IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **Case No. 90,457**

MERLAN DAVIS,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

CASES

PAGE NO.

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On August 26, 1994, Respondent was convicted of aggravated assault with a motor vehicle. (R. 444-445). This conviction was based on Respondent's increasingly hostile behavior towards the victim, Nicole Terry, after the termination of their relationship. Respondent threatened Ms. Terry over the telephone in January of 1990 and repeatedly called her and on one occasion left a threatening message on her answering machine stating that he was going to kill her and cut out her "cold, black heart." (T. 7). Ms. Terry gave a copy of the tape to the Manatee County Sheriff's Office.

While at Ms. Terry's residence, Deputy Wortman answered two telephone calls and identified himself as a deputy to the caller who was Respondent. Respondent threatened to "fucking kill" Deputy Wortman and told the deputy that he was going to kill his "kicking ass." (T. 96). Due to Respondent's repeated threats and hostility, Ms. Terry successfully petitioned for an injunction in May of 1991 proscribing future contact.

Although an injunction was in effect, on May 21, 1991, Respondent while in his vehicle followed Ms. Terry who was a passenger in Pamela Bower's vehicle. Respondent revved his engine and pulled his vehicle close to Ms. Bower's vehicle. Ms. Terry was frightened by Respondent's actions believing she would be hit. She reported the incident to the sheriff's office. (T. 12-14, 42).

Respondent also violated the injunction on May 30, 1991 by again following closely behind Ms. Terry while she was driving alone in her vehicle. He revved his engine, pulled close behind her vehicle and then backed off. He also swerved beside her as she drove over the Skyway bridge. He continued to follow her into St. Petersburg, then cut her off forcing her to slam on her brakes to avoid hitting him. Ms. Terry also reported this incident to the St. Petersburg Beach Police Department.

(T. 15-19, 47-57).

Shortly after this incident, Sergeant Bentley of the St. Petersburg Beach Police Department stopped Respondent's vehicle and questioned him about Ms. Terry. Respondent told Sergeant Bentley that he did not know a Nicole and that he was being chased by someone. Respondent did later admit to knowing Nicole, but told the sergeant that he was going to the beach to visit a friend. Respondent was nervous, sweating and in a panic. Sergeant Bentley arrested Respondent for violating the injunction. (T. 169, 171-173).

On another occasion, November 13, 1991, Respondent again followed Ms. Terry in her vehicle. Respondent was attempting to get her to stop, pull over or run off the road. He revved his engine, drove close behind her and beeped his horn. Ms. Terry drove to a convenience store and contacted the police. Respondent was gone when the police arrived. Later that day, Respondent began following Ms. Terry again. He drove up behind her coming very close to her vehicle revving his engine and flashing his lights. Ms. Terry was very frightened since she believed he would smash into her vehicle or that she would lose control of her vehicle and hit the median. (T. 19-22, 57-59).

The charged incident occurred on December 27, 1991. Ms. Terry left Bradenton at around midnight to drive to St. Petersburg. Ms. Terry was driving a Ford Festiva and Respondent was driving a Datsun 280ZX. (T. 26, 80). Ms. Terry observed Respondent on a cross street. Ms. Terry stopped and telephoned her boyfriend, Michael Glenn, who was working as a dispatch officer for the St. Petersburg Beach Police Department. Ms. Terry requested that Mr. Glenn dispatch some officers to the bridge to meet her. Ms. Terry did not telephone the Bradenton Police Department nor the Manatee County Sherrif's Office because they had never arrested Respondent when she had previously telephoned and reported that Respondent was following her.

Ms. Terry observed Respondent behind her when she stopped at the toll booth at the entrance to the Skyway bridge. (T. 25). She tried to go as fast as possible over the bridge. (T. 26). Ms. Terry saw Respondent's headlights approaching behind her and watched Respondent pull closely up to the bumper of her vehicle. Ms. Terry observed Respondent beeping his horn and waiving something. (T. 27). Ms. Terry was trying to ignore him, but she had to look at him because he was driving closely parallel to her vehicle. (T. 28-31). Ms. Terry observed him waiving a gun. (T. 28). Ms. Terry then began to drive erratically at speeds of 60 mph or more to deter him from shooting her. (T. 30).

Ms. Terry was frightened. (T. 25). Ms. Terry believed that Respondent was going to hit the back of her vehicle and send her into the wall of the Skyway bridge. (T. 27). As they approached a construction area which merged two lanes into one, Ms. Terry sped up to get in front of Respondent. (T. 32). Respondent was close to her bumper. Ms. Terry tapped on her brakes and Respondent smashed into her vehicle. (T. 32). Ms. Terry lost control of her vehicle and smashed into cement dividers. (T. 33). Ms. Terry was crying and hysterical. (T. 33). Respondent got out of his vehicle, came over to her and said, "Oh, my God. Oh, my God, Nicki, oh, my God." (T. 33).

Respondent leaned into the driver's side window of his vehicle, took something out and ran back toward the Skyway. (T. 34, 75). Ms. Terry heard Respondent tell a stopped motorist that he was not going to leave the scene of the accident. (T. 34). Ms. Terry told the police that Respondent hit her vehicle and was trying to shoot her. She also told police that she had an injunction against him. (T. 35). Ms. Terry was contacted by several media including "Inside Edition", Channel 13 and St. Petersburg Times. (T. 38, 70).

Several court-appointed attorneys represented Respondent prior to trial. Each attorney was

relieved of representation due to conflicts with Respondent. (R. 16, 18, 27-29, 31, 42-45, 51, 56-57, 70-71, 105-106, 121, 151-156, 165-169, 212, 220, 239, 242-44). Respondent also proceeded pro se at various times between attorney representations. (R. 45, 68, 121, 123-125, 195-198, 200-205, 211).

Respondent filed a motion to issue a subpoena duces tecum for the St. Petersburg Times seeking the present whereabouts of Diane Mason, a former reporter for the St. Petersburg Times. (R. 822). Ms. Mason authored the article, *No Way Out*, which chronicled the accounts of Ms. Terry, a stalking victim.[1] On January 13, 1993, a hearing was held on Respondent's motion. Defense counsel argued that Respondent had reason to believe from one source that Nicole Terry intentionally caused the collision between the two vehicles. (R. 822-823).

Defense counsel further argued that Ms. Mason spoke to Ms. Terry in depth about the collision and wanted to question Ms. Mason regarding the possibility that Ms. Terry purposely caused the collision explaining "...[a]nd if it didn't make it into the column it was simply because Diane Mason edited it out for her own journalistic purposes." (R. 824-825). Defense counsel was seeking this information for impeachment purposes even though he claimed that he had the same type of testimony from another source. (R. 829-830). Defense continued: "It would be extremely beneficial to the defense to have this information from two credible sources and in fact the jury may find that my other source is not credible." (R. 830).

A portion of the article, *No Way Out*, was published on the record:

> She knew she was going to have to slow down for the single lane. She tapped her brakes lightly hoping the brake light would make Davis back off. He stayed right on her tail, she says. She stepped on

[1]The article, *No Way Out*, was recently supplemented as part of the record per this Court's Order.

her brakes.

(R. 831).

Counsel for the St. Petersburg Times argued that the reporter's privilege applied pursuant to Tribune Co. v. Green, 440 So. 2d 484 (Fla. 2d DCA 1983) and further argued that the subpoena was no more than a "fishing expedition" without any realistic expectation that Ms. Terry ever told the reporter that she intentionally caused the collision. (R. 825-826). Counsel for the Times further argued:

> ...Counsel is indicating that the information that the reporter might possibly have that is not in the story but which she might possibly have would be relevant to impeach the victim when she testifies as to what happened. I would submit to the Court that it wouldn't actually be relevant until the victim testifies and there's some reason to impeach her. If he asks the victim did you do this on purpose and she says no, perhaps at that point someone with impeaching testimony would come forward and say well, the victim told me that she did do it on purpose.

(R. 832).

The trial court denied Respondent's motion by Order entered January 15, 1993 on the grounds of Tribune Co. v. Green, supra. On direct appeal, Respondent raised the alleged misapplication of the qualified reporter's privilege to the facts of the instant case as an issue in his initial brief. On March 26, 1997, the Second District Court of Appeal vacated Respondent's judgment and sentence based on the trial court's improper application of a qualified reporter's privilege to non-confidential information. The Second District also certified the following question to this Honorable Court as one of great importance:

> IN LIGHT OF THE DECISIONS IN CBS, INC. V. JACKSON, 578 So. 2d 698 (Fla. 1991), AND MIAMI HERALD PUBL'G CO. V. MOREJON, 561 So. 2d 577 (Fla. 1990), DOES FLORIDA LAW PROVIDE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE DISCLOSURE OF NON-CONFIDENTIAL INFORMATION

RELEVANT TO A CRIMINAL PROCEEDING?

On April 1, 1997, the State filed its Motion for Rehearing in the Second District. On April 14, 1997, the Times Publishing Company ("the Times") filed its Motion to Intervene for the Purpose of Seeking Rehearing on the Reporter Privilege Issue. On April 23, 1997, the Second District denied the State's Motion for Rehearing and struck the Motion for Rehearing filed by the Times.

On April 28, 1997, the State filed its Notice to Invoke Discretionary Jurisdiction and its Motion to Stay the Mandate in the Second District Court of Appeal. On May 1, 1997, the Second District Court of Appeal denied the State's Motion to Stay the Mandate. On May 5, 1997, the State filed its Motion to Stay the Mandate in this Honorable Court. On May 6, 1997, this Honorable Court filed its Order Postponing Decision on Jurisdiction and Briefing Schedule.

On May 13, 1997, the Second District issued the mandate. On May 23, 1997, the State filed its Motion to Recall the Mandate. On June 3, 1997, this Honorable Court granted the State's motion to recall the mandate. This Honorable Court further granted the Motion(s) for Leave to File Brief as Amicus Curiae filed by several media organizations.

SUMMARY OF THE ARGUMENT

The information sought by Respondent was not relevant to the crime charged and was never shown to have even existed. Even if there was error, it was harmless in these circumstances. Thus, no prejudice was shown herein.

ARGUMENT

ISSUE

IN LIGHT OF THE DECISIONS IN CBS, INC. V. JACKSON, 578 So. 2d 698 (Fla. 1991), AND MIAMI HERALD PUBL'G V. MOREJON, 561 So. 2d 577 (Fla. 1990), DOES FLORIDA LAW PROVIDE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE DISCLOSURE OF NON-CONFIDENTIAL INFORMATION RELEVANT TO A CRIMINAL PROCEEDING?

The Second District Court of Appeal specifically stated in its question that the information must be "relevant to a criminal proceeding". The question as presented has no applicability to the facts of the instant case because the privilege has no relevance to the crime as charged. As the facts are presented in the instant case, the question can not be answered. A factual distinction is important and easily identified when compared to Kidwell v. State, 22 Fla. L. Weekly D1416 (Fla. 4th DCA June 11, 1997), where the Fourth District certified the same question to this Honorable Court.

The certified question has a direct bearing on the facts in Kidwell. In that case, the facts include defendant John Zile's admissions known to have been made to newspaper reporter David Kidwell. The case dealt with specific unpublished statements made by Zile to the reporter. These statements were directly relevant to the criminal proceeding. This was the sole issue for appeal.

The instant case had several issues dealing with proof of guilt. The issue dealing with non-confidential information was a sub-argument of an issue dealing with impeachment of a state witness. The information sought was never determined to exist. Thus, unlike the instant case, the question of whether the privilege applies has significance in Kidwell.

The State appeals the certified question to this Honorable Court because it is a good example of a court; namely, the Second District, seeking out an issue not relevant for reversal. The conviction was reversed based on a request for "highly suspect" information from a reporter. This Honorable

Court's scope of review encompasses the decision of the court below, not merely the certified question. Reed v. State, 470 So. 2d 1382 (Fla. 1985). The certified question acts as a vehicle to bring the entire decision before this Court. Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970).

A review of the Second District's decision is warranted. The conviction should have been affirmed because Respondent suffered no prejudice in the omission of the reporter's testimony. The danger being that any time a reporter happens to be a potential witness in a case, an automatic reversal would occur if that reporter fails to testify regardless of the relevancy of the information sought.

Although the Second District relied upon Morejon and CBS, Inc. in its opinion, these cases are distinguishable from the instant case. The Second District perceived "no principled distinction between the 'relevant events' involved in the Morejon and CBS,Inc. cases, and the information sought through discovery in the matter at hand"; however, the relevance in Morejon and CBS, Inc., like Kidwell, is apparent where the relevance in the instant case is tenuous at best.

In Morejon, supra, this Court held that the qualified privilege does not apply when the journalist was an eyewitness to a police search and subsequent arrest of a defendant. In CBS, Inc., supra, this Court held that the qualified privilege was inapplicable to a subpoena seeking untelevised videotapes (outtakes) of a defendant's arrest because the subpoena request did not implicate any confidential sources of information. Thus, the court "need not balance the respective interests involved." Id. at 700.

In Morejon, the reporter's testimony was relevant because he was an eyewitness to a police

search and the subsequent arrest of the defendant.[2] In CBS, Inc., the defendant was arrested for possession of cocaine. The CBS news team were eyewitnesses to the defendant's arrest, which is similar to the circumstances in Morejon. The CBS reporters videotaped a law enforcement operation, which included the defendant's arrest. The videotape was relevant since the arresting officer's deposition testimony regarding the recounting of the arrest was inconclusive. Both involved relevant observations of alleged criminal activity and the subsequent arrests.

In the instant case, Diane Mason never observed any activity. She was not interviewing a defendant about a crime he or she allegedly committed. Ms. Mason was interviewing a stalking

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[2]Recently, in Kidwell v. State, supra, the Fourth District reasoned that this Court in Morejon did not limit its holding to eyewitness observations of the crime, but said "that the principle applies to a 'relevant event' that is later sought to be adduced in a court proceeding." However, the Fourth District further explains that admissions or statements made by an accused "are certainly on a par with eyewitness testimony as to proof of a defendant's guilt." The Fourth District's opinion fails to discuss whether the statements of someone other than the accused is equally as relevant. Judge Klein, in his concurring opinion, disagreed with the majority on this point. He opined, as follows:

> I do not agree with the majority that [Morejon], is controlling, because in Morejon the journalist as an eyewitness to a police search and an arrest of the defendant, and our supreme court held only that there was no qualified privilege for "eyewitness observations of a relevant event in a subsequent court proceeding." ...There is a significant distinction between being an eyewitness to a news event and merely conducting an interview long after, such as was done in this case...
>
> Morejon, I believe, was carefully worded so that it would not be construed more broadly. Surely, if the supreme court in Morejon had intended its decision to apply to these facts, it would have addressed Blanton and Loadholtz, the two Florida federal district court decisions discussed above, which have been widely cited in other jurisdictions. The fact that Blanton and Loadholtz, and the federal courts of appeals decisions consistent with them, were not even mentioned in Morejon, leads me to conclude that its holding is restricted to eyewitness situations.

victim about how it feels to live in fear. The focus of the St. Petersburg Times article, *No Way Out*, is the problem with stalking and the lack of protection being provided to victims by the law. Respondent is aware of the contents of that article. Further, the information sought by Respondent was not relevant to the crime charged and was never shown to have even existed.

In order to answer the certified question, the non-confidential information sought must be relevant. In its opinion, the Second District stated: "A victim's explanation of how a crime occurred is an event relevant to the criminal proceeding." (Davis Op., p. 6). While the court's statement may be true, the Second District made a cursory finding of relevance in the instant case. The crime as charged is Aggravated Assault with a Motor Vehicle. Pursuant to §784.021, Fla. Stat. (1993), Aggravated Assault is defined as "an assault with a deadly weapon without intent to kill..." Respondent intentionally and unlawfully threatened, either by word or act, to do violence to Ms. Terry and at the time Respondent through the use of his vehicle had the ability to carry out the threat and the act created in the mind of Ms. Terry the well-founded fear that the violence was about to take place through the use of Respondent's vehicle. The elements do not require any contact by Respondent with said deadly weapon; namely, his vehicle.

The Second District reasoned that the cause of the crash and the crash itself were relevant to the criminal proceeding. The elements of the charge clearly show that the Respondent still could have been charged with the crime even if he never hit Ms. Terry's vehicle. Solitro v. State, 165 So. 2d 223 (Fla. 2d DCA 1964)(an aggravated assault may be committed without a battery); compare Smith v. State, 645 So. 2d 124 (Fla. 1st DCA 1994); Calvo v. State, 624 So. 2d 838 (Fla. 5th DCA 1993); A.H. v. State, 577 So. 2d 699 (Fla. 3d DCA 1991).

"[T]he crime of aggravated assault may be committed without either a battery or a

wounding." Colainni v. State, 245 So. 2d 893 (Fla. 2d DCA 1971). "[T]he gist of the crime of aggravated assault is found in the character of the weapon with which the assault is made." Nash v. State, 374 So. 2d 1090 (Fla. 4th DCA 1979).

The facts in Solitro are similar to the facts in the instant case. The victim and Solitro's co-defendant, John Black, had argued and exchanged blows earlier that evening. At 3:30 a.m. in the parking lot of a club, Black challenged the victim to finish their fight. Solitro was sitting in his vehicle which was parked in the lot. The victim ignored Black and drove out of the lot. As he drove away, Solitro followed in his vehicle. Solitro passed the victim's vehicle and immediately pulled back in front of it whereupon the victim's car 'bumped' the rear of Solitro's vehicle. The victim turned around and went the other direction and Solitro continued to follow close behind the victim's vehicle while Black pulled alongside the victim's car waving a pistol at the victim's vehicle. Solitro eventually turned off and was not seen again. Black's vehicle and the victim's vehicle collided some time later. The Second District held that the facts were sufficient to find Solitro guilty of aggravated assault even though Solitro never hit the victim's vehicle.

The holdings in Solitro and the other caselaw cited above indicate that any possible provocation or action on the part of the victim is not relevant to the crime of aggravated assault. The fact that the victim told her story to a reporter does not create relevance as suggested by the Second District. The State asserts that a determination of relevance by the lower tribunal is necessary even when dealing with non-confidential information.

In CBS, Inc, supra,[3] Justice McDonald opined, as follows:

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[3]This Court's majority opinion in CBS, Inc., 578 So. 2d at 700, applied the balancing test to confidential information only.

> ...It is only reasonable that, if the owner objects to producing such proprietary material, the party seeking the material should demonstrate to a judicial tribunal that it is relevant, that no alternative source exists, and that the party has a need for the information before its production for inspection is compelled. This basically is the same test employed when a qualified privilege exists or when a party claims a work product privilege for tangible evidence gathered in anticipation of trial...No person's business activity should be interrupted or its work product disclosed until such a necessity therefor is shown. When one faces criminal prosecution such a showing should not be difficult and I would require it as a matter of policy.

Id. at 701(J. McDonald, concurring in part, dissenting in part). When a reporter acts in a professional capacity on a newsgathering assignment, it is necessary to balance the respective interests involved. To do otherwise, "...misapplies settled rules of constitutional interpretation established by this Court and the United States Supreme Court." Morejon, 561 So. 2d at 582 (J. Barkett, concurring specially).

The record in the instant case indicates that not only was the information irrelevant to the charge, there was no evidence that the information sought even existed or was any different than the victim's testimony. Since the information sought is not relevant to this criminal proceeding, the certified question has no bearing on the facts in the instant case. Thus, the trial court's ruling did not depart from the essential requirements of law and it properly denied Respondent's subpoena duces tecum.

Even if this Court finds that the trial court's application of the qualified reporter's privilege in its findings was error, the court's application of the privilege and the omission of Ms. Mason's testimony were harmless. The State asserts that the harmless error doctrine should apply in this type of circumstance since Respondent has failed to demonstrate any error so fundamental as to amount to a denial of due process. A trial court's decision shall not be disturbed unless prejudice is shown.

§924.33, Fla. Stat. (1995).

No prejudice was shown in the instant case. Thus, the trial court's ruling is correct even if this Honorable Court finds the trial court's reasoning erroneous. Stuart v. State, 360 So. 2d 406 (Fla. 1976); Belvin v. State, 585 So. 2d 1103 (Fla. 2d DCA 1991). "Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." Caso v. State, 524 So. 2d 422 (Fla. 1988); State v. Adams, 683 So. 2d 517 (Fla. 2d DCA 1996); see Appelgate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979).

Respondent has the burden to show that the error resulted in an unfair trial. Harrell v. State, 405 So. 2d 480 (Fla. 3d DCA 1981); contra Dollar v. State, 685 So. 2d 901 (Fla. 5th DCA 1996)(J. Sharp, dissenting op). The situations addressed in CBS, Inc. and Morejon clearly involve the admissibility of information known to exist; eyewitness observations and non-televised videotapes of a defendant. The information sought in the instant case, that the victim purposely caused the accident, was never substantiated. Besides Respondent's claims, there is no evidence that any information existed outside what was printed in the article.

Respondent appears to rely on specific information printed in the article, "*No Way Out*", demonstrating the victim's actions to substantiate his claims. The pertinent information was read into the record at the motion hearing, as follows:

> She knew she was going to have to slow down for the single lane. She tapped her brakes lightly hoping the brake light would make Davis back off. He stayed right on her tail, she says. She stepped on her brakes.

(R. 831; *No Way Out*, Section D, p. 3D). There is nothing in this statement that suggests that Ms. Terry may have intentionally caused the accident.

Further, Ms. Terry's statements in the article are consistent with her testimony at trial. During Nicole Terry's testimony she testified that she "jogged" the cars by continuously speeding up and slowing down. (T. 29-30). Ms. Terry further testified that she had to slow down even though she knew Respondent was really close on her bumper. Respondent was so close to her vehicle that she could not see his headlights in her rearview mirror. She testified that she knew that she had to slow down so she tapped on the brakes so her lights would go on, and so he would know to back off and get away because I had to slow down. "**And I tapped on the brakes and he smashed into my car.**" (T. 31-32)(emphasis added).

In her testimony, Ms. Terry admits that she tapped her brakes and further admits to entering into a "cat and mouse" situation with Respondent. Her in-court testimony is consistent with her statements set forth in the St. Petersburg Times article and any additional information from Ms. Mason would be cumulative to the evidence already established in the record. Coloma v. State, 600 So. 2d 483 (Fla. 3d DCA 1992); Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988)(admission of hearsay is cumulative and harmless error where witness testifies to same thing). It appears that the information sought was heard by the jury. Thus, Respondent was not prejudiced by the trial court's denial of his subpoena duces tecum.

Further, during cross-examination, defense counsel asked Ms. Terry, "Is there any possibility you wanted the accident to occur?" Ms. Terry answered, "Of course I didn't want the accident to occur. I was trying to get away. I was trying to get to St. Pete so I could call the police at the toll booth there." (T. 66). Throughout the cross-examination, defense counsel referred to Ms. Terry's deposition to attempt to impeach her, but after this statement, defense counsel made no such reference. Respondent failed to make any attempts at impeachment.

Again, Ms. Terry's testimony was consistent with the St. Petersburg Times article. In the article, Ms. Terry explained that she feared what would happen if she got trapped behind Petitioner with no place to go so she sped up and got in front of his vehicle. Ms. Terry further stated, **"I didn't want to antagonize him."** (*No Way Out*, Section D, p. 3D)(emphasis added). The Second District suggested that Ms. Terry's statements that she tapped on her brakes implicates that she intentionally caused the accident. However, a fair review of the article clearly shows that she never intentionally caused the accident and the article supports her in-court testimony that she in fact did not want the accident to occur.

Unlike CBS, Inc. and Morejon, Respondent had no evidence that Ms. Mason was told by Ms. Terry that she intentionally caused the accident. At the motion hearing, Respondent claimed he had an alternative source who would testify that Ms. Terry admitted that she purposely caused the accident; however, no such witness was presented to impeach Ms. Terry.

Moreover, Respondent never suggested that this alleged source knew that Ms. Mason had heard any such statements from Ms. Terry. Further, Respondent never argued that he would be prejudiced by the exclusion of the St. Petersburg Times' information, but merely wanted "two credible sources" instead of just one. (R. 829-831). This reason is insufficient to warrant reversible error. See Barbee v. State, 630 So. 2d 655 (Fla. 5th DCA 1994); §924.33, Fla. Stat. (1993).

The victim's statements as presented above were made available to all parties and these statements were made repeatedly to various media organizations, but there has never been any evidence that the victim ever stated that she wanted the accident to happen. Petitioner's request for the information from the St. Petersburg Times was merely a fishing expedition. "Reversible error cannot be predicated on conjecture." Sullivan v. State, 303 So. 2d 632 (1974), cert. denied 428 U.S.

911, 96 S. Ct. 3226, 49 L. Ed. 2d 1220, rehearing denied, 429 U.S. 873, 97 S. Ct. 190, 50 L. Ed. 2d 154, stay denied, 464 U.S. 109, 104 S. Ct. 450, 78 L. Ed. 2d 210. The fact that the witness sought is a journalist should not make the failure to hear said witness's testimony per se reversible error. Thus, a harmless error analysis is warranted in the instant case.

Evidence clearly showed that Respondent committed aggravated assault with a motor vehicle. Even if, assuming *arguendo*, Ms. Terry admitted to the reporter that her braking caused the accident, this fact is irrelevant. As previously stated, the Amended Information charged that Respondent "intentionally and unlawfully threaten[ed] to do violence to Nicole Terry while then having the apparent ability to carry out said threat and did create a well-founded fear in Nicole Terry that such violence was imminent and in the commission of said assault did use a deadly weapon, to-wit: a motor vehicle..." (R. 12).

Respondent did threaten to do violence against Ms. Terry with his vehicle by following extremely close to her vehicle almost hitting her bumper, beeping his horn and flashing his lights, screaming at her, pulling in front of her and hitting his brakes. The evidence clearly showed that Respondent was not allowed anywhere near the victim. The evidence also showed that Respondent made the same types of threats with his vehicle toward Ms. Terry on several previous occurrences. The crash itself is irrelevant to the charge. Thus, the exclusion of the information from the St. Petersburg Times is harmless error.

The alleged error complained of did not contribute to the verdict and there is no reasonable possibility that error contributed to the conviction, thus the error is harmless and does not constitute reversible error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Compare Cox v. State, 473 So. 2d 778 (Fla. 2d DCA 1985).

The State reiterates that the Second District's failure to sufficiently address relevancy warrants this Honorable Court's review of the Second District's decision. The alleged non-confidential information sought had no bearing on the crime charged and Ms. Mason was not an eyewitness to the crime. Further, there was no evidence indicating that Ms. Terry told Ms. Mason that she intentionally caused the accident. Nevertheless, any error was harmless under the circumstances of this case. Since the alleged error did not contribute to the verdict, Respondent has failed to show prejudice. Viewing the case in its totality, it is clear the Second District is reaching rather than resolving issues of merit.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court remand the case to the Second District Court of Appeal to resolve the claim without consideration of the privilege issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Allyn Giambalvo, Assistant Public Defender, Public Defender's Office, Pinellas County Courthouse, 5100 144th Avenue North, Clearwater, Florida 34620 and Patricia Fields Anderson, Esq., Rahdert, Anderson, McGowan & Steele, P.A., 535 Central Avenue, St. Petersburg, Florida 33701, Jonathan D. Kaney, Jr., Esq., 150 Magnolia Avenue, P.O. Box 2491, Daytona Beach, Florida 32115-2491, Sanford L. Bohrer, Esq., Gregg D. Thomas, Esq., David S. Bralow, Esq., and James B. Lake, Esq., P. O. Box 1288, Tampa, Florida 33601, on this 30th day of June, 1997.

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