ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v. FSC Case No. 88,076

JEFFREY ALLEN HUNTER,

Respondent.

_______________________/

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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SUMMARY OF ARGUMENT

The Second District Court of Appeal erred in vacating Respondent's grand theft of a firearm conviction. Recent decisions by this Court clearly indicate that Respondent's convictions for grand theft of a firearm and armed burglary do not violate double jeopardy. Each of the offenses require proof of an element that the other does not. Accordingly, this Court should reverse the Second District Court of Appeal's decision.

Respondent also raises additional issues in his answer brief that were intentionally not addressed by the State in its initial brief. The Second District's opinion in the instant case did not address or discuss these issues, and this Court's jurisdiction is based solely on the conflict between the district courts of appeal regarding dual convictions for armed burglary and grand theft of a firearm. The State submits that these issues are not properly raised before this Court.

Even if properly raised before this Court, Petitioner asserts that the trial court acted within its discretion when it allowed an exception to the sequestration of witnesses. The court also properly granted the State's motion in limine and correctly sentenced Respondent to consecutive sentences as a habitual violent felony offender.

ARGUMENT

ISSUE I

MULTIPLE CONVICTIONS AND SENTENCES FOR ARMED BURGLARY AND GRAND THEFT OF A FIREARM DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE THEFT OF THE FIREARM PROVIDES THE BASIS FOR THE ARMED BURGLARY CONVICTION.

In the instant case, the Second District Court vacated Respondent's grand theft of a firearm conviction stating that double jeopardy bars conviction for both armed burglary and grand theft of a firearm when the act of stealing the firearm converts the burglary into an armed burglary. Hunter v. State, 21 Fla. L. Weekly D900, D900 (Fla. 2d DCA Apr. 12, 1996) (citing Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), review denied, 664 So. 2d 249 (Fla. 1995) and State v. Stearns, 645 So. 2d 417 (Fla. 1994)). Recent decisions by this Court indicate that both the First District Court of Appeal in Marrow and the Second District Court of Appeal in the instant case "erroneously interpreted" this Court's decision in Stearns. See M.P. v. State, 21 Fla. L. Weekly S433 (Fla. Oct. 10, 1996); State v. Maxwell, 21 Fla. L. Weekly S429 (Fla. Oct. 10, 1996).

In M.P. and Maxwell, this Court held that separate convictions and sentences for carrying a concealed weapon and possession of a firearm do not violate double jeopardy when the

offenses arose from a single episode. Maxwell, 21 Fla. L. Weekly at S430; M.P., 21 Fla. L. Weekly at S434. This Court analyzed the various statutes involved and found that each offense required proof of an element that the other does not. Id.

In the instant case, Respondent was convicted of two counts of armed burglary pursuant to section 810.02(2)(b), Florida Statutes, and one count of grand theft of a firearm pursuant to section 812.014(2)(c), Florida Statutes. Petitioner submits that armed burglary and grand theft of a firearm are entirely separate and distinct offenses, and convictions for both do not violate double jeopardy.

Armed burglary requires proof of the element that the offender enter into a structure with the intent to commit an offense therein. The offense is reclassified to a first degree felony if in the course of committing the burglary, the offender is armed or arms himself once inside the structure. In order to sustain a conviction under Florida's grand theft statute, the State must establish that the offender obtained or used, or attempted to obtain or use, the property of another with the intent to either temporarily or permanently deprive the owner of the use of, or benefit from, the property.

In comparing the two statutes and the elements necessary to

sustain a conviction under each, it is apparent that these two statutes are entirely different and require proof of different and distinct elements. The armed burglary statute requires proof that the offender was armed, or armed himself, when he entered a structure. The plain language of the statute does not require that the offender commit a theft, or have the intent to commit a theft. Additionally, it does not require that the weapon involved be a firearm.

Florida's theft statute, on the other hand, requires that the State establish a taking with the intent to temporarily or permanently deprive. Obviously, a theft can be committed without also committing a burglary. Furthermore, the grand theft statute does not require "that the object of the theft necessarily be a firearm." Gaber v. State, 662 So. 2d 423, 423 (Fla. 3d DCA 1995), review granted, (FSC Case No. 86,990). Accordingly, this Court should follow its recent precedent and find that the Second District Court of Appeal erred in vacating Respondent's grand theft of a firearm conviction based on double jeopardy.

ISSUE II

THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT ALLOWED AN EXCEPTION TO THE SEQUESTRATION OF WITNESSES.

This Court's jurisdiction is based on article V, section 3(b)(3) of the Florida Constitution. This section allows this Court to review any decision of a district court of appeal that is in direct conflict with a decision of another district court of appeal. Art. V, § 3(b)(3), Fla. Const. In the instant case, the Second District Court of Appeal's decision directly and expressly conflicts with the Third District Court of Appeal. See Hunter v. State, 21 Fla. L. Weekly D900 (Fla. 2d DCA Apr. 12, 1996) and Gaber v. State, 662 So. 2d 423 (Fla. 3d DCA 1995), review granted, (FSC Case No. 86,990).

Respondent raises three additional issues which were presented to the Second District Court of Appeal below. The Second District did not address these issues in its written opinion. Petitioner submits that these issues are not properly before this Court based on this Court's limited jurisdiction in deciding the conflict between the district courts of appeal.

The district courts of appeal were meant to be courts of final, appellate jurisdiction. Lake v. Lake, 103 So. 2d 639 (Fla. 1958). In Lake, this Court stated

> Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Id. at 642. This Court further opined that when a district court certifies conflict with a decision of another district court of appeal on the same point of law, this Court may grant certiorari, and after careful study, "the decision of the district court of appeal may be quashed or modified *to the end that any conflict may be reconciled.*" Id. at 643 (emphasis added).

In the instant case, Respondent would have this Court review the decision of the Second District on issues not related to the conflict. Respondent simply "is not entitled to two appeals." Lake, 103 So. 2d at 642. As this Court stated in Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982), "once we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues *properly raised and argued* before this Court." Petitioner asserts that these issues are not properly before this Court. It would be pure speculation to attempt to find a basis for the district court's decision in regards to these issues.

Consequently, this Court should find that these issues are not properly raised for this Court's consideration.

Even if this Court finds that these issues are properly raised before this Court, Petitioner asserts that the trial court acted within its discretion in allowing an exception to the rule of sequestration. At the outset of Respondent's jury trial, Respondent invoked the rule of sequestration. (T.112). The State called Terry Hardy as a witness. (T.128-152). Immediately after Ms. Hardy testified, the State called her eight-year-old daughter, Antricia Holmes, as a witness. (T.152). The State requested that the mother be allowed to sit in the back of the courtroom during her daughter's testimony. (T.152). Defense counsel stated that he did not know whether that was necessary or not, but he realized that the decision was within the court's discretion. (T.152-153). The court allowed the mother to sit quietly in the back of the courtroom while her eight-year-old daughter testified. (T.153).

The rule of witness sequestration is not an absolute rule, and a "trial judge is endowed with a sound judicial discretion to decide whether particular *prospective* witnesses should be excluded from the sequestration rule." Randolph v. State, 463 So. 2d 186, 191 (Fla. 1984) (emphasis added), cert. denied, 473

U.S. 907, 105 S. Ct. 3533, 87 L. Ed. 2d 656 (1985). The rule is designed to avoid "the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand." Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S. Ct. 1155, 8 L. Ed. 2d 283 (1962).

In the instant case, the court allowed Terry Hardy to remain in the courtroom *after* she had testified, while her eight-year-old daughter testified briefly. Although counsel "objected," he correctly noted that the decision was within the discretion of the court. (T.152-153). Because Ms. Hardy had already testified, her presence in the courtroom during her daughter's testimony could not have colored Ms. Hardy's testimony. She did not hear any testimony other than that of her daughter. The daughter merely testified that someone had shot her bed and that she found bullet shells under her bed and pointed them out to her mother and the police. (T.153-155). This evidence was corroborated by other State witnesses. (T.144; 274-276).

Respondent asserts that the court erred by not conducting a hearing to determine the prejudice to Respondent of having Ms. Hardy remain in the courtroom during her daughter's testimony. Although case law indicates that the court should conduct a

hearing to determine whether a witness' exclusion from the rule will result in prejudice to the accused, the lack of a hearing does not require reversal. See Gore v. State, 599 So. 2d 978, 986 (Fla. 1992). In Gore, this Court noted that, although the trial court had not held a hearing, the judge did hear argument from counsel prior to making his ruling. Id. Likewise, in the instant case, the court heard argument from counsel before determining that Ms. Hardy could remain in the back of the courtroom while her daughter testified.

Similar to counsel in Gore, Respondent's counsel did not ask for any further proceedings such as a hearing or a proffer of testimony. Furthermore, Respondent has not demonstrated that Ms. Hardy's presence during her daughter's testimony prejudiced Respondent. Ms. Hardy's daughter was not a material witness; her testimony simply corroborated the testimony of other State witnesses. See Gore, 599 So. 2d at 986; Stano v. State, 473 So. 2d 1282, 1287 (Fla. 1985) (holding that the defendant must show an abuse of discretion or prejudice as a result of the court's ruling allowing an exception to the witness sequestration rule). Accordingly, this Court should find that the trial court acted within its sound discretion in allowing Ms. Hardy to remain in the courtroom during her daughter's brief testimony.

ISSUE III

THE TRIAL COURT PROPERLY GRANTED THE STATE'S MOTION IN LIMINE.[1]

Prior to Gwendolyn Hardy's testimony, the State made a motion in limine to prevent defense counsel from inquiring into the witness' arrest for aggravated battery on her boyfriend on the night of the offenses involving Respondent. (T.164-167). Gwendolyn Hardy had been arrested for aggravated battery, but the charges were dismissed and she was not convicted. (T.164). The court granted the State's motion over defense counsel's objection. (T.167).

Respondent asserts that he had a right to cross-exam Ms. Hardy regarding this unrelated arrest because it was relevant to Respondent's account of the incident. This argument is misplaced for a number of reasons. First, the law is clear that a party may impeach a witness with evidence showing that the witness was *convicted* of a felony or a crime involving dishonesty or a false statement. See Brookings v. State, 495 So. 2d 135, 140-41 (Fla. 1986). As this Court stated in Brookings, "[a] party may impeach by questioning about pending charges only if they arise out of

[1]As originally argued in Issue II of this brief, Petitioner asserts that this issue is not properly before this Court.

the same episode for which the defendant is charged." Id. In the instant case, there were no pending charges to question Ms. Hardy about. The aggravated battery charges had been dismissed. Furthermore, the charges were unrelated and did not arise out of the same criminal episodes for which Respondent was charged.

Additionally, although the arrest *may* have been relevant to Respondent's theory of events, Respondent had not testified or presented any theory of events at that time. Even if Respondent had presented his theory of events which in some way involved Ms. Hardy's arrest, the trial court did not abuse its discretion in granting the State's motion in limine. However, if this Court finds that there was error, the State submits that the error was harmless given the substantial and overwhelming evidence of Respondent's guilt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE IV

THE TRIAL COURT PROPERLY SENTENCED RESPONDENT TO CONSECUTIVE SENTENCES AS A HABITUAL VIOLENT FELONY OFFENDER.[2]

The trial court sentenced Respondent to consecutive habitual violent felony offender sentences for the offenses he committed at two separate locations. (R.107, 111-114). The evidence established that Respondent broke into Terry Hardy's home on February 9, 1994, sometime after 3:30 p.m. and before 12:30 a.m. (T.137-138). While in the house, Respondent stole a gun and some clothes, and shot bullets into Terry Hardy's daughter's bed and pillow. (T.139-145). Later that morning, Respondent attacked Jacqueline Hardy and shot Gwendolyn Hardy at their Lakeland home. (T.173-181). This incident occurred between 1:30 and 2:00 a.m. on February 10, 1994. (T.191).

The trial court properly ruled that there were two separate incidents to support Respondent's consecutive habitual felony offender sentences. (R.107). In determining whether a series of criminal events constitutes a "single" or "separate" criminal episode for the purposes of consecutive minimum mandatory sentences, the court must focus on the facts of the individual

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[2]As originally argued in Issue II of this brief, Petitioner asserts that this issue is not properly before this Court.

case. Parker v. State, 633 So. 2d 72 (Fla. 1st DCA 1994). In Parker, the court found that the defendant committed separate offenses when he sexually assaulted a woman inside her house, and then, as he exited the house, he set fire to the outside of her house. Id. at 74-76. In reaching this conclusion, the court focused on the nature of the offenses, the time sequence in which they occurred, and the place where they were committed.

In the instant case, Respondent broke into Terry Hardy's Lakeland home and stole a gun and shot her daughter's bed. There was no direct evidence as to the time of the offense, but Ms. Hardy testified that she worked from 3:30 p.m. and did not return home until approximately 12:30 a.m. (T.137-138). Sometime during that time frame, Respondent broke into her home and stole items from Ms. Hardy. At least an hour later, Respondent jumped a fence and attacked Jacqueline and Gwendolyn Hardy with the gun he stole from Terry Hardy's home.

The dissimilar offenses occurred at separate locations and times, and involved different victims. See Murray v. State, 491 So. 2d 1120, 1124 (Fla. 1986) (upholding consecutive sentences where the offenses arose from separate incidents occurring at separate times and places). In Woods v. State, 615 So. 2d 197 (Fla. 1st DCA 1993), the court upheld consecutive sentences when

the defendant shot a man outside a bar, and then entered the bar and shot another victim. The court held that the offenses involved separate victims, occurred at separate locations (in and outside of the bar), and involved a break in time between the offenses. Id. at 199.

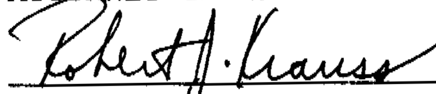
In the instant case, Respondent burglarized Terry Hardy's home and shot her daughter's bed. This incident occurred on February 9, 1994, between 3:30 p.m. and 12:30 a.m. After this offense was completed, Respondent traveled to a different location in Lakeland and physically attacked and shot Gwendolyn and Jacqueline Hardy. This incident occurred on February 10, 1994 at approximately 1:30 or 2:00 in the morning. The dissimilar offenses involved different victims, and occurred at separate locations and at separate times. Accordingly, this Court should find that the trial court correctly found that these were separate incidents for the purposes of imposing consecutive habitual violent felony offender sentences.

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, Petitioner respectfully requests that this Honorable Court reverse the Second District Court of Appeal's opinion vacating Respondent's grand theft of a firearm conviction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 John C. Fisher, Public Defender's Office, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, FL 33831, on this 30th day of October, 1996.

COUNSEL FOR PETITIONER