseparable crime evidence). What is admissible as inseparable crimes should be considered a single criminal episode or a continuous course of conduct which should not result in consecutive sentences.

It is error to impose consecutive sentences when the criminal acts occur in one continuous course of conduct. Wilson v. State, 467 So. 2d 996 (Fla. 1985) (armed defendant confronting victim as she attempted to enter her apartment, forcing her into her car, and driving a short distance before raping her constituted one continuous episode in sentencing for kidnapping with a firearm and sexual battery with a firearm). Where the events are advanced by the State at trial as a single criminal episode or a continuous course of conduct, the convictions should not result in consecutive habitual violent felony offender sentences. The consecutive sentences should be reversed.

CONCLUSION

Based on the foregoing reasons, arguments, and authorities, Respondent asks this Honorable Court to affirm the Second District Court of Appeal's opinion vacating the grand theft of a firearm conviction. Respondent additionally asks this Honorable Court to reverse the Second District Court of Appeal's affirmance of Respondent's remaining issues.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen D. Ake, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 11th day of October, 1996.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

/jcf

JOHN C. FISHER
Assistant Public Defender
Florida Bar Number 999865
P. O. Box 9000 - Drawer PD
Bartow, FL 33831