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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

BRYAN JOSEPH RAYDO,

Respondent.

CASE NO. 91,161

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

FEDERAL RULES OF EVIDENCE

OTHER CITATIONS

STATEMENT OF THE CASE AND FACTS

Raydo sets out the facts which he summarized in his initial brief filed in the First District. The State does not agree entirely with Raydo's rendition of the facts, nor does it agree with his accusations of government misconduct and incompetence (A.B. 3-15, 20-22, 29), but since his facts and accusations are irrelevant to the issue presented, there is no point in discussing them. To convict Raydo, the State relied on the testimony of the victim, who tentatively identified Raydo, and the testimony of Co-defendant Rogers.

SUMMARY OF ARGUMENT

The trial court made an in limine ruling admitting evidence. Technically, that ruling can be raised on appeal, but there is no point in doing so, because the jury never heard the evidence.

Criminal defendants cannot win on the above issue because there is no prejudice. They, therefore, have tried to create prejudice by turning the trial court's ruling into something it is not. In other words, the trial court's ruling that admits evidence metamorphoses into a ruling that both admits and excludes evidence simultaneously. A witness can be impeached, but the witness cannot testify. It, of course, is logically impossible for this metamorphosis to occur.

Once the defendant has two rulings, however, he can proceed full steam ahead. The trial court's express ruling admitting evidence may or may not be correct, but the implicit ruling excluding evidence (refusal to allow a witness to testify, especially the defendant) for no good reason is always error and probably always harmful error. A new trial, therefore, is guaranteed.

The State's position in a nutshell is as follows:

(1) In order for the defendant to obtain a new trial, the witness must testify, the objected-to impeachment evidence must be admitted; its admission must be error; and the error under the circumstances of the particular case must be harmful.

(2) The judge made only one ruling in the instant case, which was that certain impeachment evidence was admissible.

(3) That ruling was correct.

(4) Even if erroneous, the error was harmless beyond all doubt because the jury never heard the evidence.

(5) Alternatively, even if erroneous, the error was harmless because Raydo has since been convicted of petit theft (crime of dishonesty) with which he could still be impeached, which would again motivate him not to testify.

ARGUMENT

ISSUE

(A) MUST THE DEFENDANT TESTIFY AT TRIAL TO PRESERVE FOR APPEAL A CLAIM OF IMPROPER IMPEACHMENT WITH A PRIOR CONVICTION?

(B) IF THE ANSWER IS NO, DID THE TRIAL COURT ABUSE ITS DISCRETION IN RULING THAT RAYDO COULD BE IMPEACHED WITH HIS PRIOR NOLO CONTENDERE PLEA IN THE EVENT HE TESTIFIED AT TRIAL?

Raydo asserts that his state constitutional right to testify was violated by the trial court's in limine ruling *admitting* evidence. (A.B. 16-17, 19) That is logically impossible. The trial court did not exclude any evidence, much less the defendant's own testimony.

What Raydo is really arguing is that the trial court's ruling influenced him not to testify. If this were the test, every adverse ruling of the trial court would violate the defendant's right to testify, except, of course, when he in fact testified. This would be true, regardless of whether the ruling was correct or incorrect, for the "influence" would still be there.

Raydo has focused on one specific ruling, but the analysis is equally applicable to all rulings. Indeed, there are other adverse rulings that would have a far greater impact on the defendant's decision to testify than the one at issue here. An adverse ruling admitting a confession or evidence of a collateral crime immediately comes to mind.

Raydo asserts that the error to which the harmless error test applies is the denial of his right to testify; that is, the exclusion of his testimony, the content of which incidentally is

unknown. He discusses the evidence admitted at trial in a light most favorable to him with this error in mind. (A.B. 20-22) This type of error, however, is probably always harmful, as was recognized by the United States Supreme Court in Luce v. United States, 469 U.S. 38, 42 (1984): "Were *in limine* rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." Thus, the adoption of Raydo's argument would effectively gut the harmless error test and result in criminal defendants receiving endless new trials.

Contrary to Raydo's assertion, the error which is subject to the harmless error test is the trial court's ruling on the admissibility of impeachment evidence. We know beyond all doubt that that ruling had no impact whatsoever on the jury, for the jury never heard the evidence. Criminal defendants cannot win on this issue, and that is why they have tried to turn it into something it is not--denial of constitutional right to testify.

Raydo construes the word "conviction" in section 90.610, Florida Statutes to mean a judament of "conviction." (A.B. 25) The State recognizes that this is one way the statute can be construed, but it is unnecessary and unwise to construe it that way. For impeachment purposes, what is important is that the witness has violated the law. A judgment of conviction is proof of this fact, but it is no less so than a guilty jury verdict, guilty plea, or no contest plea. They all reflect a comparable

degree of certainty that the witness is a law violator. To allow a witness to testify without being impeached under these circumstances distorts the truth seeking function of the court.

Raydo's reliance on section 90.410 is misplaced (A.B. 17-19), for that section is completely independent of section 90.610. A nolo conviction is admissible under section 90.610, but evidence of the no contest plea is not admissible under section 90.410.

Raydo misapprehends the State's motive for citing *McCormick on Evidence* (A.B., 26-28), which was to illustrate the independence of the two sections. The quoted provision makes that point clear: "The conclusion must be that 609 is a complete scheme; since it does not exclude nolo convictions, they are usable." 1 *McCormick on Evidence* § 42, at 149 n. 35 (John W. Strong ed., 4th ed 1992). Indeed, it was only by separating the two provisions that the commentator could reach this result. Section 410 prohibits the use of no contest pleas; section 609 is silent. If the two are read together, nolo convictions must be excluded, regardless of how "conviction" is defined. This was the mistake the First District made.

The *McCormick* commentator did not define the word "conviction" in 609. The State cited cases holding that a judgment of conviction was unnecessary. If those cases correctly construe 609 (§ 90.610), as the State so contends, a no contest plea is just as much of a "conviction" as are guilty pleas and guilty verdicts.

To support his construction of sections 90.410 and 90.610, Raydo invokes the doctrine of lenity codified in Section 775.021(1), Florida Statutes. (A.B. 18) The "code" referred to in that statute is to the "Florida Criminal Code." § 775.011(1), Fla. Stat., not to the Florida Evidence Code, § 90.101, Fla. Stat., which is at issue here. To avoid a due process violation, criminal statutes must give the public fair notice of prohibited conduct and concomitant punishment. The doctrine of lenity serves that goal. There is no comparable requirement of fair notice of the rules of evidence before engaging in prohibited conduct. Legislative intent is the guiding principle when construing the rules of evidence. If doubt exists as to the meaning of a rule, it must be resolved in a manner that furthers the public policy behind the rule, not to accommodate litigants independent of the purpose of the rule.

Raydo asserts that the decisions in Parker v. State, 563 So.2d ***1130*** (Fla. 5th DCA 1990), ***cause dismissed, 569*** So.2d 1280 (Fla. 1990) and State v. Wilson, 509 So.2d 1281 (Fla. 3rd DCA 1987) are not in express and direct conflict with the decision in the instant case. (A.B. 19-20) Since this Court has accepted jurisdiction of this case, Raydo's argument apparently has been resolved against him. The State, in an abundance of caution, will again address the issue.

In all three cases, the trial court made an limine ruling admitting impeachment evidence; in all three cases, the witness did not testify; and in two of the cases, unlike the instant

case, the appellate court refused to review the in limine ruling. The Courts in the other two cases held that to preserve for appeal the propriety of the trial court's in limine ruling, the witness must testify, and the impeachment evidence must be admitted against the witness. The First District held just the opposite. That is why these cases are in express and direct conflict on the same legal principle. The differences in the type of witness (defendant in two of the cases and character witness in the third case) and in the type of impeachment evidence (defendant's prior violent conduct, guilty jury verdict without adjudication, and no contest plea without adjudication) were insignificant to the procedural issue. Raydo confuses the merits of the trial court's ruling with the procedural issue.

Citing to a constitutional speedy trial case, Raydo asserts that he cannot waive his right to testify by silence OK inaction. (A.B. 23) In the instant case, the judge inquired of Raydo whether he wanted to testify, and he answered in the negative. (V2, 117) Thus, this case is not about silence or inaction; it is about an express waiver on the record.

CONCLUSION

Based on the State's argument presented in the initial and reply briefs, it respectfully requests this Honorable Court to overrule the decision of the First District and affirm the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief on the merits has been furnished by U.S. Mail to the following persons this 24th of December, 1997:

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