ORIGINAL

IN THE SUPREME COURT OF FLORIDA

DARYL W. JERVIS	)	
	)	
Petitioner,	)	DCA CASE NO. 97-2684
	)	
versus	)	
	)	
STATE OF FLORIDA,	)	S.CT. CASE NO. 94,933
	)	
Respondent.	)	
	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

DARYL W. JERVIS,	)	
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Petitioner,	)	DCA CASE NO. 97-2684
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	)	S.CT. CASE NO. 94,933
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

The petitioner, Daryl W. Jervis, was found guilty of attempted second-degree murder, having been charged with attempted first-degree premeditated murder. At sentencing, the court imposed the recommended guidelines term based upon the scoresheet as presented. There was no objection, although the total shown is the result of a mistake in addition.

Jervis argued four issues on appeal, of which two are brought before this court. The conviction for attempted second-degree murder should be vacated, as such a crime cannot logically exist; and Jervis should be resentenced according to a correctly-added scoresheet. Neither of these issues was preserved below.

The Fifth District Court of Appeal affirmed the judgment and sentence. The court did not mention the first point at all; and it declined to consider the second point because it was not preserved, and cited its decision in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998).

The decision of the district court is cited as Jervis v. State, 24 Fla. L. Weekly D264 (Fla. 5th DCA January 22, 1999) (copy attached hereto as Appendix). This court accepted jurisdiction by order dated April 21, 1999, and dispensed with oral argument.

SUMMARY OF THE ARGUMENT

Point I: The Criminal Appeal Reform Act, if interpreted as in Maddox to eliminate the jurisdiction of Florida's appellate courts to address any issue that has not been preserved below, operates contrary to judicial efficiency and to essential fairness. A defendant who has been sentenced according to an inaccurate scoresheet total, which error was not preserved below by objection of counsel, should not have to forego representation when arguing against the excessive limitation on his liberty. Nor should the court system, overburdened as it is, be required to let go an issue it could correct with dispatch, so that the trial court may face the issue in post-conviction proceedings, with the possibility of its returning once again to the appellate court. This honorable court should reverse Maddox and provide a reasonable and fair interpretation of the Act.

Point II: The crime of attempted second-degree murder has no basis in logic, nor is it consistent with the established law of attempts. This honorable court is requested to declare that this crime does not exist in Florida.

ARGUMENT

POINT I

THE MADDOX OPINION INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT TO PRECLUDE REVIEW OF ANY ISSUE NOT PRESERVED, NOT EXCLUDING SENTENCING MATTERS.

Jervis's scoresheet shows a total of 113.8 points, and his sentence is the resulting recommended term. However, the correct total of the figures shown in the four scoresheet categories is 103.8. The discrepancy is particularly important, in that the corrected recommended term would be ten months shorter.

In Maddox, the district court determines that no issue not preserved may be heard on appeal, even what used to be "fundamental" sentencing error. Jervis's sentence is not illegal, either in the narrow sense of one that exceeds the statutory limit, Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995), or the broader sense of one that fails to comport with statutory or constitutional limitations, State v. Mancino, 714 So. 2d 429 (Fla. 1998).

The sentence Jervis complains of was, however, reviewable in that it is obvious on the face of the record and improperly restricts his freedom, according to Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998) (provided the court has jurisdiction through some other, preserved or fundamental, error), and Bain v.

State, 24 Fla. L. Weekly D314 (Fla. 2d DCA January 29, 1999) (expanded explication of appellate jurisdiction under Criminal Appeal Reform Act). The district court had jurisdiction to hear Jervis's appeal of the trial court's final orders of judgment and sentence, through the Florida Constitution, as Bain asserts. Where the district court may exercise its jurisdiction for any reason (such as through preserved error), it should not forswear its duty, by ignoring other errors, to see to the integrity of the judicial process, whether fundamental or patent and serious.

Jervis's sentence is a clear instance of ineffective assistance of trial counsel. As such, it ought to be corrected whether or not the appellate court has jurisdiction through other means, as Denson would require. The Third District Court has followed this course in Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), as a reasonable method of putting into effect the purpose of the Criminal Appeal Reform Act to improve the efficiency of the appellate process, while not eliminating the concept of fairness to the appellant. On this head, it is not helpful to leave such an issue to the untrained appellant to pursue, either through a claim of ineffective representation or through a motion to correct his scoresheet. If a sentencing error passes without event through the lower court, see, e.g.,rule 3.701(d)(1), Florida Rules of Criminal Procedure, and section 921.0014(3),

Florida Statutes (putting responsibility for accepting the scoresheet on the trial judge), it ought not as a consequence to be halted outside the door of the appellate court and routed instead back to the now-unrepresented defendant.

For both legal and policy reasons, the Maddox interpretation of the Criminal Appeal Reform Act's limitation of appellate jurisdiction should be rejected. This court should reverse the decision of the Fifth District below, and remand with instructions to grant relief as to the inaccurately-totaled scoresheet.

POINT II

THIS HONORABLE COURT SHOULD DECLARE THAT THE CRIME OF ATTEMPTED SECOND-DEGREE MURDER IS LOGICALLY IMPOSSIBLE AND DOES NOT EXIST IN FLORIDA.

The victim testified at trial that Jervis struck her in the face, threw her across the room, choked her, and banged her head against a chair and the kitchen counter. The jury was instructed on attempted first-degree premeditated murder and its lesser included offenses and returned a verdict of attempted second-degree murder. According to existing precedent, Jervis's conviction for attempted second-degree murder is lawful. See, e.g., Harell v. State, 24 Fla. L. Weekly D674 (Fla. 5th DCA March 12, 1999); Massie v. State, 724 So. 2d 587 (Fla. 2d DCA 1998); Manka v. State, 720 So. 2d 1109 (Fla. 4th DCA 1998); Pitts v. State, 710 So. 2d 62 (Fla. 3d DCA 1998).

Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998), the district court deals with the question whether attempted second-degree murder remains an acknowledged crime in Florida, or whether it should properly go the way of attempted felony murder, in State v. Gray, 654 So. 2d 552 (Fla. 1995). Judge Griffin, writing for the majority, refers to the supreme court's fifteen-year-old analysis in Gentry v. State, 437 So. 2d 1097 (Fla. 1983), which proves the

crime. She announces that attempted second-degree murder is different from attempted felony murder, and concludes that the evidence presented was "plainly sufficient" to support Watkins's conviction. Watkins at 939.

The majority opinion begs the question, saying that the crime exists because it exists. What is necessary now is to determine whether it **should** exist. The Watkins dissent notes that second-degree murder comes about by happenstance, and that attempt requires the intent to commit the underlying crime. Watkins, 705 So. 2d at 943 (Harris, J., dissenting). It points out that because it is logically impossible to intend to commit a happenstance, the offense that underlies an attempted second-degree murder must be that act which is imminently dangerous to another evincing a depraved mind regardless of human life. But, the dissent continues, in what we call attempted second-degree murder, this act is not merely attempted--it is "spectacularly **achieved**." Id. (emphasis in the original). The fact that the victim has not been killed does not reverse the achievement of the act. Where the victim dies as a result of the achieved act, the offense is second-degree murder. But if the victim lives, in spite of the act, the result is **not** attempted second-degree murder. It is aggravated battery, or possibly aggravated assault. Id.

In its Gray opinion, by which it receded from Amlotte v. State, 456 So. 2d 448 (Fla. 1984), in holding that there is no crime of attempted felony murder in Florida, this court repeated the Fifth District Court's statement of its responsibility "to point out to the [supreme] court new or additional arguments that should be considered by it in determining whether questioned law should remain in effect." Gray, 654 So. 2d at 554, quoting Grinage v. State, 641 So. 2d 1362, 1367 (Fla. 5th DCA 1994). This court added, with respect to the principle of stare decisis, that "[p]erpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." Gray at 554 (citation omitted).

In that attempted second-degree murder is, like attempted felony murder, logically impossible, the two offenses are not, after all, "different." The characteristic they share is a crucial one: whether by definition they can logically exist.[1] The petitioner asserts that they cannot.

The fifth and fourteenth amendments to the United States Constitution, and article I, section 9, of the Florida Constitution, guarantee a defendant that he

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[1] Considering that Gentry was decided before Amlotte, Mr. Justice Overton's presence in Gentry's unanimous majority should not be taken to mean that, his having been correct after all in Amlotte, his position in Gentry is the correct one. See Watkins, 705 So. 2d at 943, n. 1.

shall be afforded due process of law. In a criminal case, due process insures that conviction will follow only upon proof of the elements of the crime charged. See In re Winship, 397 U. S. 358 (1970). Conviction of a crime that does not exist must be the quintessential due process violation.

This court should declare that the crime of attempted second-degree murder does not exist. If it is unwilling to take this bold step, it should provide the guidance of a detailed explanation of its position.

CONCLUSION

For the reasons expressed in Point I herein, the petitioner respectfully requests that this honorable court reverse Maddox based on an interpretation of the Criminal Appeal Reform Act that takes account of both judicial efficiency and the principle of fairness and remand his cause for resentencing according to an accurate scoresheet total.

In addition, for the reasons expressed in Point II herein, the petitioner respectfully requests that this honorable court declare that the crime of attempted second-degree murderdoes not exist in Florida.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
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COUNSEL FOR PETITIONER

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 this 17th day of May, 1999.

Anne Moorman Reeves

ANNE MOORMAN REEVES
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

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

A P P E N D I X

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 the trial court seeking to have the injunction dissolved, but her effort

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STATE OF FLORIDA,	)	S.CT. CASE NO. _____
	)	
Respondent.	)	
_____	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point CG Times, a font that is proportionately spaced.

Respectfully submitted,

JAMES B. GIBSON
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May 17, 1999

Honorable Debbie Causseaux
Acting Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Daryl W. Jervis v. State, Our file No. 99-427, DCA Case No. 97-2684, S.Ct. Case No. 94,933

Dear Ms. Causseaux:

Enclosed please find the original and seven copies of the Petitioner's merit brief. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion dated January 22, 1999. Also attached to the brief is a copy of a Certificate of Font.

Also enclosed in this envelope is a 3 ½ inch disk containing the Merit Brief of Petitioner, as you require.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

Anne Moorman Reeves

ANNE MOORMAN REEVES
Assistant Public Defender

AMR/lbh

Enclosures