IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-247

JEFFREY LEE WEAVER,

Appellant/Cross Appellee,

VS.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

****
***** ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)**
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AMENDED CROSS REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

Counsel for Appellee/Cross-Appellant

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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, defendant below, Jeffrey Lee Weaver, will be referred to as “Weaver”. Appellee/Cross-Appellant, State of Florida, will be referred to as “State”. References will be by the symbol “R” for the appellate record, “T” for the transcript, “SR” and “ST” for the supplemental record or transcripts, “IB” for the initial brief, and “ACAB” for Weaver’s amended reply/cross-answer brief, followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State will rely upon its Statement of the Case and Facts presented in its Answer Brief/Initial Brief on cross-appeal as well as the facts included in the argument portions of that brief.

SUMMARY OF THE ARGUMENT

ISSUED RAISED BY APPELLEE/CROSS-APPELLANT ON CROSS-APPEAL

Issue I - It was error to sever Count V and preclude the felony murder argument. The earlier attempted armed burglary of a conveyance, an enumerated felony, and confrontation with Officer Peney before Weaver had reached a point of safety was part of the criminal episode which resulted in the homicide. The incidents should have been prosecuted together under felony murder.

Issue II - The court erred in suppressing the confession tapes as Weaver had no expectation of privacy in the police car.

Issue III - It was error to preclude the State from introducing other firearm evidence found in Weaver's car as such was relevant to the criminal episode. It showed his proficiency with weapons and rebutted the alleged defense that he did not shoot Officer Peney, but shot into the ground.

ARGUMENT

ISSUED RAISED BY APPELLEE/CROSS-APPELLANT ON CROSS-APPEAL

ISSUE I

SEVERING OF THE ATTEMPTED ARMED BURGLARY COUNT AND PRECLUDING THE STATE FROM ARGUING FELONY MURDER WAS ERRONEOUS.

The court abused its discretion when it severed[1] Count V from the indictment and precluded the introduction of physical or testimonial evidence of the attempted armed burglary of the conveyance occupied by Graciela Ortiz ("burglary"), to prove felony murder (SR12; T5 579-743; T6 746-93). Johnson v. State, 438 So.2d 774, 778 (1983) (granting severance is within court's discretion). Should this Court reverse Weaver's conviction, the State should be permitted to prosecute Count V, present the felony murder theory of guilt, and seek the felony murder aggravator.

In Weaver's answer brief (ACAB 44), he points to Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992) as supporting the

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[1]Severance should be granted only when two or more offenses are improperly charged in a single indictment or when severance of properly joined offenses is necessary to achieve a fair trial. Fla.R.Crim.P. 3.152(a)(1) and (2); Bundy v. State, 455 So. 2d 330, 345 (Fla. 1984). Under Florida Rule of Criminal Procedure 3.150, offenses are properly charged in a single indictment when they "are based on the same act or transaction or on two or more connected acts or transactions." The phrase "connected acts or transaction" in rule 3.151(a) means consolidated offense must be "connected in an episodic sense." Livingston v. State, 565 So. 2d 1288 (Fla. 1988).

trial court's severance of the attempted armed burglary and homicide counts. However, a reading of the facts of that case and this Court's finding of no fundamental error bolsters the State's claim of error. Id. at 499 On May 13, 1988, Rodriguez committed a robbery and murder during which he obtained among other things a revolver. Id. at 495-97. The next day, Fernandez, a co-defendant in the robbery/murder, attempted a home invasion with Rodriguez and other accomplices. Id. at 497 During the home invasion crime, the murder victim's gun was carried, although not used. Id. The robbery/murder and home invasion crimes were tried together. Such was found not to be fundamental error. Id. at 499.

In the instant case, the facts the State was prepared to prove were that Weaver committed an attempted armed burglary of a conveyance of Graciela Ortiz's ("Ortiz") car using the gun which had been used in the murder. When Ortiz drove off, Weaver fled the scene on foot. (T30 5137, 5140-47, 5155-60). A little more than a half mile from the incident with Ortiz, Hinkey Wilcher spotted Weaver lurking in bushes and shoving what appeared to a be a gun down his pants. About 30 minutes later, and near the location where Weaver was to be stopped by Officers Peney and Meyers, a man wearing a shirt like Weaver's was spotted near the bushes by Irving King. Shortly thereafter,

Peney and Myers detained a nervous Weaver at that location, and when the police asked about weapons, Weaver ran. Ms Engle saw Peney's shooting and identified Weaver as the gunman. The homicide occurred 1.6 miles from and about two hours after the burglary. As such, Rodriguez is no impediment to this Court finding the trial court abused its discretion in severing Weaver's charges of attempted armed burglary and the murder of Officer Peney.

This Court should find that no reasonable person would have severed the charges as they were based on a continuing transaction, connected in an episodic sense. These facts show that the burglary was an integral part of the criminal episode which culminated in Peney's murder. It explained why Weaver was in that location carrying a gun and acting so suspiciously Offices Peney and Meyers felt it prudent to stop and question Weaver. Further, it under cut Weaver's complaint about harassment voiced in his statement of the police encounter. After the failure of the attempted armed burglary, Weaver fled trying to get back to his car and place of safety. Weaver, making his way in a surreptitious fashion to his car, hid/lurked in bushes and hedges along the highway and concealed his gun in his pants. Just 1.6 miles on foot from the attempted burglary, and due to his furtive actions, Weaver attracted the attention

of Officers Peney and Myers. Their meeting under those conditions, and Weaver's added fear the officers would find the gun, precipitated to the shooting death of Officer Peney. See Griffin v. State, 639 So. 2d 966, 972 (Fla. 1994); Ellis v. State, 622 So. 2d 991 (Fla. 1993); Livingston v. State, 565 So.2d 1288 (Fla. 1988); Campbell v. State, 227 So. 2d 873 (Fla. 1969); Roberts v. State, 808 So. 2d 1266, 1267 (Fla. 4th DCA 2002) (finding denial of severance proper where defendant used priviously stolen car to commit and flee from subsequent robbery); Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990).

Peney's murder qualified as a felony murder under section 782.004(a)(2)e, Florida Statutes as Peney's murder was committed with the same gun used in the attempted burglary of Ortiz's car, and occurred as he was escaping form that crime. The State should not have been precluded from arguing the felony murder theory to the jury. There is no evidence Weaver had reached a place of safety before his confrontation with Peney. In the event this Court reverses the conviction, it must reverse the court's rulings severing Count V from the indictment and preventing felony murder theory. In the event of a reversal, the State must be permitted to argue for the felony murder aggravator in a subsequent penalty phase, should one be necessary, as the State need not charge and convict a defendant

of the underlying felony in order to prove the aggravator. Pietri v. State, 644 So. 2d 1347 n. 11 (Fla. 1994); Occhicone v. State, 570 So. 2d 902 (Fla. 1990)

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING THE TAPES MADE OF WEAVER'S CONFESSION

Weaver's answer to the State's issue is to reassert that he did not wish to be taped (ACAB 45). However, Weaver does not refute any of the State's cases which hold that a defendant does not have a reasonable expectation of privacy in a police cruiser. U.S. v. McKinnon, 985 F.2d 525 (11th Cir. 1995); State v. Smith, 641 So. 2d 849 (Fla. 1994); State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990); Brown v. State, 349 So. 2d 1196 (Fla. 4th DCA 1977). Nor does Weaver address Larzelere v. State, 676 So. 2d 394 (Fla. 1996) where the suspect had invoked her right to remain silent, the conversation taped in the jail holding cell was admissible at trial, because the State fostered no expectation of privacy. The State did not advise Weaver he would not be taped while sitting in the police cruiser or walking in public. The suppression of the tapes from the cruiser and forensic lab was an abuse of discretion.[2]

After the interrogation conducted in the police interview room, which was not taped at Weaver's request, Weaver agreed to accompany the detectives on a walk through of the crime area.

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[2]Admission of evidence is within the court's discretion and its ruling will be affirmed unless there has been an abuse. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000)

The conversations that took place during a drive through the crime scene and in the forensic lab were taped surreptitiously. Pre-trial, Weaver asked that his statements and the corresponding tapes be suppressed. The State countered that the Miranda[3] waiver was proper and Weaver had no privacy expectation. The court found no police misconduct, and concluded Weaver's Miranda waiver was knowing, intelligent, and voluntary (T10 1488-90, 1497-98; T11 1563-68, 1573, 1589, 1612-14, 1624-27, 1631, 1648-52, 1709-16; T12 1774-75; T13 1956-2010, 2011-33; SR15 689-94).

The police do not have to confirm that a suspect comprehends every consequence resulting from a waiver of Miranda. Moran v. Burbine, 475 U.S. 412 (1986) (finding constitution does not require suspect to know and understand every possible consequence of Miranda waiver); Oregon v. Elstad, 470 U.S. 298, 316-17 (1985). Once Miranda warnings are given, official silence cannot cause a suspect to misunderstand the nature of his rights. See U.S. v. Washington, 431 U.S. 181, 188 (1977). As noted in Washington, a defendant who has been advised he has the right to remain silent is in a curious position to complain his statement was compelled. Id. There is no constitutional requirement a suspect be given all the information he may feel

[3]Miranda v. Arizona, 384 U.S. 436 (1966)

useful in making his decision or "might...affect his decision to confess." Moran, 475 U.S. at 422. The police have never been required to help a suspect decide whether or not to talk. Id. It has never been a constitutional requirement the police make sure the defendant's waiver was a prudent decision.

Weaver never asked if his statements could be taped in the police car. He ably negotiated a secession of the taping in the police station, yet he did not seek the same treatment here. At a minimum, should the case be reversed, but the Court finds that the audio tapes are not admissible, then the video portion should be available to the State on retrial. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. U.S., 389 U.S. 347, 351 (1967). A person does not have a reasonable expectation of privacy as he walks in public or a police station. U.S. v. Santana, 427 U.S. 38 (1976); State v. Duhart, 810 So. 2d 972 (Fla. 4th DCA 2002).

ISSUE III

IT WAS ERROR TO EXCLUDE GUNS, AMMUNITION, AND RELATED EVIDENCE FOUND IN WEAVER'S AUTOMOBILE

The court granted in part the defense motion in limine and excluded all evidence found in Weaver's automobile to the extent the evidence was not associated with a .357 gun. Officer Peney was shot with a .357 weapon. This ruling was an abuse of discretion,[4] and in the event Weaver is granted a new trial, the State should be able to admit all the evidence collected from Weaver's car on retrial.

Weaver relies on O'Connor v. State, 835 So. 2d 1226 (Fla. 4th DCA 2003) for support of the trial court's granting of the defense motion in limine regarding the firearm evidence found in his car (CAB 46-48). However, he does not attempt to distinguish any of the State's cases showing such evidence is admissible. O'Connor, and the cases it relied upon, are distinguishable from the instant matter as the evidence did not tend to prove the defendants' abilities to accomplish the crimes with which they were charged. O'Connor's conviction was reversed by the Fourth District Court because the evidence admitted (photographs of a shotgun, bullet proof vest, and

[4]The standard of review in abuse of discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000).

poster with a humorous saying) were irrelevant to show the defendant was involved in or could accomplish the shooting death of the victim with a nine millimeter handgun. However, here, the excluded evidence (firearms, ammunition, pawn tickets, scopes, books, etc.) was relevant to show identity, motive, intent, knowledge of and expertise in weaponry, and lack of mistake in Weaver's ability to run, spin, take a shooting stance, aim, fire, hit the pursuing Officer Peney and turn to continue the escape.

In O'Connor, the court referenced Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987) where the Fourth District Court of Appeals determined the trial court should have suppressed a gun found in Huhn's car at the time of his arrest some five months after the crime. Because the gun was not connected to the crime, the court found it was not relevant. However, here, the arsenal in Weaver's car tended to help prove Weaver's motive to escape the police. According to Weaver's own statement, he feared the police finding a single handgun on his person, thus, his motive for running was even higher given the arsenal he possessed and maintained in his vehicle. Weaver's knowledge and expertise in weaponry, including the ability to reload and calibrate the power of the ammunition, establishes that Weaver knew what would happen should his bullet hit its target.

Clearly, there is a stronger connection between Weaver's firearms evidence than that presented in O'Connor and Huhn. Consequently, the evidence should not have been suppressed in Weaver's case.

Moreover, the array of weaponry tends to show his proficiency in firearms and marksmanship which would rebut the claim his bullet did not strike Officer Peney. Weaver was not someone who just found a gun and was unfamiliar with its operation and damage it could cause. The arsenal he had in his car put the episode in context as well as his ability to spin, aim, and fire accurately at his pursuer. The material was inextricable intertwined with the initial burglary and the ability/reason to commit the subsequent homicide. Bryan v. State, 533 So. 2d 774 (Fla. 1988) (approving admission of evidence of prior robbery to establish possession of murder weapon); Irizarry v. State, 496 So. 2d 822 (Fla. 1986) (concluding it was proper to admit machetes even though they were not the murder weapon as they showed defendant favored machetes as tools/weapons); Harris v. State, 177 So. 187 (Fla. 1937) (concluding admission of gun found in defendant's car was probative although not same caliber as murder weapon); Irving v. State, 627 So. 2d 92 (Fla. 3d DCA 1993); Dowell v. State, 516 So. 2d 271 (Fla. 4th DCA 1987). Should this Court reverse for

a new trial, this evidence should be available to the State for admission against Weaver.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Appellant's conviction and sentence of death, however, if the Court reverses, it should grant the State's issues on cross-appeal.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Richard L. Rosenbaum, Esq., 350 East Las Olas Boulevard, Suite 1700, Las Olas Center II, Fort Lauderdale, Fl 33301 on February 18, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced

proportionately on February 18, 2004.

_____
LESLIE T. CAMPBELL