ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CHARLES ARTHUR JERRY,

Petitioner,

v. CASE NO. 93,828

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #397024

LORI E. NELSON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0971995
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND FACTS:

Respondent provides the following facts in support of its brief on the merits:

The information stated that the armed robbery occurred on February 14, 1997. (Vo. 1, R 80). February 14 was a Friday. (Vol 3, Tr 215). At trial, the victim first testified that he was robbed in Melbourne, Florida after he was paid in the early morning hours of February 14. (Vol 2, Tr 165-166). On redirect, when the prosecutor asked the victim to clarify the date on which the crime occurred, the victim testified that he was robbed after being paid on Friday. (Vol 3, Tr 206).

Nina Foster, petitioner's girlfriend, testified that she, her children and petitioner stayed at her house in Cocoa, Florida, during the week that the crime occurred. (Vol 3, Tr 222-223). She testified that petitioner stayed with her from February 11 through February 16, and did not have transportation available to him. (Vol 3, Tr 215, 218, 222, 225). She testified that no out-of-town guests had stayed with her. (Vol 3, Tr 223). Ms. Foster testified that she remembered the prosecutor and an investigator, Tom Williams, coming to talk to her, but that she did not tell them that she had relatives or out-of-town guests during the week. (Vol 3, Tr 223).

The state called Mr. Williams as a rebuttal witness. Mr. Williams testified that he and the prosecutor had talked with Ms.

Foster, and that Ms. Foster stated that guests had stayed with her during the week that the crime occurred. (Vol 3, Tr 231-232). On Cross-examination, Mr. Williams testified that he did not take notes or record the conversation with Ms. Foster. (Vol 3, Tr 232). On redirect, Mr. Williams testified that he asked Ms. Foster to "go on tape" but she declined to do so without consulting a lawyer. (Vol 3, Tr 233).

During closing argument, the prosecutor argued that the victim's testimony could be interpreted to mean that the victim was robbed after being paid late Friday night, going into the next morning. (Vol 3, Tr 251, 277). Defense counsel argued that the defendant had testified that he was robbed in the early morning on Friday. (Vol 3, Tr 259, 263, 264). The prosecutor further argued that the defense had attempted to suggest that the investigator didn't record the conversation with Ms. Foster because he was making it up, or didn't want to make a recording. (Vol 3, Tr 253-254). The prosecutor then said "... I was there, they weren't. And I know that there was an attempt to tape record it. I mean, that's what Mr. Williams said... They made it sound like there was something suspicious because Mr. Williams didn't record this conversation. But he tried to record this conversation." (Vol 3, Tr 254).

At the charge conference, the trial judge asked whether the jury instructions should state that the "date of this offense is

February 14, twenty-four hours either side?" (Vol 3, Tr 238). The prosecutor replied, "Correct," and defense counsel did not object. (Vol 3, Tr 238). The jury was instructed that "The State must prove that the crime was committed on February 14, 1997, or twenty-four hours either side thereof." (Vol 3, Tr 292). Defense counsel did not object to the instruction. (Vol 3, Tr 292).

On direct appeal, the Fifth District Court of Appeal per curiam affirmed without written opinion, citing to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998). See Jerry v. State, 715 So. 2d 1141 (Fla. 5th DCA 1998).

SUMMARY OF ARGUMENT

POINT ON APPEAL: In the instant case, the per curiam affirmance of the Fifth District Court of Appeal cited to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, 718 So. 2d 169 (Fla. 1998), which is currently pending review in this Court. In citing to Maddox, however, the Fifth District did not expand the holding of Maddox, and did not hold that fundamental error no longer exists with regard to trial errors. Further, petitioner cannot show fundamental error with respect to the alleged trial errors. The decision below should be affirmed.

STATEMENT CERTIFYING FONT

The undersigned hereby certifies that this brief is submitted using Courier New font, 12 point type.

ARGUMENT

POINT ON APPEAL

IN THE INSTANT CASE, THE PER CURIAM AFFIRMANCE OF THE FIFTH DISTRICT COURT OF APPEAL DID NOT ABOLISH THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO TRIAL ISSUES.

In the instant case, jurisdiction was granted because the per curiam affirmance of the Fifth District Court of Appeal cited to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, 718 So. 2d 169 (Fla. 1998), which is currently pending review in this Court. Petitioner notes that he raised only trial errors, rather than sentencing errors, on direct appeal. He argues that, by citing to Maddox, the Fifth District in effect expanded the holding of Maddox and held that "there is so[sic] longer any fundamental error in either trial or sentencing contexts." (Petitioner's brief, 16).

In Maddox, the Fifth District Court of Appeal held that under recent amendments to the Florida Rules of Appellate Procedure, fundamental error no longer exists in the sentencing context, and that no sentencing error can be considered in a direct appeal unless the error has been preserved for review. Maddox, 708 So. 2d at 619.

The Fifth District noted in Maddox that according to recent caselaw from this Court, fundamental error exists only with regard to trial errors. Id. (citing Summers v. State, 684 So. 2d 729, 729(Fla. 1996) and Archer v. State, 673 So. 2d 17, 20 (Fla.), cert.

Denied, ___ U.S. ___, 117 S.Ct. 197, 136 L.Ed. 2d 134 (1996). The Fifth District expressly stated, "It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors." Maddox, 708 So. 2d at 619.

It is clear from Maddox that the Fifth District Court of Appeal recognizes that fundamental error exists with regard to trial errors. By citing Maddox in the instant case, the Fifth District merely recognized that petitioner had not shown fundamental error with regard to the errors which he alleged were committed during his trial.[1]

Moreover, contrary to petitioner's arguments, he has not demonstrated fundamental error with regard to the alleged trial errors. Petitioner alleges that two unpreserved trial errors constituted fundamental error. (Petitioner's Brief, 19-20) First, he alleges that fundamental error occurred when the jury was improperly instructed that the state could show the robbery was committed within 24 hours before or after the date charged in the

---

[1]Petitioner additionally states that Maddox was wrongly decided, and "adopts and incorporates by reference herein, Maddox's arguments ..." (Petitioner's brief, 20). This is improper. In any event, Respondent notes that the instant case does not concern the issue in Maddox -- whether fundamental error exists with regard to sentencing errors, and whether unpreserved sentencing error can be considered on direct appeal. Maddox, 708 So. 2d at 619. In the instant case, petitioner raised only trial errors on direct appeal. He alleges that the Fifth District has effectively expanded Maddox and held that fundamental error no longer exists with respect to trial errors.

information. Second, he alleges that the prosecutor's comment during closing argument constituted fundamental error.

In the instant case, the information stated that the armed robbery occurred on February 14, 1997. (Vol 1, R 80). Petitioner argues that the jury was improperly instructed that the state could show the robbery was committed within 24 hours before or after the date charged in the information. He argues that the instruction was, in effect, an improper variance from the date charged in the information, which hampered the preparation of his defense.

The issue was not preserved for appeal and petitioner cannot show fundamental error. Where time is not an element of the charged offense, there can be a variance between the dates proved at trial and those alleged in the information as long as the defendant is not surprised or hampered in preparing his defense. See Tingley v. State, 549 So.2d 649, 650 (Fla. 1989). The state must prove that the crime was committed before the return date of the indictment or information and within the applicable state of limitations. Id. Where there is a one day difference between the date alleged in the charging document and that shown by the evidence at trial, the discrepancy is not prejudicial if the defense has deposed witnesses and knows the sequence of events that occurred on those dates. Craig v. State, 585 So.2d 278, 281 (Fla. 1991)(where indictment charged that offense occurred on March 31, but evidence showed it occurred on March 30, defense was not

prejudiced because defense had deposed witnesses and knew the sequence of events that occurred on both dates). To preserve the issue for appeal, defense counsel must object and articulate the surprise or prejudice suffered by the defense as a result of the variance. Wykle v. State, 659 So.2d 1287, 1289 (Fla. 5th DCA 1995).

As noted by Petitioner, he has not preserved this issue for appeal. Jury instructions are subject to the contemporaneous objection rule and, absent a timely objection, can be raised on appeal only if fundamental error occurred. State v. Delva, 575 So. 2d 643, 644 (Fla. 1991). Petitioner did not object to the jury instruction at trial, either when it was proposed at the charge conference or when it was read by the trial judge. (Vol 3, Tr 238, 291-292). Nor did petitioner object when the prosecutor argued, in closing, that the victim's testimony could be interpreted to mean that he was robbed late Friday night, February 14. (Vol 3, Tr 251-253). Petitioner failed to object to the instruction, or to articulate any surprise or prejudice suffered as a result of the alleged variance between the time alleged in the information and that proven at trial or stated during the jury instructions. Wykle, 659 So.2d at 1289. Further, he did not move for a judgment of acquittal regarding the difference in the date alleged and that proven at trial. This issue is not preserved and may not be raised on appeal. Delva, 575 So. 2d at 644; See generally, Castor v.

State, 365 So. 2d 701 (Fla. 1976).

Petitioner argues that there was no need for a contemporaneous objection, because the trial court committed fundamental error by giving an incomplete or inaccurate instruction on an element of the charged crime. However, time is not a substantive element of the charged offense of robbery. §812.13, Fla. Stat. (1997); See Tingley, 549 So.2d at 650. The instruction at issue was not objected to, and did not concern an element of the charged offense. The issue is not preserved and may not be raised for the first time on appeal.

Petitioner cannot show fundamental error sufficient to overcome his lack of a contemporaneous objection. There was no fatal variance between the date alleged in the information and that stated in the jury instructions, and petitioner cannot show that he was surprise or hampered in preparing his defense. As noted supra, even where the evidence at trial shows that the offense was committed a day later than the date alleged in the information, the discrepancy is not prejudicial if the defense has deposed witnesses and knows the sequence of events that occurred on those dates. Craig, 585 So.2d at 280-281. In the instant case time was not an element of the charged offense, and the jury instruction did not constitute an improper variance from the date alleged in the information.

In any event, petitioner cannot show prejudice from the

alleged variance. The defense engaged in discovery and was aware of the sequence of events concerning the charged crime, and petitioner's girlfriend provided an alibi for the twenty-four hours before and after the charged date.

The information alleged that the robbery occurred on February 14. February 14 was a Friday. (Vol 3, Tr 215). The victim testified that he was robbed after he was paid on Friday. (Vol 2, Tr 165-166; Vol 3, Tr 206). The prosecutor argued that the victim's testimony could be interpreted to mean that the victim was robbed after being paid late Friday night, going into the next morning. (Vol 3, Tr 251, 277). Defense counsel argued that the defendant had testified that he was robbed in the early morning of the fourteenth. (Vol 3, Tr 259, 263, 264). Defense counsel was free to argue, and did, that the victim's testimony was not credible. (Vol 3, Tr 264-265, 267). The defense conducted discovery, questioned petitioner at an earlier hearing or deposition (Vol 2, Tr 194-195), and failed to object or articulate any prejudice from the alleged variance. The defense was aware of the chronology of events surrounding the charged crime, and never argued that the defense was somehow hampered by the complained of jury instruction.

Additionally, petitioner's girlfriend provided an alibi for both the date alleged in the information and the time period encompassing twenty four hours before and after that date. She

testified that petitioner stayed with her in Cocoa, Florida, from February 11 through February 16, and did not have transportation available to him. (Vol 3, Tr 215, 218, 222, 225). The crime occurred in Melbourne on February 14. (Vol 2, Tr 165). Petitioner cannot show that he was prejudiced in preparing his defense.

Petitioner further argues that his motion for judgment of acquittal should have been granted because the state failed to prove that the crime occurred at the time and date specifically charged. However, petitioner did not raise this issue in any of his motions for judgment of acquittal, and this issue is thus not preserved for appeal. (Vol 3, Tr 210, 228). See generally, Castor v. State, 365 So. 2d 701 (Fla. 1976). Moreover, as previously noted, time was not an element of the crime of robbery. §812.13, Fla. Stat. (1997); See Tingley, 549 So.2d at 650. The defense in the instant case engaged in full discovery, knew the sequence of events of the charged crime, and did not object or allege that the preparation of petitioner's defense had been hampered. It was sufficient for the state to prove that the crime occurred within twenty-four hours of the time charged. Craig, 585 So.2d at 280-281. Petitioner cannot show fundamental error.

Nor can Petitioner show fundamental error with respect to the prosecutor's comment during closing argument. A party's failure to object to improper prosecutorial comments will preclude appellate review, unless the comments are so prejudicial as to constitute

fundamental error. Street v. State, 636 So. 2d 1297 (Fla. 1994), cert. denied, --- U.S. ---, 115 S.Ct. 743, 130 L.Ed. 2d 644 (1995); Jones v. State, 666 So. 2d 995 (Fla. 5th DCA 1996). Fundamental error in closing occurs when the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." Jones, 666 So. 2d at 997 (citing Silva v. Nightingale, 619 So. 2d 4, 5 (Fla. 5th DCA 1993).

Further, the control of prosecutorial comments to the jury is within the trial court's discretion, and the exercise of that discretion will not be disturbed absent a clear showing of abuse. Jones, 666 So. 2d at 997. Counsel is afforded wide latitude in arguing to a jury, and a prosecutor may make legitimate arguments based on logical inferences drawn from the evidence. Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). Counsel is afforded particularly wide latitude in retaliating to comments made by opposing counsel. Hazelwood v. State, 658 So. 2d 1241, 1243 (Fla. 4th DCA 1995)(citing Ferguson v. State, 417 So. 2d 639 (Fla. 1982)).

In the instant case, petitioner cannot show that the prosecutor's comment pervaded the entire trial, and gravely impaired "a calm and dispassionate consideration of the evidence and the merits by the jury." Jones, 666 So. 2d at 997. The prosecutor's comment, that he was present during the investigator's

interview with the defendant's girlfriend, did not comment on facts not in evidence. The comment did not constitute fundamental error sufficient to overcome the lack of a contemporaneous objection.

On cross-examination, Nina Foster, the defendant's girlfriend, testified that she, her children and petitioner stayed at her house during the week that the crime occurred. (Vol 3, Tr 222-223). She testified that no out-of-town guests had stayed with her, and that no car was available for petitioner to drive out of town. (Vol 3, Tr 223). Ms. Foster testified that she remembered the prosecutor and an investigator, Tom Williams, coming to talk to her, but that she did not tell them that she had relatives or out-of-town guests that week. (Vol 3, Tr 223).

The state called Mr. Williams as a rebuttal witness. Mr. Williams testified that he and the prosecutor had talked with Ms. Foster, and that Ms. Foster stated that guests had stayed with her during the week that the crime occurred. (Vol 3, Tr 231-232). On Cross-examination, Mr. Williams testified that he did not take notes or record the conversation with Ms. Foster. (Vol 3, Tr 232). On redirect, Mr. Williams testified that he asked Ms. Foster to "go on tape" but she declined to do so without consulting a lawyer. (Vol 3, Tr 233).

During closing, the prosecutor argued that the defense had attempted to suggest that the investigator didn't to record the conversation with Ms. Foster because he was making it up, or didn't

want to make a recording. The prosecutor then said "... I was there, they weren't. And I know that there was an attempt to tape record it. I mean, that's what Mr. Williams said... They made it sound like there was something suspicious because Mr. Williams didn't record this conversation. But he tried to record this conversation." (Vol 3, Tr 253-254).

The prosecutor's comment "I was there, they weren't," did not comment on facts not in evidence. Mr. Williams had already testified, without objection, that he and the prosecutor were present when he interviewed Ms. Foster. The prosecutor's comment certainly did not pervade the entire trial and prevent the jury from calmly and dispassionately considering the evidence. Jones, 666 So. 2d at 997.

Petitioner argues that he did object to "mischaracterization of the alleged victim's testimony," and that he made no further objection when that objection was overruled. (Petitioner's brief, 26). However, that objection was made in response to a comment which is unrelated to the comment at issue here. Specifically, the objection addressed the prosecutor's summary of the victim's testimony. (Tr 248). The denial of that objection did not obviate the need for an objection to the unrelated prosecutorial comment which is at issue in this appeal.

Respondent respectfully suggests that jurisdiction was improvidently granted, and requests that this Court dismiss the

instant case. Alternatively, respondent argues that the per curiam affirmance of the Fifth District Court of Appeal below did not expand the holding of Maddox v. State, and did not hold that fundamental error no longer exists with regard to trial errors. Further, petitioner cannot show fundamental error with respect to the alleged trial errors. The decision below should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court affirm the decision of the Fifth District Court of Appeal in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #397024
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

LORI E. NELSON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0971995
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by delivery to Rosemarie Farrell, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32114, this 16th day of February, 1999.

Lori Nelson
Counsel for Respondent