W00A 087

IN THE SUPREME COURT OF FLORIDA

CHARLES ARTHUR JERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

DCA CASE NO. 97-2308
CASE NO. 93,828

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On March 3, 1997 Charles A. Jerry, Jr., the Petitioner herein, was arrested and charged with armed robbery and petit theft on February 14, 1997 at 1:30 a.m., in violation of Fla. Stat. Sections 812.13 (2)(a) and 812.014 (1997). (R I, 81) Reportedly, Jerry had used a small caliber handgun to rob a homeless man of his $35.00 weekly paycheck. (R I, 81) At his first appearance the following day, the Petitioner was determined indigent, a public defender was appointed, and bond was set at $100,000. (R I, 84, 85)

Jerry was tried by a jury on May 14, 15, and 16, 1997, before Judge John Dean Moxley, Jr. (R II, 1-200; III, 201-304) Despite extensive local press coverage of the Petitioner's suspected involvement in a number of armed robberies, and several murders, prior to his trial in the instant case, there were no related motions by defense counsel, nor were prospective jurors queried regarding likely exposure to the news articles, and the corresponding impact if any. (R II, 7-113)

During the state's opening statement, a defense objection to the characterizations of the victim made by the assistant state attorney, as "testimony" was overruled. (R II, 148) An additional objection made as the state broached reference to the

alleged vial of crack, was addressed by the state's voluntary compliance with the earlier defense motion in limine. (R II, 152-3)

The state's case against the Petitioner consisted of one witness, the alleged victim, James A. Peterkin. (R II, 160-178) Peterkin testified that he was homeless, but that he performed upkeep and odd jobs around a Texaco station in Melbourne to earn some money. (R II, 162) The alleged victim stated that he had known Jerry for about a year and a half, during which time he had seen him about eight times. (R II, 163-4) Although Peterkin knew who the Petitioner was, he had never conversed with Jerry, and would walk the other way when he saw him. (R II, 164-5)

Peterkin testified that in the early morning hours of February 14, 1997, after having been paid, he bought a pack of cigarettes and a little bottle of liquor at a house on Stone Street in Melbourne, and crossed the street to the side of the vacant building, which had formerly been Spain's Bar. (R II, 165-8, 180) As he was crossing the street, Peterkin saw a man whom he identified as Jerry, calling to him. (R II, 163, 167-8) Peterkin answered, but kept walking, and Jerry walked alongside of him, and put his arm around him, saying that he wanted to talk. (R II, 167-8) Some people whom he knew had begun to

approach Peterkin, but Jerry reportedly told them to leave them alone so they could talk. (R II, 169)

When the other people moved away, Jerry allegedly asked Peterkin where his money was and told him to give it up. (R II, 170-1) Two defense objections to Peterkin's testimony as narrative were overruled. (R II, 170-1) Peterkin said that when he tried to turn and get away, the Petitioner grabbed him around the neck, and a scuffle followed. (R II, 171-2) By Peterkin's account, during the scuffle, Jerry drew a .38 revolver, stuck it in Peterkin's ear, and forced him to crawl on the ground to retrieve a personal item which had fallen out Jerry's pocket. (R II, 174) Peterkin gave up his money as soon as the gun was placed to his ear. (R II, 174-5) When the state asked the witness to repeat his account of what had happened when he was on the ground, a defense "asked and answered" objection was sustained. (R II, 175-6) Following the robbery, the assailant held a gun on Peterkin, forcing him to leave in the opposite direction of the bystanders. (R II, 177) Peterkin went back to the Texaco station, and finding no one there, left to "doctor" his neck, which he claimed by that time had begun swelling up. (R II, 177)

On cross-examination, Peterkin testified that he had known eight or nine of the fifteen or twenty people who had been there

that night, and that the area in which the robbery occurred had been well-lighted. (R II, 181-2, 185) The alleged victim had not sought medical attention at any time following the incident, had not missed any work, nor had he reported the incident to the police for five days. (R II, 185-7)

In his signed report to the police, Peterkin described his assailant as being between five feet eight or nine inches, and weighing around one hundred sixty pounds, as compared to the Petitioner's actual height of five feet eleven inches and weight of between two hundred and twenty and two hundred and thirty pounds. (R I, 81; II, 187; III, 222) In his report, Peterkin had claimed that his assailant had grabbed him around the neck from behind, as opposed to from alongside of him as he testified in court. (R II, 191-3) While Peterkin had testified that he was robbed of his entire thirty five dollars pay, he conceded that the amount was actually closer to thirty two dollars. (R II, 194) Peterkin also admitted that at an earlier hearing he had testified that the entire incident had lasted four to five minutes, as compared to his in-court testimony that the incident had lasted about eleven minutes. (R II, 196-8)

Peterkin acknowledged that in the earlier testimony he had stated that a lot of the people on the street that night had seen

what had happened. (R II, 199) Upon a sustained state objection, additional testimony was read, clarifying that "...nobody would have the balls enough to come and testify against him." (R II, 199) On redirect examination, the state clarified that the incident occurred on Friday. (R III, 206) Following this testimony the state rested, and the defense motion for judgment of acquittal was denied. (R III, 209-10)

Following a brief recess, the defense called Officer Schnider, the arresting officer. (R I, 81; III, 211) However, in a bench side conference, the state announced that Schnider had been allowed to leave. (R III, 211) Without protest, the defense next called Nina Foster, the Petitioner's girlfriend and alibi witness. (R III, 212)

According to Ms. Foster, she borrowed her mother's car to pick up Jerry when he stayed at her home in Cocoa, since Jerry didn't have a car, and her car needed an engine. (R III, 213-4, 224-5) Foster testified that she had picked up the Petitioner on Tuesday, February 11th at 7:00 pm as he had requested her to do but he hadn't been ready. (R III, 215-6) Jerry had stayed with Foster during that week, and Foster particularly remembered Thursday evening, February 13, 1997 since Jerry had cooked dinner for her and her two children for the first time. (R III, 216-7)

That evening they had watched television, Jerry had had a couple of beers, and they had gone to bed at around 11:30 pm. (R III, 217-8)

Jerry had announced that he was going to buy her white roses the following day for Valentine's, but he missed his opportunity by having slept in the following morning. (R III, 217, 221) Foster was upset with the Petitioner, and when she got home from work at 3:00 pm on February 14th, they argued. (R III, 221) However, when her children got home, they decided to forget about the incident, and to go do something together to have fun. (R III, 221) Foster and Jerry and the two children went to the nearby high school to race the children's go-cart. (R III, 221)

Foster had never seen the Petitioner with a gun in the year she had known him (R III, 213; 221-2) She confirmed that the only means of transportation to and from her home in Cocoa was via her mother's car. (R III, 222)

During cross-examination the state attorney reminded the witness of a visit that he and Tom Williams, an investigator from the state attorney's office, had paid to her and her neighbors. (R III, 223) The state attorney asked Foster if she hadn't told them that she had had some relatives or out-of-town guests at her house that week. (R III, 223) Foster stated that she had told

him that some friends of hers had stopped by on the afternoon of February 14, 1997. (R III, 223-4) When asked how she expected Jerry to buy her flowers when he had not worked from February 11-16, when he was visiting her, she responded that he operated a lawn service with her children on week-ends, and that she only expected the flowers because he said he was going to buy them. (R III, 226-7) Defense objections to this line of questioning as irrelevant and calling for speculation, were overruled. (R III, 227) Following Foster's testimony, the defense renewed its motion for judgment of acquittal, which was again denied. (R III, 228)

The state called the state attorney's office investigator, Thomas Williams, as a rebuttal witness. (R III, 229) Williams testified that he and the assistant state attorney had gone to see Foster on April 21, 1997, and that she had told them that she had had company the entire week of Valentine's Day. (R III, 230-1) On cross-examination the witness admitted that he had taken no notes, nor had he taped the interview with Foster. (R III, 232) Although he hadn't found out who any of the guests were, he did admit that Foster had stated that Jerry was one of them. (R III, 233) Following cross and redirect examination, the jury was sent home for the evening. (R III, 234) Another defense motion

for judgment of acquittal was made and denied. (R III, 234-5) The charge conference was held, the Glisson Rider was considered and habitual offender enhancement was discussed. (R III, 236-7) Because firearm possession was charged as an element of the crime, the state did not ask for firearm enhancement. (R III, 243-4) On the morning of May 16, 1997, the verdict forms were reviewed, and the jury heard closing arguments. (R III, 243-4; 245-281)

During the state's initial closing argument, a defense objection to the mischaracterization of the testimony and motives of the alleged victim-witness was overruled. (R III, 248) During this portion of the state's closing, without objection, the assistant state attorney accused the defense alibi witness of lying, based upon her earlier alleged statement to him and the state attorney's office investigator, stating, "I was there and they weren't." (R III, 250-4) The state challenged the Petitioner's alibi on the evening of February 14, 1997 because Foster hadn't specifically stated what they had done following the go-cart racing that evening. (R III, 252)

In the defense closing, it was argued that the crime was alleged to have taken place on the morning of February 14, 1997, not the morning of February 15, 1997. (R III, 259) In final

closing, the assistant state attorney stated that so long as the state proves that the crime occurred within twenty-four hours on either side of the date alleged, the state has met its burden of proof regarding the date on which the crime was charged as having occurred. (R III, 278-9) Following closing arguments, the jury was instructed. (R III, 281-99) The court stated that the state had only to prove that the alleged crime was committed within twenty-four hours of the date charged. (R III, 291-2) The jury returned its verdict of guilt of robbery with a firearm. (R I, 105; III, 300) A presentencing investigation was ordered. (R III, 303)

On July 18, 1997 a hearing was held pursuant to Fla. Stat. Section 775.084 (3)(a) before Judge Moxley to determine whether the Petitioner should be sentenced as a habitual felony offender. (R I, 1-63, 122-3) Two law enforcement witnesses were presented by the state. Over a defense relevancy objection, Warren, the first witness testified that in 1995 Jerry had told him that "he had started jacking people and become addicted to it." (R I, 6-7) A defense objection that the state was leading the witness was sustained (R I, 7) Defense objection to a question concerning whether or not this witness felt that the Petitioner was a danger to the community, was sustained. (R I, 9) Warren

confirmed that fingerprint exhibits presented to him had been taken by him in that same courtroom, several weeks earlier. (R I, 10) On cross-examination, Warren admitted that the Petitioner had told him that the only people whom he robbed were drug dealers: "...no gas stations, no old ladies, just drug dealers." (R I, 11)

A second witness, Knight, a fingerprint technician confirmed that the fingerprints of the Petitioner matched those contained on three prior felony convictions. (R I, 13) The defense called two witnesses, a long-time friend, and a Melbourne police officer. (R I, 15-18, 19-22) Simpson, an officer who had been involved in three or four previous cases involving Jerry, testified that although he had never had any problems with him on those occasions, there were two sides to Jerry's personality. (R I, 20-1) Although the only persons who would need to fear the Petitioner were drug dealers, Simpson stated that the Petitioner needed to be on his medication, and that he needed mental help. (R I, 20-2)

On cross-examination Simpson stated that Jerry's criminal episodes took place when he was taking illegal drugs, but that when he was taking his medication, he didn't deal with illegal drugs. (R I, 22-3) On redirect examination, Simpson confirmed

that although Jerry had been investigated in connection with several murder cases, he had never been charged with murder. (R I, 24)

Finally, Jerry testified that prior to entering jail, he had been prescribed thorazine and lithium for mood swings and behavioral problems, that he had had three previous psychiatric commitments, and that he had been addicted to cocaine since he was fourteen years old. (R I, 26) He also stated that he had had problems with his public defender, who had refused to bring negative news coverage suggesting that Jerry had been a suspect in several murders over the past several years, to the attention of the trial court. (R I, 30-1) Nor had these concerns been addressed at jury selection. (R I, 31) Nothing had been said or done about an encounter which Jerry and the Bailiff had had with one of the jurors, when the Petitioner was being taken to the rest room in handcuffs. (R I, 33, 59) The Petitioner felt that his attorney had worked with the state attorney in order to find him guilty, so Jerry had filed a Bar complaint against the public defender, and the defender had sought to withdraw. (R I, 30, 31, 33, 34) The public defender had thought it unnecessary to raise the possible prejudice issue since those were murders and this case was an armed robbery. (R I, 31) Because the crime didn't

fit his "MO," Jerry's public defender had been confident that he was going to win the case at trial. (R I, 34) Jerry's counsel at sentencing confirmed Jerry's indigency, and wish to have a public defender appointed for purposes of appeal. (R I, 35-6)

During cross-examination, the Petitioner placed upon the record that his admissions about having robbed drug dealers were made when he came forward as the sole witness to help convict a man of murder. (R I, 41-42) During redirect examination, Jerry stated that he believed that the news articles naming him as the suspect in two area murders tainted the jury, and also had an impact upon the way he was prosecuted in the instant case. (R I, 44)

Following testimony, the presentencing investigation was reviewed and confirmed as accurate. (R I, 49-52) The Petitioner confirmed that he had been given notice of the state's intention of seeking habitual offender sanctions, when notice could not be located in the court file. (R I, 53) The state argued that the Petitioner was dangerous to the community, and should be sentenced to life in prison. (R I, 54-5) The defense argued for leniency, given the documented problems with Petitioner and his trial counsel, and the deficiencies of the trial itself. (R I, 59-61) If the Petitioner were to be habitualized, his counsel

argued that, under all of the circumstances, a guidelines sentence should be imposed. (R I, 61) The Petitioner's sentencing guidelines range was from 59.7 to 99.5 state prison months. (R I, 155-6) The court deferred sentencing to consider the matters in evidence and arguments presented. (R I, 62)

A second sentencing hearing before Judge Moxley was held on August 15, 1997. (R I, 64-79, 124-7) The court reviewed the Petitioner's juvenile and adult criminal record, and determined that he met the criteria for habitualization as a felony offender. (R I, 72) The court reviewed previous lenient treatment and opportunities for rehabilitation. (R I, 10, 11) When given an opportunity to address the court, the Petitioner reiterated the problems he had experienced at trial, and offered to present copies of the articles in question to the court. (R I, 75-6) The court stated that Jerry was not being sentenced for uncharged conduct, he was being sentenced for the robbery of Mr. Peterkin. (R I, 76) The Petitioner stated that he was innocent of that crime. (R I, 77)

The court adjudicated the Petitioner guilty and sentenced him as a habitual felony offender to prison for the term of the rest of his natural life. (R I, 77, 128-33, 134-9) The judge also required that the Petitioner serve a mandatory minimum term

of three years for possession and use of a firearm during commission of the armed robbery. (R I, 77) The Petitioner was advised of his right to appeal, determined indigent and appointed a public defender. (R I, 77-8, 150-3) A notice of appeal was filed on August 15, 1997. (R I, 142) The Petitioner raised two fundamental errors at trial in his initial appellate brief.

The Fifth District Court of Appeal affirmed the Petitioner's judgment and sentence per curiam on August 21, 1998, citing ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92, 805. (See Appendix.) The Petitioner invoked the discretionary jurisdiction of the Florida Supreme Court, which was accepted on November 24, 1998, in Case Number 93, 828. This appeal follows.

SUMMARY OF ARGUMENT

The district court, affirmed per curiam the Petitioner's judgment and sentence in an appeal which raised only fundamental error *at trial*, citing to ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998). In so holding, the Fifth District Court of Appeal has either failed to even consider the issues raised by the Petitioner, thereby demonstrating the perils of its own policy of ignoring unpreserved fundamental error; or, the Court has sought to expand its ***Maddox*** holding to preclude review of any unpreserved fundamental errors at trial as well as at sentencing. Either rationale argues for reversal of the case sub judice.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL HEREIN INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO TRIAL ISSUES.

On appeal, the petitioner raised two issues, each alleging fundamental error at trial. The opinion of the Fifth District in the instant case cited as controlling authority the case ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998), which case is currently pending review by this Court. In Maddox, in an en banc opinion, the Fifth District Court of Appeal held that The Criminal Appeal Reform Act abolished the concept of fundamental error in the sentencing context. ***Id.***; Fla. Stat. Section 924.051 (1996). Although the issues in the instant case do not concern the sentence, by affirming on the authority of ***Maddox***, the Fifth District Court of Appeal has now apparently held that there is so longer any fundamental error either in trial or sentencing contexts. This was error.

After a jury trial, the Petitioner, CHARLES ARTHUR JERRY was convicted of robbery with a firearm, and sentenced as a habitual felony offender to life in prison. The Petitioner presented an unrefuted alibi for the day, date and time during which the

information alleged the crime had occurred. However, without any previous discussion, agreement or notice to the defense, the trial judge instructed the jury that the state's burden of proof would be met if the crime were determined to have been committed "on February 14, 1997, or twenty four hours either side thereof." Defense counsel did not object below.

In addition, during his closing argument the prosecutor testified that he had personal, superior knowledge based upon his contact with the alibi witness which convinced him that she was lying. Following the overruling of a defense objection to the prosecutor's mischaracterization of the sole defense witness's testimony, the defense made no further objections.

On appeal, the petitioner presented to the district court these two fundamental trial errors apparent from the record. The district court issued a per curiam affirmance citing the case of ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998) review pending, Florida Supreme Court Case Number 92, 805, as controlling authority for the affirmance. ***Jerry v. State***, 715 So.2d 1141 (Fla. 5th DCA 1998).

Maddox holds that the Criminal Appeal Reform Act as codified in Section 924.051, Florida Statutes (1996) has eliminated the

concept of fundamental error at least as it had been previously applied to the sentencing context. **Id** at 619. ***Maddox v. State, supra,*** is currently pending review by this Court. Therein, that petitioner has argued that that decision conflicts with ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1977); ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2d DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3d DCA 1998) and ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). More recently, the case also conflicts with ***Mizell v. State***, 23 Fla. L. Weekly D1978 (Fla. 3d DCA August 26, 1998). Petitioner Maddox has urged this Court to overturn the Fifth District Court of Appeal's holding in his case upon the plain meaning of the statute, and in the interests of fairness, due process and judicial economy.

The instant Petitioner first argues that the decision in his case is inapposite to ***Maddox*** as that holding, itself, is framed. ***Maddox*** was careful to distinguish sentencing error, from fundamental, i.e., trial error. ***Id***. at 619. Relying upon two Florida Supreme Court cases, the ***Maddox*** court defined the "fundamental error" contemplated by the legislature in the Criminal Appeal Reform Act, as the same variety which "reaches down into the validity of the *trial* itself to the extent that a

verdict of guilty could not have been obtained without the assistance of the alleged error." ***Archer v. State***, 673 So.2d 17 (Fla. 1996). See also ***Summers v. State***, 684 So.2d 729 (Fla. 1996).

The jury verdict complained of in the instant case on appeal, could not have been obtained without the prejudicial, errors alleged to be fundamental error at trial. Petitioner's sole arguments on direct appeal concerned improper reduction of the state's burden of proof by the court's instructions to the jury enlarging the time alleged in the information, and addressed by the testimony at trial, that the charged crime was to have occurred, and improper and prejudicial prosecutorial testimony during closing argument.

The improper jury instruction was without defense objection. Although there was defense objection to improper characterization of the alibi witness's testimony during the state's initial closing argument, it was overruled. However, a more egregious statement during the final state closing was without renewed defense objection. Where as here, there was no competent evidence introduced consistent with the allegations of the information, and only improper prosecutorial "testimony" accused

the defense alibi witness of lying, fundamental errors are reviewable and reversible on appeal, even absent defense objection below.

Second, the instant case is wrong for the same and even greater reasons than ***Maddox*** is wrong. The ***Maddox*** Court determined that by enacting the Criminal Appeal Reform Act in 1996, the legislature has removed the appellate court's authority to correct unpreserved sentencing errors on appeal. See Fla. Stat. Section 924.051 (1997); and Fla. R. App. P. 9.140 (b)(d). The Petitioner adopts and incorporates by reference herein, ***Maddox***'s arguments that (1) judicial economy, fairness and due process, as well as the plain meaning of the statute and rules, all dictate an interpretation of the Criminal Appeal Reform Act which provides for the remedy on appeal of fundamental error apparent on the face of the record, or alternatively, (2) even assuming, that the District Court of Appeal is correct in its interpretation that unpreserved error cannot be addressed on appeal, the result would be a denial of the constitutional right to appeal, as well as a violation of the separation of powers which would render the statute unconstitutional.

Finally, for the same reasons that the Petitioner argues

that This Court must quash both ***Maddox*** and ***Jerry v. State***, the case sub judice, he asks the Court to review the prejudicial, fundamental errors at trial which are apparent in the record, and rule upon them.

Where the charging documents, state witness, defense alibi witness, and argument addressed a crime alleged as having occurred at 1:30 a.m. on Valentine's Day in 1997, it was fundamental prejudicial error for the trial court to unilaterally lower the burden of proof chargeable to the state, in instructing the jury. Rather, the defense motion for judgment of acquittal should have been granted.

Fla. R. Crim. P. 3.140 (d)(3) requires that each charged count in an indictment or information on which a defendant is to be tried contain allegations stating as definitely as possible the time and place of the commission of the offense charged. Reasonable doubts regarding the construction of a statement of particulars concerning an information are to be resolved in favor of a the defendant. Fla. R. Crim P. 3.140 (n). In the instant case, the charging document, the information, and the only state witness testified that the alleged armed robbery took place at 1:30 a.m. on February 14, 1997. The sole state witness, the alleged victim, testified to events which were to have transpired

in the early morning hours of Valentine's Day, 1997. While the sole defense witness testified to the Petitioner's presence with her from February 11 to 16, 1997, detailed testimony sufficient to establish alibi was presented regarding the specific date and time that the crime was alleged as having occurred. Where the Petitioner had an unrefuted alibi for his whereabouts at that date and time, it was error for the court to instruct the jury at the conclusion of the evidence and argument that the state's burden of proof regarding the date and time of the crime could be met if the crime were determined to have occurred within twenty-four hours on either side of the date charged, without any previous discussion, agreement or notice to the defense. The trial court's giving of an incomplete and inaccurate instruction on law related to an element of the offense during jury instruction, even without objection constitutes fundamental error. ***Jones v. State***, 666 So.2d 995 (Fla. 5th DCA 1996).

Although time is not ordinarily a substantive part of an information, a variance between the dates proved at trial and those alleged in the information cannot be permitted where it surprises or hampers the defendant in preparing his defense. ***Tingley v. State***, 549 So.2d 649 (Fla. 1989). Here, the variance

between the date and time charged and addressed at trial and the seventy two hour period announced by the trial court at the conclusion of the trial and arguments, both surprised and hampered the preparation of the defense. There was no discussion nor agreement to expand the time period in which the crime was alleged as having been committed, before the court's unilateral revision of the date of the crime in the information during pre-deliberation jury instructions, after both the state and defense had rested, and completed their closing arguments.

Where the state failed to prove that the Petitioner robbed the alleged victim on the date and time specifically charged, and failed to allege that the charged conduct occurred at any other date and time, until closing argument rebuttal, the defense motion for judgment of acquittal should have been granted.

Fundamental error warranting a new trial occurred where the prosecutor in his closing argument, employed personal testimonial of having superior knowledge based upon his contact with the defense alibi witness, which convinced him that she was lying. This error was particularly prejudicial where the trial was a credibility duel between the alleged victim-witness for the state, and the defense alibi witness.

No weapon was ever found, and only the testimonial evidence

of the alleged victim was presented by the state at Petitioner's trial. Yet the prosecutor buttressed this deficiency by testifying to his superior ability to judge the noncredibility of the defense alibi witness based upon facts not in evidence: vicariously, during rebuttal witness testimony of an investigator from the state attorney's office, and directly, throughout closing argument. The prosecutor claimed through his co-employee that the Petitioner's girlfriend, Foster, had told them when they questioned her at her house, that she had house guests for approximately a week, around the subject Valentine's day. On cross-examination the witness conceded that Foster had also stated that the Petitioner had been visiting that week. Because during her cross-examination by the state, Foster had disputed having stated that she had out-of-town house guests that week, and maintained that she didn't have any guests at her house that week other than the Petitioner, and some friends who had stopped in on the afternoon of February 14th, during his closing argument the prosecutor claimed that he knew she was lying. He dismissed defense attacks on the unevidenced hearsay, stating "...I was there, they weren't." Following the overruling of a defense objection to the prosecutor's mischaracterization of the sole state witness's testimony, the defense made no further

objections.

Where prejudicial conduct during closing argument has import which is so extensive as to pervade a trial, and impair dispassionate consideration of the evidence and the merits by the jury, fundamental error occurs. ***Hampton v. State***, 680 So.2d 581 (Fla. 3d DCA 1996). In the instant case, the prosecutor abused his position, and injected his own testimonial attack on the credibility of the defense witness, skewing the evidence to be weighed by the jury. Due to its enormous impact, the improper opinion testimony of a prosecutor has been deemed fundamental error, even in the absence of an objection. ***Olson v. State***, 23 Fla.L.Weekly 357 (Fla.5th DCA February 6, 1998). Such an error is particularly prejudicial where the credibility of the accused and the alleged victim are the sole issues in a case. ***Id***. A prosecutor cannot place his credibility in issue by commenting on witness testimony. ***Holloway v. State***, 23 Fla.L.Weekly 275 (Fla.4th DCA January 30, 1998). Where the totality of a prosecutor's conduct rises to a level of fundamental error which destroys a defendant's right to a fair trial, the need for multiple or contemporaneous objections is obviated. ***Knight v. State***, 672 So.2d 590 (Fla.4th DCA 1996). In the instant case,

one objection to state mischaracterization of the alleged victim's testimony was overruled, and no further objections were made to the continuing characterizations of witness testimony. Where as here, the evidence is very close, improper prosecutorial comments such as referring to testimony or items not in evidence, will warrant a new trial. ***Rosso v. State***, 505 So.2d 611 (Fla. 3d DCA 1987). Here, the prosecutor challenged the defense witness's testimony, based upon his own recollection of a conversation not otherwise in evidence, alleging superior knowledge of the facts and additional reasons for discrediting that witness's testimony. This was patently improper. ***Walker v. State***, 473 So.2d 694 (Fla.1st DCA 1985). The resulting prejudice to the Petitioner, due to the limited evidence against him, requires that his judgment be vacated, and he be granted a new trial.

The Petitioner in the case sub judice argues that ***Maddox*** is inapposite to the instant case, which poses two arguments regarding fundamental error *at trial*. Even if the ***Maddox*** holding is enlarged to include fundamental error at trial, the ease with which fundamental errors such as those in the instant case can be overlooked, as well as the patently unjust result illustrates the need to quash ***Maddox***. The Supreme Court is asked to exercise its

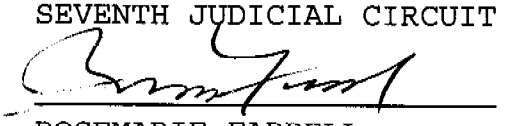
jurisdiction to vacate the instant decision, and rule on the merits of the several issues raised as fundamental error. The Petitioner urges the Court to enter an order of acquittal based upon insufficient evidence of the charged crime, or alternatively, to remand for a new trial. At a minimum, the Supreme Court is asked to quash the order of affirmance, and remand the matter to the Fifth District Court of Appeal for review on the merits.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court vacate the decision of the Fifth District Court of Appeal, and reverse the judgment and sentence of the trial court based upon insufficient evidence that the act charged in the information occurred, or alternatively, remand for a new trial. In the alternative, the Petitioner asks that the per curiam affirmance relying upon ***Maddox*** be quashed, and the matter remanded with instructions for the District Court to decide the appeal on the merits.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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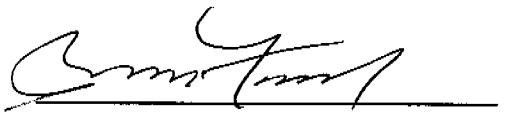
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Charles Arthur Jerry, this 21st day of December, 1998.



ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 12 point Courier New font, a font that is not proportionally spaced.

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CHARLES ARTHUR JERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 97-2308
	)	CASE NO. 93,828
STATE OF FLORIDA,	)	
	)	
Respondent,	)	
	)	

APPENDIX

Appendix A- Initial Brief of Appellant filed in DCA Case No. 97-2308

Appendix B- ***Jerry v.*** State, 715 So.2d 1141 (Fla.5th DCA 1998)

Appendix C- ***Maddox v.*** State, 708 So.2d 617 (Fla.5th DCA 1998)

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APPENDIX

Appendix A- Initial Brief of Appellant filed in DCA Case No. 97-2308

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF
THE STATE OF FLORIDA

CHARLES A. JERRY,

Appellant,

vs. CASE NO.: 97-2308

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR APPELLANT

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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF
THE STATE OF FLORIDA

CHARLES A. JERRY,

Appellant,

vs. CASE NO.: 97-2308

STATE OF FLORIDA,

Appellee.

STATEMENT OF THE CASE AND FACTS

On March 3, 1997 Charles A. Jerry, Jr., the Appellant herein, was arrested and charged with armed robbery and petit theft on February 14, 1997 at 1:30 a.m., in violation of Fla. Stat. Sections 812.13 (2)(a) and 812.014 (1997). (R I, 81) Reportedly, Jerry had used a small caliber handgun to rob a homeless man of his $35.00 weekly paycheck. (R I, 81) At his first appearance the following day, the Appellant was determined indigent, a public defender was appointed, and bond was set at $100,000. (R I, 84, 85) No action was taken on the amount of bond at a hearing on March 24, nor at an arraignment on April 1, 1997 at which the Appellant entered his not guilty plea. (R I, 87-90) Defense motions for temporary release so that Jerry could see his father before he died, and to attend the funeral, were ignored by the court. (R I, 92-3, 98-9) Appellant's April 21, 1997 motion for release on recognizance or reduction of bail was denied by Judge Holcomb following a hearing on May 7, 1997. (R I, 102-3)

Jerry was tried by a jury on May 14, 15, and 16, 1997, before Judge John Dean Moxley, Jr. (R II, 1-200; III, 201-304) Despite extensive local press coverage of the Appellant's suspected involvement in a number of armed robberies, and several murders, prior to his trial in the instant case, there were no related motions by defense counsel, nor were prospective jurors queried regarding likely exposure to the news articles, and the corresponding impact if any. (R II, 7-113) Following selection and swearing of the jury, in his preliminary instructions, Judge Moxley admonished the jurors not to read the local sections of either the *Orlando Sentinel* or *Florida Today* newspapers. (R II, 113-17, 124) After the jury was excused for the evening, defense counsel made a motion in limine in order to preclude any references to the alleged fact that the Appellant had dropped a vial of cocaine during the alleged robbery and had required the victim to pick it up. (R II, 128-29) The court reserved ruling, pending development of the testimony at trial. (R II, 129) The defense also presented the court with its alibi witness list, prior to the court adjourning at approximately noon. (R II, 130) When the court reconvened the following afternoon, the jurors were given additional instructions, and opening statements were heard. (R II, 130-147; 147-160) During the state's opening statement, a defense objection to the characterizations of the victim made by the assistant state attorney, as "testimony" was overruled. (R II, 148) An additional objection made as the state broached reference to the alleged vial of crack, was addressed by the state's voluntary compliance with the earlier defense motion in limine. (R II, 152-3)

The states's case against the Appellant consisted of one witness, the alleged victim, James A. Peterkin. (R II, 160-178) Peterkin testified that he was homeless, but that he performed upkeep and odd jobs around a Texaco station in Melbourne to earn some money.

(R II, 162) The alleged victim stated that he had known Jerry for about a year and a half, during which time he had seen him about eight times. (R II, 163-4) Although Peterkin knew who the appellant was, he had never conversed with Jerry, and would walk the other way when he saw him. (R II, 164-5) Peterkin testified that in the early morning hours of February 14, 1997, after having been paid, he bought a pack of cigarettes and a little bottle of liquor at a house on Stone Street in Melbourne, and crossed the street to the side of the vacant building, which had formerly been Spain's Bar. (R II, 165-8, 180) As he was crossing the street, Peterkin saw a man whom he identified as Jerry, calling to him. (R II, 163, 167-8) Peterkin answered, but kept walking, and Jerry walked alongside of him, and put his arm around him, saying that he wanted to talk. (R II, 167-8) Some people whom he knew had begun to approach Peterkin, but Jerry reportedly told them to leave them alone so they could talk. (R II, 169) When the other people moved away, Jerry allegedly asked Peterkin where his money was and told him to give it up. (R II, 170-1) Two defense objections to Peterkin's testimony as narrative were overruled. (R II, 170-1) Peterkin said that when he tried to turn and get away, the appellant grabbed him around the neck, and a scuffle followed. (R II, 171-2) By Peterkin's account, during the scuffle, Jerry drew a .38 revolver, stuck it in Peterkin's ear, and forced him to crawl on the ground to retrieve a personal item which had fallen out Jerry's pocket. (R II, 174) Peterkin gave up his money as soon as the gun had been placed to his ear. (R II, 174-5) When the state asked the witness to repeat his account of what had happened when he was on the ground, a defense "asked and answered" objection was sustained. (R II, 175-6) Following the robbery, the assailant held a gun on Peterkin, forcing him to leave in the opposite direction of the bystanders. (R II, 177) Peterkin went back to the Texaco station, and finding no one there, left to "doctor" his neck, which he claimed by that time had begun

swelling up. (R II, 177)

On cross-examination, Peterkin testified that he had known eight or nine of the fifteen or twenty people who had been there that night, and that the area in which the robbery occurred had been well-lighted. (R II, 181-2, 185) The alleged victim had not sought medical attention at any time following the incident, had not missed any work, nor had he reported the incident to the police for five days. (R II, 185-7) In his signed report to the police, Peterkin described his assailant as being between five feet eight or nine inches, and weighing around one hundred sixty pounds, as compared to the Appellant's actual height of five feet eleven inches and weight of between two hundred and twenty and two hundred and thirty pounds. (R I, 81; II, 187; III, 222) In his report, Peterkin had claimed that his assailant had grabbed him around the neck from behind, as opposed to from alongside of him as he testified in court. (R II, 191-3) While Peterkin had testified that he was robbed of his entire thirty five dollars pay, he conceded that the amount was actually closer to thirty two dollars. (R II, 194) Peterkin also admitted that at an earlier hearing he had testified that the entire incident had lasted four to five minutes, as compared to his in-court testimony that the incident had lasted about eleven minutes. (R II, 196-8) Peterkin acknowledged that in the earlier testimony he had stated that a lot of the people on the street that night had seen what had happened. (R II, 199) Upon a sustained state objection, additional testimony was read, clarifying that "...nobody would have the balls enough to come and testify against him." (R II, 199) On redirect examination, the state clarified that the incident occurred on Friday. (R III, 206) Following this testimony the state rested, and the defense motion for judgment of acquittal was denied. (R III, 209-10)

Following a brief recess, the defense called Officer Schnider, the arresting officer. (R

I, 81; III, 211) However, in a bench side conference, the state announced that Schnider had been allowed to leave. (R III, 211) Without protest, the defense next called Nina Foster, the Appellant's girlfriend and alibi witness. (R III, 212) According to Ms. Foster, she borrowed her mother's car to pick up Jerry when he stayed at her home in Cocoa, since Jerry didn't have a car, and her car needed an engine. (R III, 213-4, 224-5) Foster testified that she had picked up the Appellant on Tuesday, February 11th at 7:00 pm as he had requested her to do but he hadn't been ready. (R III, 215-6) Jerry had stayed with Foster during that week, and Foster particularly remembered Thursday evening, February 13, 1997 since Jerry had cooked dinner for her and her two children for the first time. (R III, 216-7) That evening they had watched television, Jerry had had a couple of beers, and they had gone to bed at around 11:30 pm. (R III, 217-8) Jerry had announced that he was going to buy her white roses the following day for Valentine's, but he missed his opportunity by having slept in the following morning. (R III, 217, 221) Foster was upset with the Appellant, and when she got home from work at 3:00 pm on February 14th, they argued. (R III, 221) However, when her children got home, they decided to forget about the incident, and to go do something together to have fun. (R III, 221) Foster and Jerry and the two children went to the nearby high school to race the children's go-cart. (R III, 221) Foster had never seen the Appellant with a gun in the year she had known him (R III, 213; 221-2) She confirmed that the only means of transportation to and from her home in Cocoa was via her mother's car. (R III, 222) During cross-examination the state attorney reminded the witness of a visit that he and Tom Williams, an investigator from the state attorney's office, had paid to her and her neighbors. (R III, 223) The state attorney asked Foster if she hadn't told them that she had had some relatives or out-

of-town guests at her house that week. (R III, 223) Foster stated that she had told him that some friends of hers had stopped by on the afternoon of February 14, 1997. (R III, 223-4) When asked how she expected Jerry to buy her flowers when he had not worked from February 11-16, when he was visiting her, she responded that he operated a lawn service with her children on week-ends, and that she only expected the flowers because he said he was going to buy them. (R III, 226-7) Defense objections to this line of questioning as irrelevant and calling for speculation, were overruled. (R III, 227) Following Foster's testimony, the defense renewed its motion for judgment of acquittal, which was again denied. (R III, 228)

The state called the state attorney's office investigator, Thomas Williams, as a rebuttal witness. (R III, 229) Williams testified that he and the assistant state attorney had gone to see Foster on April 21, 1997, and that she had told them that she had had company the entire week of Valentine's Day. (R III, 230-1) On cross-examination the witness admitted that he had taken no notes, nor had he taped the interview with Foster. (R III, 232) Although he hadn't found out who any of the guests were, he did admit that Foster had stated that Jerry was one of them. (R III, 233) Following cross and redirect examination, the jury was sent home for the evening. (R III, 234) Another defense motion for judgment of acquittal was made and denied. (R III, 234-5) The charge conference was held, the Glisson Rider was considered and habitual offender enhancement was discussed. (R III, 236-7) Because firearm possession was charged as an element of the crime, the state did not ask for firearm enhancement. (R III, 243-4) On the morning of May 16, 1997, the verdict forms were reviewed, and the jury heard closing arguments. (R III, 243-4; 245-281) During the state's initial closing argument, a defense objection to the mischaracterization of the testimony and

motives of the alleged victim-witness was overruled. (R III, 248) During this portion of the state's closing, without objection, the assistant state attorney accused the defense alibi witness of lying, based upon her earlier alleged statement to him and the state attorney's office investigator, stating, "I was there and they weren't." (R III, 250-4) The state challenged the Appellant's alibi on the evening of February 14, 1997 because Foster hadn't specifically stated what they had done following the go-cart racing that evening. (R III, 252) In the defense closing, it was argued that the crime was alleged to have taken place on the morning of February 14, 1997, not the morning of February 15, 1997. (R III, 259) In final closing, the assistant state attorney stated that so long as the state proves that the crime occurred within twenty-four hours on either side of the date alleged, the state has met its burden of proof regarding the date on which the crime was charged as having occurred. (R III, 278-9) Following closing arguments, the jury was instructed. (R III, 281-99) The court stated that the state had only to prove that the alleged crime was committed within twenty-four hours of the date charged. (R III, 291-2) The jury returned its verdict of guilt of robbery with a firearm. (R I, 105; III, 300) Following polling and final instructions from the court, the jury was dismissed. (R III, 301-302) A presentencing investigation was ordered, and sentencing was initially set for June 27, 1997. (R III, 303)

On July 18, 1997 a hearing was held pursuant to Fla. Stat. Section 775.084 (3)(a) before Judge Moxley to determine whether the Appellant should be sentenced as a habitual felony offender. (R I, 1-63, 122-3) Two law enforcement witnesses were presented by the state. Over a defense relevancy objection, Warren, the first witness testified that in 1995 Jerry had told him that "he had started jacking people and become addicted to it." (R I, 6-7) A

defense objection that the state was leading the witness was sustained (R I, 7) Defense objection to a question concerning whether or not this witness felt that the Appellant was a danger to the community, was sustained. (R I, 9) Warren confirmed that fingerprint exhibits presented to him had been taken by him in that same courtroom, several weeks earlier. (R I, 10) On cross-examination, Warren admitted that the Appellant had told him that the only people whom he robbed were drug dealers: "...no gas stations, no old ladies, just drug dealers." (R I, 11) A second witness, Knight, a fingerprint technician confirmed that the fingerprints of the Appellant matched those contained on three prior felony convictions. (R I, 13) The defense called two witnesses, a long-time friend, and a Melbourne police officer. (R I, 15-18, 19-22) Simpson, an officer who had been involved in three or four previous cases involving Jerry, testified that although he had never had any problems with him on those occasions,.there were two sides to Jerry's personality. (R I, 20-1) Although the only persons who would need to fear the Appellant were drug dealers, Simpson stated that the Appellant needed to be on his medication, and that he needed mental help. (R I, 20-2) On cross-examination Simpson stated that Jerry's criminal episodes took place when he was taking illegal drugs, but that when he was taking his medication, he didn't deal with illegal drugs. (R I, 22-3) On redirect examination, Simpson confirmed that although Jerry had been investigated in connection with several murder cases, he had never been charged with murder. (R I, 24) Finally, Jerry testified that prior to entering jail, he had been prescribed thorazine and lithium for mood swings and behavioral problems, that he had had three previous psychiatric commitments, and that he had been addicted to cocaine since he was fourteen years old. (R I, 26) He also stated that he had had problems with his public defender, who had

refused to bring negative news coverage suggesting that Jerry had been a suspect in several murders over the past several years, to the attention of the trial court. (R I, 30-1) Nor had these concerns been addressed at jury selection. (R I, 31) Nothing had been said or done about an encounter which Jerry and the Bailiff had had with one of the jurors, when the Appellant was being taken to the rest room in handcuffs. (R I, 33, 59) The Appellant felt that his attorney had worked with the state attorney in order to find him guilty, so Jerry had filed a Bar complaint against the public defender, and the defender had sought to withdraw. (R I, 30, 31, 33, 34) The public defender had thought it unnecessary to raise the possible prejudice issue since those were murders and this case was an armed robbery. (R I, 31) Because the crime didn't fit his "MO," Jerry's public defender had been confident that he was going to win the case at trial. (R I, 34) Jerry's counsel at sentencing confirmed Jerry's indigency, and wish to have a public defender appointed for purposes of appeal. (R I, 35-6) During cross-examination, the Appellant placed upon the record that his admissions about having robbed drug dealers were made when he came forward as the sole witness to help convict a man of murder. (R I, 41-42) During redirect examination, Jerry stated that he believed that the news articles naming him as the suspect in two area murders tainted the jury, and also had an impact upon the way he was prosecuted in the instant case. (R I, 44) Following testimony, the presentencing investigation was reviewed and confirmed as accurate. (R I, 49-52) The Appellant confirmed that he had been given notice of the state's intention of seeking habitual offender sanctions, when notice could not be located in the court file. (R I, 53) The state argued that the Appellant was dangerous to the community, and should be sentenced to life in prison. (R I, 54-5) The defense argued for leniency, given the documented problems with

Appellant and his trial counsel, and the deficiencies of the trial itself. (R I, 59-61) If the Appellant were to be habitualized, his counsel argued that, under all of the circumstances, a guidelines sentence should be imposed. (R I, 61) The appellant's sentencing guidelines range was from 59.7 to 99.5 state prison months. (R I, 155-6) The court deferred sentencing to consider the matters in evidence and arguments presented. (R I, 62)

A second sentencing hearing before Judge Moxley was held on August 15, 1997. (R I, 64-79, 124-7) The court reviewed the Appellant's juvenile and adult criminal record, and determined that he met the criteria for habitualization as a felony offender. (R I, 72) The court reviewed previous opportunities for rehabilitation and lenient treatment. (R I, 10, 11) When given an opportunity to address the court, the Appellant reiterated the problems he had experienced at trial, and offered to present copies of the articles in question to the court. (R I, 75-6) The court stated that Jerry was not being sentenced for uncharged conduct, he was being sentenced for the robbery of Mr. Peterkin. (R I, 76) The Appellant stated that he was innocent of that crime. (R I, 77) The court adjudicated the Appellant guilty and sentencing him as a habitual felony offender to prison for the term of the rest of his natural life. (R I, 77, 128-33, 134-9) The judge also required that the Appellant serve a mandatory minimum term of three years for possession and use of a firearm during commission of the armed robbery. (R I, 77) The Appellant was advised of his right to appeal, determined indigent and appointed a public defender. (R I, 77-8, 150-3) A notice of appeal was filed on August 15, 1997. (R I, 142) This appeal follows.

SUMMARY OF ARGUMENT

POINT ONE: Where the charging documents, state witness, defense alibi witness, and argument addressed a crime alleged as having occurred at 1:30 a.m. on Valentine's Day in 1997, it was fundamental prejudicial error for the trial court to unilaterally lower the burden of proof chargeable to the state, in instructing the jury. Rather, the defense motion for judgment of acquittal should have been granted.

POINT TWO: Fundamental error warranting a new trial occurred where the prosecutor in his closing argument, employed personal testimonial of having superior knowledge based upon his contact with the defense alibi witness, which convinced him that she was lying. This error was particularly prejudical where the trial was a credibility duel between the alleged victim-witness for the state, and the defense alibi witness.

ARGUMENT

POINT ONE

WHERE THE APPELLANT PRESENTED AN UNREFUTED ALIBI FOR THE DATE THE CRIME WAS CHARGED AS HAVING BEEN COMMITTED, IT WAS ERROR FOR THE TRIAL COURT TO ENLARGE THE POSSIBLE TIME PERIOD FOR THE CHARGED ACT.

Fla. R. Crim. P. 3.140 (d)(3) requires that each charged count in an indictment or information on which a defendant is to be tried contain allegations stating as definitely as possible the time and place of the commission of the offense charged. Reasonable doubts regarding the construction of a statement of particulars concerning an information are to be resolved in favor of a the defendant. Fla. R. Crim P. 3.140 (n). In the instant case, the charging document, the information, and the only state witness testified that the alleged armed robbery took place at 1:30 a.m. on February 14, 1997. (R I, 80, 81; II, 165, 180) The sole state witness, the alleged victim, testified to events which were to have transpired in the early morning hours of Valentine's Day, 1997. (R II, 165) While the sole defense witness testified to the Appellant's presence with her from February 11 to 16, 1997, detailed testimony sufficient to establish alibi was presented regarding the specific date and time that the crime was alleged as having occurred. Where the Appellant had an unrefuted alibi for his whereabouts at that date and time, it was error for the court to instruct the jury at the conclusion of the evidence and argument that the state's burden of proof regarding the date and time of the crime could be met if the crime were determined to have occurred within twenty-four hours on either side of the date charged, without any previous discussion, agreement or notice to the defense. The trial court's giving of an incomplete and inaccurate instruction on

law related to an element of the offense during jury instruction, even without objection constitutes fundamental error. Jones v. State, 666 So.2d 995 (Fla. 5th DCA 1996).

Although time is not ordinarily a substantive part of an information, a variance between the dates proved at trial and those alleged in the information cannot be permitted where it surprises or hampers the defendant in preparing his defense. Tingley v. State, 549 So.2d 649 (Fla. 1989). Here, the variance between the date and time charged and addressed at trial and the seventy two hour period announced by the trial court at the conclusion of the trial and arguments, both surprised and hampered the preparation of the defense. There was no discussion nor agreement to expand the time period in which the crime was alleged as having been committed, before the court's unilateral revision of the date of the crime in the information during pre-deliberation jury instructions, after both the state and defense had rested.

Where the state failed to prove that the Appellant robbed the alleged victim on the date and time specifically charged, and failed to allege that the charged conduct occurred at any other date and time, until closing argument rebuttal, the defense motion for judgment of acquittal should have been granted.

POINT TWO

PROSECUTORIAL TESTIMONIAL AGAINST THE ALIBI WITNESS DURING CLOSING ARGUMENT WAS FUNDAMENTAL PREJUDICAL ERROR WHICH REQUIRES A NEW TRIAL.

No weapon was ever found, and only the testimonial evidence of the alleged victim was presented by the state at Appellant's trial. Yet the prosecutor buttressed this deficiency by testifying to his superior ability to judge the noncredibility of the defense alibi witness based upon facts not in evidence: vicariously, during rebuttal witness testimony of an investigator from the state attorney's office, and directly, throughout closing argument. (R III, 231, 250-5) The prosecutor claimed through his co-employee that the Appellant's girlfriend, Foster, had told them when they questioned her at her house, that she had house guests for approximately a week, around the subject Valentine's day. (R III, 231-2) On cross-examination the witness conceded that Foster had also stated that the Appellant had been visiting that week. (R III, 233) Because during her cross-examination by the state, Foster had disputed having stated that she had out-of-town house guests that week, and maintained that she didn't have any guests at her house that week other than the Appellant, and some friends who had stopped in on the afternoon of February 14th, during his closing argument the prosecutor claimed that he knew she was lying. (R III, 222-224) He dismissed defense attacks on the unevidenced hearsay, stating "...I was there, they weren't." (R III, 254) Following the overruling of a defense objection to the prosecutor's mischaracterization of the sole state witness's testimony, the defense made no further objections.

Where prejudical conduct during closing argument has import which is so extensive as to pervade a trial, and impair dispassionate consideration of the evidence and the merits by the

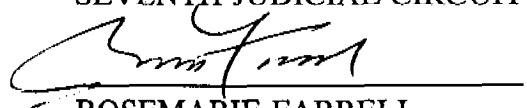
jury, fundamental error occurs. Hampton v. State, 680 So.2d 581 (Fla. 3d DCA 1996). In the instant case, the prosecutor abused his position, and injected his own testimonial attack on the credibility of the defense witness, skewing the evidence to be weighed by the jury. Due to its enormous impact, the improper opinion testimony of a prosecutor has been deemed fundamental error, even in the absence of an objection. Olson v. State, 23 Fla.L.Weekly 357 (Fla.5th DCA February 6, 1998). Such an error is particularly prejudicial where the credibility of the accused and the alleged victim are the sole issues in a case. Id. A prosecutor cannot place his credibility in issue by commenting on witness testimony. Holloway v. State, 23 Fla.L.Weekly 275 (Fla.4th DCA January 30, 1998). Where the totality of a prosecutor's conduct rises to a level of fundamental error which destroys a defendant's right to a fair trial, the need for multiple or contemporaneous objections is obviated. Knight v. State, 672 So.2d 590 (Fla.4th DCA 1996). In the instant case, one objection to state mischaracterization of the alleged victim's testimony was overruled, and no further objections were made to the continuing characterizations of witness testimony. Where as here, the evidence is very close, improper prosecutorial comments such as referring to testimony or items not in evidence, will warrant a new trial. Rosso v. State, 505 So.2d 611 (Fla. 3d DCA 1987). Here, the prosecutor challenged the defense witness's testimony, based upon his own recollection of a conversation not otherwise in evidence, alleging superior knowledge of the facts and additional reasons for discrediting that witness's testimony. This was patently improper. Walker v. State, 473 So.2d 694 (Fla.1st DCA 1985). The resulting prejudice to the Appellant, due to the limited evidence against him, requires that his judgment be vacated, and he be granted a new trial.

CONCLUSION

Based upon the arguments presented and the authorities cited, the undersigned Counsel requests that this Honorable Court reverse the judgment and sentence of the trial court, or alternatively, remand for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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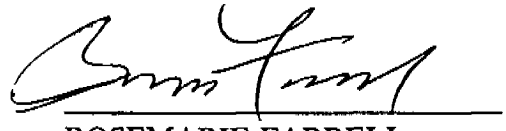
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Fl 32118, in his basket at the Fifth District Court of appeal, and mailed to Charles A. Jerry, this 3rd day of March, 1998.



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