

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94, 673

THE STATE OF FLORIDA,

Petitioner,

-vs-

BERNARD EVANS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, Bernard Evans, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "App." followed by the appropriate letter and a colon to indicate the appropriate page number. All references to the Record on appeal and Transcripts will be designated by "R. Vol." and "T. Vol." respectively, followed by the appropriate volume number and a colon to indicate the appropriate page number.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in 12 point Courier New type size and style.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the Third District Court of Appeal which reversed the Defendant's conviction and sentence for second degree murder. (App. A).

The Defendant was charged with murder in the second degree and unlawful possession of a firearm while engaged in a criminal offense. (R. Vol.I.: 1-2).

The State presented Dr. Jay Barnhart, Deputy Chief Medical Examiner in Dade County, who testified that the victim, Thaddeus Scott, had five gunshot wounds on his body. (T. Vol. I: 196). Four projectiles were recovered from the Scott's body. (T. Vol. I: 198-199). Gunshot A entered the victim on the left side, eight inches below the top of the head and a few inches below and behind the left ear, crossed the neck and into the spinal column. (T. Vol.I: 200). Gunshot wound A was an immediate incapacitating wound which means it caused a great deal of tissue damage in and around the spinal cord which causes a loss of function from the neck down. (T. Vol. II: 201).

Gunshot wound B was under the left armpit, where the projectile entered the chest and went into the left lung, through the heart, continued through the right lung and ended up in the chest wall on the right side. (T. Vol. II: 202). Due to this

projectile, the victim would immediately have difficulty breathing and in a very short time, it would be impossible for him to breathe because the bleeding filled up his lung cavities and the lungs would collapse from the bullet holes in his lungs. (T. Vol. II: 204).

Gunshot wound C was on the front of the chest, a little bit to the right of the midline and also came from the left. (T. Vol. II: 205). The bullet entered eight inches below the top of the shoulder and into the pectoralis muscle and near the breast. (T. Vol. II: 205).

Gunshot wound D was on the back of the left forearm, six inches below the top of the shoulder. (T. Vol. II: 206). The bullet went through the bone of the forearm, causing the bone to be fractured in a lot of pieces. (T. Vol. II: 206).

The medical examiner's opinion of the victim's cause of death is multiple gunshot wounds, which caused him to bleed to death from the wounds and also contributed to spinal cord injury. (T. Vol. II: 211).

The State next called Marie Angrand, an identification technician for the City of Miami, who testified that the victim did not have anything in his hands or any weapons near him at all. (T.

Vol. II: 222). A closed pocket knife was found in the victim's pocket. (T. Vol. II: 223).

The State called Sylvia Kennedy Green to the stand. She testified that she lived in an apartment building near Brenda Brown, who she became very close friends with. (T. Vol. II: 234). Green knew the victim for twenty years since she grew up with him. (T. Vol. II: 235). Green knows the Defendant through Brenda Brown since Brown was dating him. (T. Vol. II: 235). However, Brown and Scott were boyfriend and girlfriend for years. (T. Vol. II: 245). Scott went to jail in 1995 or just before 1995. (T. Vol. II: 246). Brown became involved with the Defendant while Scott was in jail. (T. Vol. II: 246). Green testified that she knew that Brown and the Defendant were intimately involved because Brown was pregnant with the Defendant's child. (T. Vol. II: 248). The defense raised an objection and the parties had a sidebar conference. (T. Vol. II: 248-249). The court sustained the objection and instructed the jury to disregard the question and answer. (T. Vol. II: 250-251). The Defendant moved for a mistrial which was denied. (T. Vol. II: 250).

Scott was released from jail and moved back in with Brown. (T. Vol. II: 252-253). The Defendant continued his relationship with Brown by going to Green's house and asking Green's sister to

deliver messages to Brown. (T. Vol. II: 253-254). The Defendant also brought food for Brown and gave it to Green's sister to bring to Brown. (T. Vol. II: 255). On the night before Scott was killed, Green saw the Defendant outside her apartment waiting for Green's sister to come out. (T. Vol. II: 256). The Defendant made a statement to Green that he wanted to kill someone. (T. Vol. II: 256). The defense counsel objected to the question as leading. The objection was sustained and the prosecutor requested a sidebar conference in which he explained that the reason he was leading was so that the witness would not blurt out anything else about Brown's pregnancy. (T. Vol. II: 257). During the sidebar conference, in which the jury was removed from the courtroom, the witness' testimony regarding the statement by the Defendant was proffered. (T. Vol. II: 257-260). The defense objected to the testimony only because he alleged that there was no predicate for the testimony. (T. Vol. II: 261). The defense counsel moved for a mistrial based on the witness's testimony that Brown was pregnant with the Defendant's child. (T. Vol. II: 263). The prosecutor and trial court stated that was not the issue, the objection to that testimony was sustained and it would not be repeated. (T. Vol. II: 263-264).

The trial court heard proffered testimony that the Defendant threatened to kill Scott and Brown if Scott caused Brown to lose the baby. (T. Vol. II: 266). The defense continued to object based on a lack of a proper predicate. (T. Vol. II: 267). The defense counsels stated that they had never heard of Brown having a miscarriage and that the statement lacks trustworthiness. (T. Vol. II: 267). There was no request for a Richardson¹ hearing. The trial court ruled that the statement by the Defendant was admissible with limitations. (T. Vol. II: 270).

The testimony of Sylvia Kennedy Green continued. Outside Green's apartment the night before the murder, the Defendant was crying and drinking and was upset. (T. Vol. II: 277). The Defendant threatened to kill Scott. (T. Vol. II: 277).

The next morning, Brown and Scott were getting into an altercation. (T. Vol. II: 278). Green heard a crash coming from Brown's apartment at eight in the morning. (T. Vol. II: 279). Brown and Scott argued after that. (T. Vol. II: 279). The argument continued throughout the day. (T. Vol. II: 280). At 2 p.m. Green was waiting for the kids to get home from school and she saw Brown crying. (T. Vol. II: 281). Brown told Green that Scott had been hitting her all day. (T. Vol. II: 282). Green testified

¹ Richardson v. State, 246 So. 2d 771 (Fla. 1971)

that she had seen Scott push Brown's head through a wall and push her with his hands on previous occasions. (T. Vol. II: 283).

The Defendant was across the street by the store in his car. (T. Vol. II: 283-284). Nothing was blocking the Defendant's view of Brown's apartment. (T. Vol. II: 285). At about 2:40 p.m. the Defendant went to Brown and asked her what was wrong. (T. Vol. II: 285-286). Brown told the Defendant that she and Scott got into a little something but that she could handle it. (T. Vol. II: 286). The Defendant told Brown that she did not have to take this. (T. Vol. II: 287). Scott was standing in the doorway. (T. Vol. II: 287). Scott asked the Defendant if he had anything to do with this and if he was her man. (T. Vol. II: 287). The Defendant stated that he was her friend. (T. Vol. II: 288). Brown told the Defendant that she could handle it and the Defendant left. (T. Vol. II: 288). Brown told Scott that she wanted him to leave. (T. Vol. II: 288). Scott went inside to get his things. (T. Vol. II: 288). The Defendant came back after about ten minutes. (T. Vol. II: 289). Scott asked the Defendant for a ride to his mother's house. (T. Vol. II: 289). The Defendant agreed. (T. Vol. II: 289). Brown stepped in and said that she did not think it would be wise for the two of them to ride together. (T. Vol. II: 290). Brown and Scott got into a verbal altercation. (T. Vol. II: 290).

The Defendant turned to walk away, turned around and looked at Brown and then at Green and said in a whisper, "I'll put an end to this." (T. Vol. II: 292). The Defendant left in his car and went home. (T. Vol. II: 293).

An individual known as "Macaroni" tried to convince Scott to go up the street to the store so that he can get away from Brown. (T. Vol. II: 295). The Defendant returned and said something to Brown and Macaroni and left again, going back to his house. (T. Vol. II: 298). Macaroni and Scott walked down the street. (T. Vol. II: 296). Green walked right there and stood on the corner. (T. Vol. II: 297). Macaroni and Scott went into the store. (T. Vol. II: 298). Green was there because she felt that something was going to happen. (T. Vol. II: 299). Then she heard a screech of tires from the Defendant's car. (T. Vol. II: 299-300). Green saw the Defendant in his car going in the direction of the store. (T. Vol. II: 302). Green walked faster towards the store. (T. Vol. II: 302). She heard two gunshots. (T. Vol. II: 302). The shots were coming from the store. (T. Vol. II: 302). Green ran to the store. (T. Vol. II: 302). Green ran and ducked behind a van because the Defendant's "car started shooting right in front of the van." (T. Vol. II: 304-305). Green heard another shot and Brown's son, who she did not know was there, screaming, "No!" (T. Vol. II: 307).

Green went around the van. (T. Vol. II: 308). She saw the Defendant standing with one leg outside the car and one leg inside the car. (T. Vol. II: 308). He was holding a .38 snub nose gun in his hand shooting Scott while Scott was backing away from the Defendant. (T. Vol. II: 309). Scott was not attacking the Defendant. (T. Vol. II: 309). Scott did not have a weapon in his hands. (T. Vol. II: 310). Scott fell to the ground. (T. Vol. II: 310). Green left with Brown's son and called 911. (T. Vol. II: 311). The Defendant got in his car and left, screeching away. (T. Vol. II: 311).

It seemed that the first shot hit Scott up high and the second shot grabbed his mid section and with the third shot he fell to the ground. (T. Vol. II: 312-313).

The police arrived and eventually took a statement from Green. (T. Vol. II: 315). Green had told the police that she did not see anything. (T. Vol. II: 315). The defense objected to this line of questioning because they alleged that it was improper rehabilitation because they had not impeached her testimony yet. (T. Vol. II: 315). The court sustained the objection and the prosecutor requested a sidebar conference. (T. Vol. II: 315-316). It was during this sidebar conference that defense counsel stated for the first time that the defense was "blind sighted" by the

direct testimony because the testimony did not come up in her deposition. (T. Vol. II: 317). The court took a recess. (T. Vol. II: 319).

Before bringing the jury back into the courtroom, the court ruled that the prosecutor may ask the witness questions regarding what she told the police. (T. Vol. II: 325).

Green testified that she had not been entirely truthful with the police because she was afraid. (T. Vol. II: 326). Defense counsel cross-examined the witness regarding the fact that she had told the police and him, in deposition, that she did not see the shooting. (T. Vol. II: 327). However, Green testified that she told the police that she saw and heard the shooting but that she had not come around the van to actually see the Defendant shooting. (T. Vol. II: 327). Green told the police that she had seen the shooting about a month before the trial, when she felt safe. (T. Vol. II: 328).

During the cross-examination, the prosecutor objected to a certain line of questioning which was impermissible because of a previous motion in limine. (T. Vol. II: 335). During that sidebar conference, the defense counsel raised the issue that the State had not communicated to the defense counsel the change in Green's testimony. (T. Vol. II: 337). No Richardson hearing was

requested. Instead, the defense counsel moved for a mistrial. (T. Vol. II: 337, 341). The trial court did not rule on the motion. The testimony continued. Green testified that she never told the police about the Defendant's statement the night before the murder that he would kill Scott because no one asked her about anything that happened the night before. (T. Vol. II: 343). Again during another sidebar conference during cross-examination on a prior ruling on a motion in limine, the defense counsel stated that he did not think it was fair that the witness changed her story and they were not advised. (T. Vol. II: 354). The parties were discussing a different issue at the time and thus, there was no response to the statement. (T. Vol. II: 354). Again, no Richardson hearing was requested.

A stipulation was made that the firearm report found that the projectiles from the victim were caliber 38 Special. (T. Vol. II: 359-360).

Detective Albert Garner, the lead investigator on this case, testified that Sylvia Kennedy (Green) identified a photograph of the Defendant as the individual who shot Scott. (T. Vol. II: 367). The Defendant turned himself in to the police. (T. Vol. II: 371). When Garner met with the Defendant in the holding cell, the Defendant immediately stated that "these are the shorts that I was

wearing when I shot that guy yesterday" and he pointed to a pair of shorts that he had with him. (T. Vol. II: 373). There is a tear on the left side of the shorts by the pocket. (T. Vol. II: 374). The Defendant was read his constitutional rights. (T. Vol. II: 375). The Defendant signed a Miranda Rights Waiver Form. (T. Vol. II: 376, 379).

The Defendant made a statement which corroborated Green's testimony except that the Defendant stated that after he agreed to give Scott a ride to his mother's house, the Defendant went home and armed himself with his .38 caliber revolver in case Scott tried anything with him. (T. Vol. II: 383). When he returned, Scott was gone and the Defendant went to play the numbers down the street. (T. Vol. II: 383). The Defendant drove south on 2nd Avenue and turned into the parking lot. (T. Vol. II: 383). The Defendant heard Scott saying, "there goes that f--k ass n----r" to a small group of people in the parking lot. (T. Vol. II: 383). Scott then walked over to the Defendant. The Defendant attempted to get out of his car but Scott pushed him back. (T. Vol. II: 383). When the Defendant tried to get out of his vehicle again, his pocket ripped. (T. Vol. II: 383). The Defendant then reached into the glove box to retrieve his handgun and he fired the gun until it was empty. (T. Vol. II: 384). The Defendant left and went to a friend's house

and then to Naples where he spent the night in a motel. (T. Vol. II: 384). He decided to turn himself in. (T. Vol. II: 384). On the trip back from Naples, the Defendant threw the gun out the window of his car. (T. Vol. II: 384).

The Defendant never stated to Garner that Scott was armed. (T. Vol. II: 384). Garner could not recall whether the Defendant stated that he had tried to leave while Scott was approaching him. (T. Vol. II: 385). The Defendant never stated that Scott threatened to kill him. Scott was only using profanities, yelling and screaming. (T. Vol. II: 385). The Defendant never stated that Scott had a knife on him. (T. Vol. II: 386).

The State rested. (T. Vol. II: 392). The defense counsel renewed his motion for mistrial based on the testimony of Green. (T. Vol. II: 398). The trial court denied the motion. (T. Vol. II: 399). No Richardson hearing was requested. The Defendant moved for judgment of acquittal. (T. Vol. II: 399). After argument from both sides, the motion was denied. (T. Vol. III: 403). The Defendant rested his case. (T. Vol. III: 407). The Defendant unsuccessfully renewed his motion for judgment of acquittal. (T. Vol. III: 408-410).

Defense counsel further inquired of the trial court and prosecutor and for the first time requested a Richardson hearing.

(T. Vol. III: 410-412). A Richardson hearing was then held. (T. Vol. III: 412). The trial court found that there was no discovery violation based on the prosecutor's argument that the State had complied with Rule 3.220(b)(1)(B), Fla.R.Crim.P. and denied the motion for mistrial. (T. Vol. III: 413-415).

During the charge conference, the trial court dismissed the unlawful possession of a firearm while engaged in a criminal offense count. (T. Vol.III: 420,451).

During closing argument, the defense counsel stated that the testimony by Sylvia Kennedy Green "were lies, all lies." (T. Vol. III: 456). The argument went on later that "[r]easonable doubt that Sylvia Green is telling you the truth when she comes before you and says that I lied, in essence I lied. The question you must ask yourselves is, is she lying then? Is she lying now? Can you base your decision upon the statements of someone as incredible as that? I suggest not. (T. Vol. III: 458). Again, the argument continued that, "[t]here are so many inconsistencies in Sylvia Green's testimony. . . Sylvia Green is not capable of being believed, is not credible. There were several holes in her testimony and you all cannot believe her." (T. Vol. III: 460).

The jury returned a verdict of guilty on second degree murder with a firearm and the Defendant was adjudicated guilty. (T. Vol.

III: 531). The Defendant was sentenced to fifteen years imprisonment with a three year minimum mandatory term for the use of a firearm and given credit for time served. (R. Vol. I: 88-90).

The Defendant filed a direct appeal in the Third District. The Third District held that the trial court failed to conduct a timely and adequate Richardson hearing and reversed the case for a new trial. The Third District found that in failing to disclose the testimony to the defense, the State failed to meet its obligations under Rule 3.220(j). Thus, the Third District found that the violation was substantial and undeniably had a negative effect on defense counsel's ability to properly prepare for trial. (App. A).

This petition follows.

QUESTION PRESENTED

WHETHER THE WITNESS'S CHANGED TESTIMONY
SUPPORTS A MOTION FOR A RICHARDSON HEARING AND
RISES TO THE LEVEL OF A DISCOVERY VIOLATION?

SUMMARY OF THE ARGUMENT

The Third District erred in finding that the trial court failed to conduct a timely and adequate Richardson hearing. Green's pre-trial and trial testimony was laid side-by-side for the jury to consider in order to discredit the witness which was favorable to the defense. The inconsistencies in Green's testimony had no effect on the defense trial preparation and strategy. Thus, Green's changed testimony does not support a motion for a Richardson hearing and does not rise to the level of a discovery violation.

ARGUMENT

THE WITNESS'S CHANGED TESTIMONY DOES NOT SUPPORT A MOTION FOR A RICHARDSON HEARING AND DOES NOT RISE TO THE LEVEL OF A DISCOVERY VIOLATION.

This Court has held that changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry. Bush v. State, 461 So. 2d 936 (Fla. 1984). The Third District erred in finding that the trial court failed to conduct a timely and adequate Richardson hearing, that the State failed to meet its obligations under Rule 3.220(j) and that the violation was substantial and undeniably had a negative effect on defense counsel's ability to properly prepare for trial.

In the instant case, the change in Green's testimony did not rise to the level of a discovery violation and did not support a motion for a Richardson inquiry. Green's pre-trial testimony indicates that Green was present at the scene of the crime because, since she was aware of the tension between the Defendant and the victim, she went to the scene because she was "afraid something would happen", and heard the shots fired as she ducked behind a van in the parking lot. (T. Vol. II: 299). Green's trial testimony, that she saw the Defendant firing the shots at the victim, does not change the version of the events that dramatically that the defense

counsel would have materially changed the preparation and trial strategy.

Furthermore, defense counsel on cross-examination questioned Green regarding the fact that she had told the police and defense counsel at deposition that she did not see the shooting. (T. Vol. II: 327). Not only did defense counsel cross-examine Green regarding this controverted testimony, defense counsel's closing argument almost entirely concentrated on the fact that Green's testimony is "not capable of being believed, is not credible." (T. Vol. III: 460). Since the defense counsel was able to argue the inconsistencies in Green's testimony, the change in Green's testimony did not prejudice or harm the Defendant. Even if Green had not changed her testimony, the defense counsel likely would have argued to the jury that Green was not capable of being believed since she was the State's key witness. Thus, the Defendant's trial preparation or strategy would not have been materially different had the change in testimony not occurred. Therefore, the State's failure to disclose the changed testimony to the defense did not rise to the level of a Richardson violation. Bush; Reese v. State, 694 So. 2d 678 (Fla. 1997).

Further, Green testified at trial that she never told the police about the Defendant's statement the night before the murder

that he would kill the victim because no one ever asked her about anything that happened the night before. (T. Vol. II: 343). Defense counsel deposed Green and could certainly have questioned her about events leading up to the crime. According to Green's testimony, no one ever asked her about anything that happened the night before.

Most significantly, the Defendant made a statement to the detective in this case that he in fact, fired the gun at the victim until it was empty. (T. Vol. II: 384). The Defendant's assertions that his actions were made in self defense are belied by the fact that Green testified that there was no weapon in Scott's hands and that Scott was not attacking the Defendant, (T. Vol. II: 309-310), and the testimony of the identification technician who testified that the victim did not have anything in his hands or any weapons near him at all. (T. Vol. II: 222). A closed pocket knife was found in the victim's pocket. (T. Vol. II: 223). Thus, the changed testimony of Green had no impact whatsoever on the Defendant's preparation or strategy for trial. Regardless of which version of events Green testified to, the Defendant's only theory of defense was self defense and he could only argue that the State's witnesses were not credible. This is what he did.

Therefore, the State's failure to disclose the change in testimony did not rise to the level of a discovery violation.

The Third District erred in its findings based on the precedent established in Bush. In Bush, an investigator stated in his deposition that Charlotte Grey, a clerk from a nearby convenience store which had been visited by Bush, had not identified any photographs. At trial, the investigator testified that Grey did identify Bush's photograph during the photo lineup. This Court held that the prosecutor's failure to inform the defense of this change of testimony is not a discovery violation. This Court reasoned that when testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider in order to discredit the witness and is favorable to the defense.

This Court approved of the opinion in Bush in Johnson v. State, 696 So. 2d 326 (Fla. 1997) where this Court held that the State's failure to disclose to defense the fact that the prosecutor had a pretrial meeting with a witness, in which the witness reviewed the photographic lineup, did not warrant a mistrial. This was so because the defense had ample opportunity to impeach the testimony of the witness.

Certainly, the defense in this case had every opportunity to impeach the trial testimony of Green in order to discredit her. The defense counsel also had ample opportunity to object to Green's testimony as soon as the inconsistencies were testified to but chose not to do so. The defense counsel never informed the trial court that the testimony of Green was different than her pretrial statements until, at the conclusion of Green's direct testimony, the prosecutor attempted to question Green on the stand regarding the inconsistencies. Thus, there was no error in allowing the controverted testimony. Reese v. State, 694 So. 2d 678 (Fla. 1997) (court did not err in allowing the controverted testimony where, although the defendant had not been informed of that portion of the statement, defense attorney admitted that he heard state attorney's reference to the testimony in opening statement and had realized at that time that he was not in possession of any such statement but made no objection during opening arguments, made no request and instead waited until four witnesses had been produced and examined to raise any objection).

The Defendant was able and did cross-examine Green regarding her testimonial inconsistencies and impeached her testimony. Further, nearly his entire closing argument focused on Green's testimony not being credible. Thus, he took the testimonial

discrepancies of Green and laid them side-by-side for the jury to consider in order to discredit Green which was favorable to the defense. The jury still convicted the Defendant after considering these inconsistencies. Therefore, there was no error in the trial court permitting the testimony and finding that there was no Richardson violation. The Defendant's conviction should not have been reversed.

This is a classic case where changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry. It is an everyday occurrence that a witness is impeached on the stand with prior inconsistent statements. This case is no different. Where a defendant has the opportunity to discredit the witness by impeachment, the change in testimony does not prejudice the defendant. Furthermore, the defendant's trial preparation and strategy is not materially different where the changed testimony can be impeached. This type of evidence can never support a discovery violation.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that this Court reverse the opinion of the Third District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed to JOHN H. LIPINSKI, Esq., 1455 N.W. 14th Street, Miami, Florida 33125 on this _____ day of _____, 1999.

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APPENDIX TO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
APPENDIX TO BRIEF OF PETITIONER ON THE MERITS was mailed to JOHN H.
LIPINSKI, Esq., 1455 N.W. 14th Street, Miami, Florida 33125 on this
_____ day of _____, 1999.

LARA J. EDELSTEIN
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