ORIGINAL

IN THE SUPREME COURT OF FLORIDA

DARYL W. JERVIS,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

DCA CASE NO. 97-2684

S.CT. CASE NO. 94,933

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DARYL W. JERVIS,	)	
	)	
Petitioner,	)	DCA CASE NO. 97-2684
	)	
versus	)	
	)	S.CT. CASE NO. _____
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

STATEMENT OF THE CASE AND FACTS

The petitioner was found and adjudged guilty of attempted second-degree murder, and was sentenced to the recommended term based on a scoresheet total of 113.8 points. (R97-98, R99, R103-105, R106; T564, T566-567; S155.)

The petitioner appealed his conviction and sentence to the Fifth District Court of Appeal. (R120-121.) On appeal, he argued that the trial court had erred in its ruling on two evidentiary matters, that the correct scoresheet total was 103.8 and indicated a lesser sentence, and that the crime of attempted second-degree murder does not logically exist. On January 22, 1999, the Fifth District Court issued its opinion affirming the petitioner's conviction and sentence. Jervis v. State, 24 Fla. L. Weekly D264 (Fla. 5th DCA January 22, 1999). (Appendix.) In rejecting the petitioner's argument, the district court opined that the evidentiary issue not waived was error but harmless;

rejected the scoresheet argument as unpreserved and cited Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), currently pending for review with this court in case number 92,805 (filed April 23, 1998); and stood silent on the final point.

A notice to invoke this court's discretionary jurisdiction was timely filed on January 16, 1999.

SUMMARY OF THE ARGUMENT

This honorable court has discretionary jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981), to review the instant case, where the Fifth District Court of Appeal cited in its opinion to a case currently pending before this court.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE PURSUANT TO JOLLIE v. State, 405 SO. 2D 418 (FLA. 1981).

On appeal to the Fifth District Court of Appeal, the petitioner argued that the trial court had erred in its ruling on two evidentiary matters, that the correct scoresheet total was not 113.8 but 103.8 and thus indicated a lesser sentence, and that the crime of attempted second-degree murder does not logically exist.

On January 22, 1999, the Fifth District Court issued its opinion affirming the petitioner's conviction and sentence. Jervis v. State, 24 Fla. L. Weekly D264(Fla. 5th DCA January 22, 99). (Appendix.) In rejecting the arguments on appeal, the district court opined that the evidentiary issue not waived was error but harmless; rejected the scoresheet argument as unpreserved and cited Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), currently pending before this court in case number 92,805 (filed April 23, 1998); and stood silent on the final point.

This honorable court has discretionary jurisdiction to accept the instant case pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

CONCLUSION

The petitioner respectfully requests that this honorable court exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Daryl W. Jervis, Inmate No. B-705736, #G3-208L, Main Unit, Central Florida Reception Center, Post Office Box 628050, Orlando, Florida 32862-8050, on this 24th day of February, 1999.

ANNE MOORMAN REEVES
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

DARYL W. JERVIS,	)	
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Petitioner,	)	DCA CASE NO. 97-2684
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_____	)	

A P P E N D I X

JERVIS V. STATE
24 FLA. L. WEEKLY D 264 (FLA. 5TH DCA JANUARY 22, 1999)

Criminal law—Attempted second degree murder—No error in failure to allow defendant to cross-examine victim concerning her status as probationer after being convicted of DUI, where court had allowed defendant to ask victim about whether she had been prosecuted for any crime during pendency of defendant's case, and victim admitted that she had been convicted of criminal offense—Error in permitting deputy to testify that defendant had threatened to kill him after arrest was harmless—Claim of error in sentencing guidelines scoresheet not preserved for appeal where defendant did not object at trial and did not file motion to correct error within 30 days of rendition of sentence

DARYL JERVIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2684. Opinion filed January 22, 1999. Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge. Counsel: James B. Gibson, Public Defender, and Anne Moorman Reeves, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Jervis appeals his conviction and sentence for attempted second degree murder.[1] He argues the trial court erred in failing to allow the defense to cross-examine the victim concerning her status as a probationer, having been convicted of DUI.[2] He further argues the trial court erred in allowing a deputy to testify that Jervis threatened to kill him, after he arrested Jervis. Finally, Jervis argues the scoresheet used in sentencing was incorrect and he should be resentenced. We affirm.

The attempted murder charge and conviction grew out of an incident when Jervis, who had been cohabiting with his girlfriend, Cheryl Traenkner, broke into their residence and attacked her. He attempted to strangle her, beat her, and threatened to kill her. She managed to escape to a neighbor's house and call 911.

When the police arrived, Jervis was standing outside the residence. Holland, the arresting deputy, testified about the condition of the residence, which evidenced a struggle. He also stated the victim's face was beaten and swollen, that her mouth was bloody and her throat was black and blue. She was hysterical, screaming and crying, and she asserted, pointing at Jervis, that he had tried to kill her.

At the trial, the court refused to allow the defense to impeach Traenkner by cross-examining her about being on probation, after having been convicted of DUI. We do not think this issue was preserved for appeal. § 924.051(3)(1)(b), Fla. Stat. (1997); *McQuirk v. State,* 667 So.2d 441 (Fla. 5th DCA 1996). The defense asserted that *Jean-Mary v. State,* 678 So.2d 928 (Fla. 1996) allows the defense to cross-examine a state witness about pending criminal investigations to show bias, self-interest or motive to testify in support of the state's case. The court ruled accordingly that the defense could ask Traenkner about whether she had been prosecuted for any crime during the pendency of Jervis' case. The defense agreed with this ruling and asked that question. Traenkner replied in the affirmative. That was the end of the matter.

In any event, we find no error here. This case involves a criminal conviction, not an investigation as did *Jean-Mary*. Further, the Florida Supreme Court has held that evidence of *pending* charges against a witness is generally not admissible for impeachment purposes. *Fulton v. State*, 335 So.2d 280 (Fla. 1976).[3] However where, as here, there has been a prior conviction of the witness, and the witness admits to the conviction, only the fact that a conviction occurred can be brought out. *Fulton*. That is what occurred in this case. Traenkner admitted she had been convicted of a criminal offense, but the nature of the offense was not disclosed to the jury.

With regard to the second point on appeal, that the trial court erred in allowing the deputy to state that Jervis had threatened to kill him after being arrested, we agree this may have been error, but we think in this case it was harmless. The threats occurred after the attack on Traenkner had been concluded and thus were not part of the criminal episode. They appear to have been the product of Jervis' anger at being arrested and possibly his having imbibed too much alcohol. Thus they were collateral evidence of "bad acts" and thus not procedurally admissible. *Jorgenson v. State*, 714 So. 2d 423 (Fla. 1998).

But the evidence concerning Jervis' attack on Traenkner was overwhelming. Traenkner vividly testified as to Jervis' vicious attack on her. This was supported by the deputy's testimony and medical testimony. Jervis remained at the scene when the police responded to the 911 call. If error occurred in this regard, it was harmless; we cannot find it contributed in any way to Jervis' conviction. § 924.051(7), Fla. Stat. (1997); *Jackson v. State,* 707 So.2d 412, 414-415 (Fla. 5th DCA 1998).

On the third point of error, Jervis argues his scoresheet should have been 103.8 points and not 113.8 points. This discrepancy would have equated to a ten-month shorter recommended sentence. However, this court has taken the view in order to preserve a sentencing error such as this one a defendant must either object at the sentencing hearing or file a rule 3.800(b) motion to correct the error within 30 days of rendition of the sentence. Fla. R. App. P. 9.140(d); *Maddox v. State,* 708 So.2d 617 (Fla. 5th DCA 1998), *rev. granted,* 718 So.2d (Fla. 1998). Jervis did neither in this case. In fact, at the sentencing hearing the defense appeared to agree with the scoresheet calculation. We do not think this ground was preserved for appellate purposes.

AFFIRMED. (PETERSON and THOMPSON, JJ., concur.)

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[1]§§ 782.04(1) & 777.04(1)(4)(c), Fla. Stat. (1997).

[2]§ 316.193, Fla. Stat. (1997).

[3]There is an exception to this rule if the pending charges against the witness, and the charges for which the defendant is being tried, arose out of the same criminal episode. *Fulton v. State*, 335 So. 2d 280 (Fla. 1976).

* * *

Criminal law—Perjury by contradictory statement—Filing of false affidavit by wife in domestic violence action against husband—Evidence sufficient to establish that statement constituting perjury was made under oath—Recantation defense cannot be raised for first time on appeal where defense was not raised in trial court—Recantation defense without merit where defendant did not admit that statement was false, and where proceeding in which recantation was asserted was not proceeding against husband for injunction for domestic violence, but in criminal prosecution against husband for violating injunction—No error in denial of motion for judgment of acquittal

SAMANTHA ADAMS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-3112. Opinion filed January 22, 1999. Appeal from the Circuit Court for Lake County, Don F. Briggs, Judge. Counsel: James B. Gibson, Public Defender, and Dee Ball, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) Samantha Adams was convicted of perjury by contradictory statement[1] after filing a false affidavit in a domestic violence action against her husband. She appeals her conviction, contending the trial court erred in not granting her motion for judgment of acquittal because 1) the evidence established that she did not sign the affidavit under oath, and 2) her defense of recantation was established as a matter of law. We affirm finding neither argument to possess merit, but write to emphasize that criminal consequences attach to the false swearing of complaints, even where the affiant might have been motivated by the desire to benefit the person against whom the complaint was sworn.

In *Markey v. State*, 47 Fla. 38, 37 So. 53 (1904), our supreme court held that it is essential that the statement relied on as constituting perjury be made under oath. The court then went on to explain what was contemplated by an oath. The evidence submitted at trial was sufficient to establish a *prima facie* case for perjury under *Markey* and thus properly withstood a motion for judgment of acquittal.

In her second argument, Ms. Adams contends that she established the defense of recantation and therefore she was entitled to receive a judgment of acquittal. She points out that after she gave the false sworn statement in support of her petition for a domestic violence injunction, she attempted to recant her allegations "through communications with various individuals in the Office of the State Attorney." Ms. Adams wrote a letter to the prosecutor and

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_____	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 12 point Courier new, a font that is not proportionately spaced.

Respectfully submitted,

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