

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALAN OSTERHOUDT, JR.,

Petitioner,

v.

CASE NO. SC16-303

5TH DCA NO. 5D13-4277

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE FACTS

The State generally accepts Petitioner's statement of the case and facts but notes the following additions and/or corrections in support of its merits brief.

Detective Jill Morrell,¹ the lead investigator, drafted a warrant to search Alan Osterhoudt, Junior's ("Osterhoudt") house based on a variety of information, including the 911 recording. (VIII 724-25).² While Detective Morrell was drafting the search warrant, Osterhoudt was in custody at the Sheriff's Office. (VIII 745). He was subsequently taken to the Hernando County Jail. Id.

At trial, defense counsel questioned Detective Morrell during cross-examination as follows:

Q. All right. Let's just talk about a couple of the -- I guess we'll go a little chronologically.

You talked about -- when you were answering the State, you said earlier you got the search warrant and it was based on the 911 tape, 'cause that's the only thing we had to go on?

A. Correct.

Q. Those were your words. So, initially, all you had was the 911 tape?

A. Correct.

Q. And you've listened to the 911 tape?

¹ Hernando County Sheriff's Office

² "I" through "XIII" reference the volumes of the record. Each reference is followed by the pertinent page number(s).

A. Yes, I did.

Q. It's approximately in length probably around six minutes total, but actual talk maybe around two minutes or so?

A. Correct.

Q. And you stated that when you got to the scene, you saw a few items of evidentiary value, as Mr. Catto³ stated.

A. Correct.

Q. You determine what has evidentiary value?

A. Based on what we knew from the 911 call and just things that you see visually. Like the deputies had talked about how they took Alan into custody out in the front yard.

Q. Sure.

A. So, based on initial statements that people may have gained from neighbors or the deputies or other detectives will determine what we seize.

Q. What does evidentiary value mean to you, what does it actually mean?

A. Things that are relevant to the case.

Q. Okay. Relevant to your -- to your side of the case as law enforcement?

A. Correct.

Q. Because you're there to investigate a potential crime?

A. Correct.

Q. And you're there to look for things that support your idea that a crime may have

³ The prosecutor.

occurred?

A. Yes.

. . .

Q. If I remember what I was asking you -- as a law enforcement officer, you're there to determine whether or not a crime may have occurred; correct?

A. Correct.

Q. Okay. And you have your team of people that are assigned those various tasks to gather information so that you can determine whether or not a possible crime may have occurred?

A. Correct.

Q. All right. There's a possibility that no crime had occurred; is that true?

A. Correct.

Q. Okay. And that's what you're there to investigate?

A. Correct.

Q. And at the time that you're there and you have your people out there, as you stated before, you're going -- you're going off the 911 tape and you obtained a search warrant to go in the house and look for other things?

A. Correct.

Q. Now, when you say you're looking for items of evidentiary value, you're looking for things to support whether or not you believe a crime occurred?

A. Correct.

. . .

Q. . . . And who was the person that actually formally charged him from the law enforcement office of the Hernando County Sheriff's Office?

A. That was me.

Q. So, you actually, at some point later, actually formally charged him?

A. I drafted the arrest affidavit and sent -- had taken it to the jail, yes.

Q. He, in fact, was under arrest at that time?

A. Yes.

Q. Prior to you doing the arrest warrant, he had already been arrested?

A. Yes.

Q. And what were the charges before you drafted up the charges?

A. It was second degree murder.

Q. So, he's already charged before you drafted up the papers charging him with second degree murder?

A. Based on the 911 call and based on the initial statements that I had from the deputies, yes.

Q. So, you said you only had the 911 tape. So, had you already made a decision this was a second degree murder case?

A. After speaking with the deputies and they determined what was in the house based on the 911 call, yes.

Q. Well, you didn't get into the house with the search warrant until about 3:30; right?

A. The deputies had been in the house

and had visually seen the gun where he had said he put it.

Q. Okay. So, the initial ones, Deputy Smith and a couple of the ones that cleared -

A. Deputy May.

Q. -- that cleared the house --

A. Correct.

Q. -- and took the initial photographs, okay, pretty much their purpose of going through the house is not to search for anything or touch anything; right?

A. Correct.

Q. The purpose of them going in the house is to determine -- to clear the house, make sure it's safe and check on anyone to see if they're alive or dead, or give any medical aid; right?

A. Correct.

Q. Okay. They had done that part?

A. Yes.

Q. And then they're instructed to immediately leave that house and sit and wait for you to get a search warrant?

A. They already had the information from the 911 tape and having -- going through the house and searching it, the drawer in the master bedroom was open and the firearm was in plain sight where he said he had left it.

Q. So, pretty much the 911 tape dictated what charges would occur later on?

A. Obviously, we would have liked to have gotten a statement, but at that point we had not been able to get a statement from Alan so we had to go (indiscernible).

(VIII 740-49).

In side bar, defense counsel moved for a mistrial, which the trial court denied. (VIII 749-61). The court found that Detective Morrell made no statement which indicated that Osterhoudt exercised his right to remain silent. (VIII 749, 750, 751). Further, defense counsel invited the response based on his inquiry. (VIII 749, 750).

THE COURT: The issue is the question and answer that was given and the extent to which the defendant's Constitutional right to remain silent has been injected into the trial as an issue.

Okay. I -- I think counsel would concede after the play back that the response was limited and it was in response to the question. It was not unresponsive, it was responsive to the question.

The detective indicated that they would have liked to have gotten a statement but at that point they were not able to. She clearly said at that point. It doesn't suggest that he never gave a statement or refused to give a statement.

You have gone to great lengths pointing out that she was at the house and he was someplace else, there's nothing from which the jury could come to any reasonable conclusion that your client had an opportunity to give a statement and refused.

That's what the Constitution protects and that has not been impinged at this point. There may be a hint, but there is certainly nothing from which the jury could draw the reasonable conclusion that he invoked his right to remain silent.

(VIII 756-57).

The court gave the defense an opportunity to provide the court with a curative instruction. (VIII 761). Defense counsel declined, noting,

I agree that a curative would shed light on what may or may not be in their heads right now. None of us can figure that out.

However, that is why I made the motion, because I don't think -- anything that we do further from here would do more damage as far as a curative would be concerned.

(VIII 761).

Counsel renewed the motion for a mistrial, which the court denied. (X 1003).

I believe that any possible prejudicial effect on the defendant has been ameliorated by the fact that the defendant took the stand and testified.

He was cross-examined by the State based on the comments he made on the 911 call, there was no reference or suggestion to any failure to make any other statement. I paid careful attention to that.

Frankly, I might have reconsidered my ruling had there been any question in that direction in terms of his encounter with Detective Williamson, which is presumably where the invocation occurred, but I -- I will hold to my earlier finding that I do not believe that the question and the answer by Detective Morrell in any way clearly referenced an invocation of any constitutional right.

She -- she qualified her statement in time based on the -- the point of the question that was being asked, because the suggestion was clearly being made that she caused the defendant to be arrested simply because there was information on a 911 call and presumably

a fatality and a gun was discovered.

And in attempting to explain her position, which she said was -- would have liked to have a statement at that point, and that was [the] end of it.

There was no further discussion of it, there was no overt or clear indication that the defendant was given another opportunity to make a statement and invoked his Constitutional right not to do so.

(X 1003-04).

While his appeal was pending, Osterhoudt filed a Motion to Correct Sentencing Errors pursuant to rule 3.800(b)(2) of the Florida Rules of Criminal Procedure. (XII 299-305). He argued *inter alia* that the fine and surcharge imposed pursuant to sections 775.083(1) and 938.04, Florida Statutes (2011) should be stricken because they were not individually and specifically pronounced during sentencing. Id. The circuit court did not rule on the motion. (XIII 318, 319). Osterhoudt subsequently filed a Motion for Rehearing, which also was not ruled on by the court. (XII 306-07; XIII 321).

SUMMARY OF THE ARGUMENTS

ISSUE ONE: Respondent maintains that there is no express and direct conflict between the instant case and any other district court opinion. None of the opinions cited by Appellant addressed the precise issue addressed by the Fifth District.

Should this Court retain jurisdiction, it should uphold the Fifth District's affirmance of the imposition of the unpronounced, but otherwise proper, discretionary fine and surcharge. Osterhoudt raised a procedural challenge to both in his rule 3.800(b)(2) motion. Osterhoudt did not assert that he did not receive notice of the fine and surcharge, or that they were otherwise improper. As with special conditions of probation, a timely filed rule 3.800 motion adequately protects a defendant's right to procedural due process. Because Osterhoudt raised a procedural claim, he waived his right to appellate review. The Fifth District's reasoning on this point was correct.

ISSUE TWO: The Fifth District properly affirmed the denial of Osterhoudt's motion for a mistrial. Detective Morrell's response cannot reasonably be construed as commenting on Osterhoudt's exercise of his right to remain silent. Further, defense counsel invited the response. Even assuming harmless error applies, any error was harmless beyond a reasonable doubt.

ARGUMENTS

ISSUE ONE

THE FIFTH DISTRICT PROPERLY AFFIRMED THE IMPOSITION OF THE DISCRETIONARY FINE AND SURCHARGE AS THE FILING OF THE RULE 3.800(b) MOTION PROTECTED OSTERHOUDT'S RIGHT TO PROCEDURAL DUE PROCESS.

The State maintains that there is no express and direct conflict between Osterhoudt v. State, 182 So. 3d 16 (Fla. 5th DCA 2015), reh'g denied (Jan. 14, 2016), and Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995), or any other decision of a Florida district court of appeal.

Pursuant to article V, Section 3(b)(3) of the Florida Constitution, this Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." See also Fla. R. App. P. 9.030(a)(2)(A)(iv). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986). In addition, an "inherent or so called 'implied' conflict" may not serve as a basis for this Court's jurisdiction. DHRS v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986).

The Fifth District's opinion relied on the fact that Osterhoudt only raised a procedural challenge to the discretionary

fine and surcharge. Consequently, he waived appellate review of his claim. By contrast, Reyes concluded that the oral lump sum assessment of costs was improper. The court reiterated that the trial judge must individually announce all discretionary costs. On the face of the opinion, Osterhoudt did not conflict with this statement of the law. Neither Reyes nor any of the other opinions upon which Osterhoudt relies for conflict addressed whether a defendant waived appellate review by raising only a procedural challenge to otherwise proper discretionary costs in a rule 3.800 motion. Indeed, it does not appear within the four corners of the opinions that either party raised this precise issue.

Should this Court retain jurisdiction, it should affirm the Fifth District's ruling. "Motions to correct sentencing errors involve 'purely legal issues,' and are therefore reviewed de novo." Ray v. State, 68 So. 3d 346, 347 (Fla. 1st DCA 2011). Here, Osterhoudt challenges the trial court's imposition of a \$300.00 discretionary fine pursuant to section 775.083(1), and a \$15.00 surcharge pursuant to section 938.04. The sentencing transcript does not reflect that the court orally pronounced either amount. The trial court denied Osterhoudt's rule 3.800(b) motion. "[D]iscretionary costs or fines must be orally pronounced at sentencing in order to comport with due process requirements.'" Strong v. State, 140 So. 3d 680, 681 (Fla. 5th DCA 2014) (quoting Boyington v. State, 125 So. 3d 327, 327-28 (Fla. 1st DCA 2013)).

The Fifth District properly analogized discretionary costs to unpronounced special conditions of probation. In Maddox v. State, 760 So. 2d 89 (Fla. 2000), this Court reviewed the effect of rule 3.800(b) on unpronounced special conditions of probations. Unlike statutorily mandated or authorized general conditions, of which defendants have constructive notice, special conditions must be orally pronounced in order to comply with due process. Id. at 105. This Court explained that the

primary concern in correcting unannounced special conditions of probation is the due process violation occurring when a person does not have notice and an opportunity to object to the [special] condition of probation. However, following our promulgation of rule 3.800(b), defendants have been given a procedural mechanism to object to the imposition of special conditions of probation that have not been orally pronounced. This procedural mechanism satisfies due process concerns because the defendant has an opportunity to object following the imposition of the special condition of probation.

Id. at 105.

The Fifth District relied on this reasoning in affirming the unpronounced special conditions in Grubb v. State, 922 So. 2d 1002 (Fla. 5th DCA 2006) and Velez-Pizzini v. State, 58 So. 3d 278 (Fla. 5th DCA 2011). Both cases stand for the proposition that when a defendant raises a procedural challenge to an unpronounced but otherwise proper special condition of probation, the condition need not be stricken if the defendant has filed a rule 3.800(b)

motion; the defendant's procedural due process rights are adequately protected by the timely-filed motion. Neither Grubb nor Velez-Pizzini raised substantive challenges to the special conditions.

The Fifth District properly extended this reasoning to the instant case. As with special conditions of probation, due process requires that a defendant is provided notice and an opportunity to be heard and object before discretionary costs are imposed. Rodriguez v. State, 676 So. 2d 50, 51 (Fla. 5th DCA 1996). Oral pronouncement provides a defendant with notice and "an opportunity in open court to object to the imposition of these discretionary costs." Reyes, 655 So. 2d at 116. The primary concern this Court had in correcting unannounced special conditions of probation is identical to the concern with correcting unannounced discretionary fees, costs, and fines.

The Fifth District properly concluded that Osterhoudt waived appellate review of his claims by raising "only procedural and not substantive, claims in his 3.800 motion." Osterhoudt, 182 So. 3d at 17. Rule 3.800(b) applies equally to special conditions of probation and discretionary costs. See Jackson v. State, 983 So. 2d 562, 573 (Fla. 2008) ("'[S]entencing errors' under rule 3.800(b) . . . all involve errors related to the ultimate sanctions imposed, whether involving incarceration, conditions or probation, or costs."). In his rule 3.800(b) motion, Osterhoudt claimed that the

trial court violated his procedural due process rights when it imposed the discretionary fine and surcharge without specifically pronouncing them at sentencing. Osterhoudt was given notice of the fine and surcharge when he received the order.⁴ As with unpronounced special conditions of probation, rule 3.800(b) provided Osterhoudt with a procedural mechanism to object to the fine and surcharge. See Maddox, 760 So. 2d at 109 (“Presently, rule 3.800(b) provides defendants with an opportunity to contest the erroneous imposition of costs after receiving notice of the costs in the written judgment.”). Osterhoudt’s procedural due process rights were adequately protected when he objected to the fine and surcharge in a timely rule 3.800(b) motion. Consequently, his claims of error were waived when he did not raise a substantive objection to the fine or surcharge.

Osterhoudt contends that the distinction between a procedural and substantive objection is not valid in light of the reasons articulated in Reyes. Osterhoudt’s reliance on Reyes in this respect is misplaced. Reyes was decided before the promulgation of rule 3.800(b).⁵ Prior to rule 3.800(b), a defendant did not have

⁴ Osterhoudt does not claim that he did not have notice of the order.

⁵ This Court promulgated rule 3.800(b) on June 27, 1996, effective July 1, 1996. See Amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800, 675 So. 2d 1374, 1374 (Fla. 1996). The rule was twice amended. See Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1103 (Fla. 1996); Amendments to Florida Rules of Criminal

the means to object upon learning that the sentencing order deviated from the oral pronouncement. Jackson, 983 So. 2d at 573. Further, the Second District later noted that Reyes "did not create common law regarding costs in criminal cases; it merely described the statutory requirements for costs existing in 1995." Cook v. State, 896 So. 2d 870, 872 (Fla. 2d DCA 2005). To the extent that Osterhoudt contends that striking the discretionary fine is proper in order to allow a trial court to consider his ability to pay, Cook recognized that this is not a required consideration unless mandated by statute. Id. at 873.

The Fifth District was correct in concluding that the procedural objection analysis should extend to unpronounced discretionary fees, costs, and fines. Because Osterhoudt raised only a procedural basis to strike the fine and surcharge, this Court should affirm as he had notice and the opportunity to object.

Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015 (Fla.), reh'g granted, 761 So. 2d 1015, 1025 (1999).

ISSUE TWO

THE FIFTH DISTRICT PROPERLY AFFIRMED THE DENIAL OF THE MOTION FOR A MISTRIAL BECAUSE, WHEN VIEWED IN CONTEXT, DETECTIVE MORRELL'S COMMENT COULD NOT BE CONSTRUED AS COMMENTING ON OSTERHOUDT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Osterhoudt contends that the trial court erred when it denied his motion for a mistrial. He asserts that, during trial, Detective Morrell improperly commented on Osterhoudt's exercise of his right to remain silent. The Fifth District properly concluded that this claim was without merit because the comment was not fairly susceptible of being construed by the jury as commenting on Osterhoudt's right to remain silent.

Osterhoudt has not demonstrated that Detective Morrell's statement deprived him of a fair trial. "The constitutional right to remain silent, as set forth in the Fifth Amendment to the United States Constitution and article I, section nine, of the Florida Constitution, is guaranteed to every citizen charged with a crime." Horne v. State, 127 So. 3d 898, 902 (Fla. 5th DCA 2013). It is well established that a defendant's silence at the time of or after arrest cannot be used against him in court. State v. Hoggins, 718 So. 2d 761, 770 (Fla. 1998). This is true even if the defendant chooses to testify at trial. Robbins v. State, 891 So. 2d 1102, 1106 (Fla. 5th DCA 2004). A comment which "is fairly susceptible of being construed by the jury as a comment on the defendant's

exercise of his or her right to remain silent" violates the constitutional guarantee of a right to remain silent. Hoggins, 718 So. 2d at 769.

A trial court has the discretion to grant or deny a motion for a mistrial. Power v. State, 605 So. 2d 856, 861 (Fla. 1992). The court should only grant the motion "when the error is deemed so prejudicial that it vitiates the entire trial, depriving the defendant of a fair proceeding." Jennings v. State, 123 So. 3d 1101, 1125 (Fla. 2013) (quoting Floyd v. State, 913 So. 2d 564, 576 (Fla. 2005)). The denial of a motion for a mistrial is reviewed for an abuse of discretion. Poole v. State, 997 So. 2d 382, 391 n.3 (Fla. 2008) (explaining that the harmless error test does not apply where "the trial judge never ruled on the objection, but simply denied defense counsel's motion for mistrial"). A reviewing court cannot view the challenged comment in isolation. Rather, "[w]hether such a comment is improper depends on the context in which it was made." Joyner v. State, 979 So. 2d 1246, 1248 (Fla. 4th DCA 2008).

In this case, the context in which Detective Morrell made the comment demonstrates that it cannot fairly be construed as commenting on Osterhoudt's exercise of his right to remain silent. During opening statements, defense counsel contended that police developed the case against Osterhoudt based solely on the 911 recording, implying that law enforcement jumped to conclusions.

(VI 365-66). Detective Morrell was responding to counsel's line of questioning which focused on the investigation that led to the decision to charge Osterhoudt with second-degree murder.

Q. Did you have any knowledge as to the whereabouts of Mr. Osterhoudt when you came back to the crime scene with the search warrant?

A. Yes, I did.

Q. And where was he at?

A. He was at the Hernando County jail.

Q. Had he been formally charged with anything at that time, to your knowledge?

A. The paperwork had not been completed yet --

Q. Okay.

A. -- because we were serving the search warrant.

Q. I understand. And who was the person that actually formally charged him from the law enforcement office of the Hernando County Sheriff's Office?

A. That was me.

Q. So, you actually, at some point later, actually formally charged him?

A. I drafted the arrest affidavit and sent - had taken it to the jail, yes.

Q. He, in fact, was under arrest at that time?

A. Yes.

Q. Prior to you doing the arrest warrant, he had already been arrested?

A. Yes.

Q. And what were the charges before you drafted up the charges?

A. It was second degree murder.

Q. So, he's already charged before you drafted up the papers charging him with second degree murder?

A. Based on the 911 call and based on the initial statements that I had from the deputies, yes.

Q. So, you said you only had the 911 tape. So, had you already made a decision this was a second degree murder case?

A. After speaking with the deputies and they determined what was in the house based on the 911 call, yes.

Q. Well, you didn't get into the house with the search warrant until about 3:30; right?

A. The deputies had been in the house and had visually seen the gun where he had said he put it.

Q. Okay. So, the initial ones, Deputy Smith and a couple of the ones that cleared -

A. Deputy May.

Q. -- that cleared the house --

A. Correct.

Q. -- and took the initial photographs, okay, pretty much their purpose of going through the house is not to search for anything or touch anything; right?

A. Correct.

Q. The purpose of them going in the house is to determine -- to clear the house, make sure it's safe and check on anyone to see if they're alive or dead, or give any medical aid; right?

A. Correct.

Q. Okay. They had done that part?

A. Yes.

Q. And then they're instructed to immediately leave that house and sit and wait for you to get a search warrant?

A. They already had the information from the 911 tape and having -- going through the house and searching it, the drawer in the master bedroom was open and the firearm was in plain sight where he said he had left it.

Q. So, pretty much the 911 tape dictated what charges would occur later on?

A. Obviously, we would have liked to have gotten a statement, but at that point we had not been able to get a statement from Alan so we had to go (indiscernible).

(VIII 74-49).

Detective Morrell's response did not indicate that police were unable to obtain a statement from Osterhoudt because he exercised his right to remain silent. Viewed in context, a lay jury would more likely conclude that police were unable to speak with Osterhoudt because he was not present when Detective Morrell was determining what the criminal charges would be. Earlier testimony had already established that sheriff's deputies took Osterhoudt into custody shortly after they arrived at Osterhoudt's house. Osterhoudt was at the jail when the search warrant was served and executed. At that point, he was not formally charged with a crime. There was nothing in Detective Morrell's response that could fairly be construed as Osterhoudt refusing to speak to

police because he invoked his right to remain silent. Her response did not vitiate Osterhoudt's trial. See Rimmer v. State, 825 So. 2d 304, 323 (Fla. 2002) (finding that spouse's response, that she did not ask the defendant about the double homicides, "was not fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify"). This situation is much different from other cases reversing on this basis. See Ash v. State, 995 So. 2d 1158 (Fla. 1st DCA 2008) (reversing the conviction where a police officer testified that the defendant refused to discuss what happened before being placed under arrest); Melehan v. State, 126 So. 3d 1118, 1127 (Fla. 4th DCA 2012) (concluding that testimony that the defendant "made no statement when arrested" violated his right to remain silent); Gadison v. State, 158 So. 3d 615 (Fla. 5th DCA 2013) (reversing for a new trial where a police officer testified that the defendant refused to speak once his Miranda⁶ rights were read to him).

In addition, defense counsel declined the trial court's offer of a curative instruction.

If you would like me to give some sort of curative instruction, I'll give you an opportunity to fashion one.

For my part, I believe the reference was so obscure that if I give a curative instruction, it's going to create more of a problem than it will solve.

⁶ Miranda v. Arizona, 384 U.S. 436 (1966).

MR. FOOTE: I would agree.

THE COURT: But I will give you the opportunity to do that if you would like.

MR. FOOTE: I agree that a curative would shed light on what may or may not be in their heads right now. None of us can figure that out.

However, that is why I made the motion, because I don't think -- anything that we do further from here would do more damage as far as a curative would be concerned.

(VIII 761). "It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal." Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974).

Also, defense counsel invited Detective Morrell's response. "[A] defendant 'may not make or invite an improper comment and later seek reversal based on that comment.'" Joyner, 979 So. 2d at 1249. In deciding whether a response was invited, the court must determine "whether the witness's answer was responsive to the question and whether counsel could have anticipated the witness's response." Terry v. State, 668 So. 2d 954, 962 (Fla. 1996). Here, defense counsel was questioning Detective Morrell about the investigation, starting with the basis for obtaining the search warrant. Counsel then asked the detective about how she decided which items had evidentiary value when determining if a crime had been committed. During his inquiry, counsel emphasized several

times that the only evidence police relied on to support the search warrant and the second-degree murder charge was the 911 recording. (VIII 741, 744, 747, 748). Detective Morrell's comment was in direct response to counsel's implication that deputies failed to properly investigate the shooting before determining what criminal charge to bring against Osterhoudt.⁷ Detective Morrell explained why she relied on the 911 recording and the deputies' statements in deciding to charge Osterhoudt with second-degree murder. Her answer was responsive to counsel's line of questioning.

Osterhoudt contends that any error was not harmless. Harmless error is not applicable to this Court's analysis. Poole, 997 So. 2d at 391 n.3.⁸ Moreover, there is no reasonable possibility that Detective Morrell's comment contributed to the guilty verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The jury had sufficient evidence independent of the comment from which it could conclude that Osterhoudt was guilty of manslaughter with a firearm. See § 782.07(1), Fla. Stat. (2011). Osterhoudt was heard on the 911 recording stating that he and his wife argued and he shot her. (VI 382; VIII, 879). Osterhoudt told the 911 operator that he had

⁷ In fact, defense counsel argued during his opening statement and closing argument that law enforcement officers made assumptions and jumped to conclusions when conducting the investigation. (VI 371-72; X 1059).

⁸ Defense counsel did not formally object to Detective Morrell's response, but later stated that he renewed his objection. (VIII at 749, 751). The trial court never ruled on the objection. (VIII at 749-61).

"done the most heinous thing I have ever done in my life," and that he was sorry. (VI 383; VIII 881). He also stated where his wife's body was located and where police could find the gun. (VI 382, 384; VIII 880, 881). Mrs. Osterhoudt had one bullet wound to the back of her head. (VII 655-656). The caliber of the bullet that killed her matched Osterhoudt's firearm, which had one spent cartridge casing. (VII 547, 609, 677). Osterhoudt testified that he shot his wife, although he claimed he was startled and the gun discharged. (VIII 875, 877; IX 906, 908, 909).

Further supporting a finding of harmless error: Detective Morrell's statement was isolated and could not reasonably be construed as a comment on Osterhoudt's invocation of his right to remain silent. And, the prosecutor never referenced law enforcement officers' inability to obtain a statement from Osterhoudt. See Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997) (concluding that question and statement were harmless where isolated and not a focus of cross-examination or argument). Assuming any error, it was harmless beyond a reasonable doubt.

Detective Morrell's response was not fairly susceptible of being interpreted by the jury as a comment on Osterhoudt's exercise of his right to remain silent. Further, Osterhoudt invited the error by declining a curative instruction. And, defense counsel's inquiry invited Detective Morrell's response. The trial court did not abuse its discretion when it denied the motion for a mistrial.

The Fifth DCA's affirmance on this point was proper.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this Honorable Court affirm the judgment and sentence, and uphold the Fifth District's affirmance of the trial court's rulings.

DESIGNATION OF E-MAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents in this proceeding, pursuant to rule 2.516 of the Florida Rules of Judicial Administration: crimappdab@myfloridalegal.com (primary) and Marjorie.Vincent-Tripp@myfloridalegal.com (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Merits Brief has been furnished by e-mail to counsel for Petitioner, Michael Ufferman (2022-1 Raymond Diehl Rd, Tallahassee, FL 32308) at ufferman@uffermanlaw.com on October 24, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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