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IN THE SUPREME COURT OF FLORIDA

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

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS ii

SUMMARY OF THE ARGUMENT 1

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. 3

POINT II: THIS HONORABLE COURT SHOULD DECLARE THAT THE CRIME OF ATTEMPTED SECOND-DEGREE MURDER IS LOGICALLY IMPOSSIBLE AND DOES NOT EXIST IN FLORIDA. 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF CITATIONS

CASES CITED	PAGE NO.
Amlotte v. State 456 So. 2d 448 (Fla. 1984)	5
Bain v. State 24 Fla. L. Weekly D314 (Fla. 2d DCA January 29, 1999)	4
Harriel v. State 710 So. 2d 102 (Fla. 4th DCA 1998)	3
Hyden v. State 715 So. 2d 960 (Fla. 4th DCA 1998)	3
Maddox v. State 708 So. 2d 617 (Fla. 5th DCA 1998) rev. granted, No. 92,805 (Fla. July 7, 1998)	2
Mizell v. State 716 So. 2d 829 (Fla. 3d DCA 1998)	2, 3
Nelson v. State 719 So. 2d 1230 (Fla. 1st DCA 1998)	3

OTHER AUTHORITIES CITED

Section 924.051(3), Florida Statutes (1996) 2

Rule 9.140, Florida Rules of Appellate Procedure 2

IN THE SUPREME COURT OF FLORIDA

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

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.

The respondent argues that the Fifth District Court of Appeal was correct in concluding, in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, No. 92,805 (Fla. July 7, 1998),[1] that the idea of fundamental error in a sentencing context no longer exists. To support its position, the respondent relies almost entirely upon the language of rule 9.140, Florida Rules of Appellate Procedure, which provides that a defendant may appeal a sentencing error following a guilty or nolo contendere plea, if it was preserved. This rule, however, conflicts directly with the legislative dictate of the Criminal Appeal Reform Act itself, in section 924.051(3), Florida Statutes (1996), providing that error which is fundamental may be appealed even if it was not preserved. Inasmuch as the legislature has specifically recognized the continuing viability of

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[1] This case was argued on May 11, 1999, along with those cases with which this court consolidated it.

fundamental error in a sentencing context, that concept may not be eliminated by judicial rule.

The respondent also provides a brief analysis of the case law as it has led to the Criminal Appeal Reform Act, whose purpose is to eliminate the many inconsistencies in sentence correction on appeal, as well as the "clogged" nature of the appellate system. The petitioner does not deny the inconsistencies, or the abundance of appeals. But it appears that the Reform Act and its Maddox interpretation will not reduce but increase the clogging of the judicial system;[2] and without question it will reduce that system's justice.

The other four district courts have issued opinions asserting that the Reform Act permits appeal of some unpreserved error. For example, the First District Court decided in Nelson v. State, 719 So. 2d 1230 (Fla. 1st DCA 1998), that an illegal sentence is fundamental error and may be raised for the first time on appeal, where an illegal sentence is one that exceeds the statutory maximum; the Second District Court set out in Bain v. State, 24 Fla. L. Weekly D314 (Fla. 2d DCA January 29, 1999), that review is jurisdictional and that of unpreserved errors, only those which are fundamental are reviewable, where the class

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[2] See, e.g., Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), n. 1

"fundamental" includes illegal sentences and other serious, patent errors; the Third District Court opined in Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), that it need not decide what is fundamental error and whether it remains viable under the Reform Act, and will address unpreserved sentencing errors apparent on the face of the record as clear ineffectiveness of counsel; and the Fourth District Court determined that an illegal sentence, which is a sentence exceeding the statutory maximum, is reviewable even without preservation, Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998), and see Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), n. 1.

The point here is that the Criminal Appeals Reform Act is not so simple and straightforward as the respondent claims.[3] Thus, in spite of any changes it may have worked in the law, the petitioner's issues are addressable on appeal. His incorrectly totaled scoresheet, though it was not objected to itself, accompanied two preserved issues on appeal. The error is not harmless, as the respondent argues, merely because the sentence produced remains within the corrected guidelines limits: It is not harmless because the trial judge chose to impose the recommended sentence; and given that the recommended sentence is

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[3] Nor is it reformative, except in the most generic sense that it has reshaped the law.

in fact ten months less than shown on the scoresheet, it may be postulated that the corrected total is what the court would have pronounced had it been available.[4] This error is also reviewable as an instance of ineffective assistance of counsel, in that defense counsel did not add the scoresheet correctly and require that Jervis be sentenced according to an accurate total.

The petitioner acknowledges a need for improvement in Florida's system of appellate review. But he rejects absolutely the notion that the Maddox system addresses any such need.

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[4] The respondent's assertion that not only was this issue not preserved, but no issue argued on appeal was preserved, is incorrect. The first and second issues on appeal were fully preserved.

POINT II

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

As to the argument that the crime of attempted second-degree murder does not exist, such that Jervis may not be convicted of it, the respondent complains that Jervis supplies no authority for his position that to be convicted of a nonexistent crime is fundamental error. In fact, the petitioner never defined the matter as fundamental. But surely it is axiomatic (Maddox to the contrary notwithstanding) that fundamental error includes such error as conviction for a nonexistent crime. In addiiton, the petitioner refers to Mr. Justice Overton's conclusion in Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984) (Overton, J., dissenting), that further extension of the felony murder doctrine was "illogical and without basis in law," and suggest that to continue to convict of attempted second-degree murder is also illogical and without basis in law.

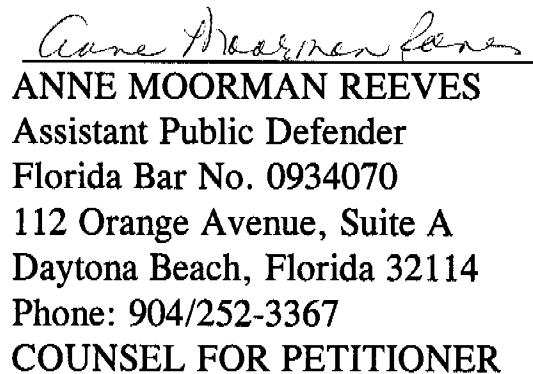
CONCLUSION

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
SEVENTH JUDICIAL CIRCUIT



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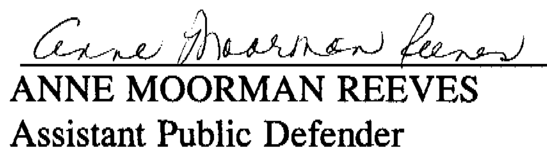
CERTIFICATE OF SERVICE

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 this 28th day of June, 1999.



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. 94,933
	)	
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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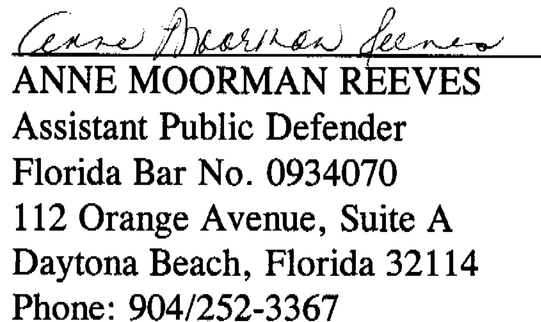
Respondent.	)	
______________________	)	

CERTIFICATE OF FONT

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

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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