IN THE SUPREME COURT OF FLORIDA

WYDELL JODY EVANS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC00-468
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY THROUGH ITS POLICE OFFICER WITNESSES.

Appellee first argues that the improper admission of hearsay testimony through Officer Wendy Yorkey was not preserved for appeal. Appellant obviously disagrees. The preliminary questions and answers elicited through Officer Yorkey

were arguably not being admitted to prove the truth of the matter asserted and thus were not necessarily subject to hearsay objection. However, the identification of Erica by Appellant was indeed being offered for the truth of the matter asserted and thus constitutes inadmissible hearsay unless permitted by some recognized exception. Thus, the objection came at the appropriate time and is properly preserved for appeal.

Turning to the merits, Appellee argues that indeed the statements were admissible under the excited utterance exception to the hearsay rule. Appellee contends that there was insufficient time for any reflective thought and thus the statements clearly were admissible since the individuals were still experiencing the startling events. However, the record belies this assertion. From the moment that Appellant got out of the car and Erica and Sammy took the victim to the hospital, they had enough time to formulate their "story." When questioned by the officers, rather than simply being made up on the spot, the statements of Sammy and Erica were the result of the reflective process. That these individuals later recanted this story, while understandable perhaps, does not make these statements excited utterances. In the cases cited by Appellee for the proposition that the passage of time is not the deciding factor, the statements ultimately admitted into evidence were not statements made after the individuals had already lied. It is inconceivable

to think that a statement made after an individual has already lied about an event could possibly be considered an excited utterance. It must also be emphasized that when the initial objection was made it was the court and not the prosecutor who claimed the admission was an excited utterance.

Appellee next argues that even if the trial court erred in permitting the testimony, it was harmless since the individuals testified at trial and identified Appellant as the shooter. However, Appellee ignores the fact that the state's entire case hinged on the testimony of these two witnesses. The defense at trial was that the shooting was accidental. Thus, the testimony of these two individuals was extremely critical to the state's case. The testimony of the police officers recounting the improper hearsay testimony served to bolster the credibility of these witnesses. While Appellee argues that this argument is not preserved for appeal, Appellant is at a loss to understand such assertion. The trial court had already ruled that the statement was admissible. Any further argument by trial counsel would have been futile. The argument made on appeal is to counter Appellee's all too familiar chorus of "harmless error." Appellant contends that there is no preservation problem in this regard.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENTS IN THE GUILT PHASE WHICH IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT.

Appellee once again argues that the issue is not preserved for appeal. Appellant strongly disagrees. As noted, the first offending comment by the prosecutor during closing argument was not objected to. It was only when the prosecutor returned to this same statement, suggesting to the jury that the defendant had some burden to produce evidence, that defense counsel immediately objected. Clearly, the second comment was properly preserved for appeal. Because the trial court overruled the objection the second time, any objection to the first comment would have been similarly treated by the trial court. Under these circumstances, any objection would have been a futile gesture on defense counsel's part.

Appellee then seeks to distinguish the instant case from ***Ruiz v. State***, 743 So.2d 1 (Fla. 1999) apparently on the basis that there were more objectionable

comments in ***Ruiz***. than in the instant case. Such argument on the part of Appellee is disingenuous. If the prosecutor improperly exhorts a jury to convict a defendant improperly, the number of objectionable comments is clearly not determinative. It must be remembered, that this was not a case where the issue of guilt was open and shut. While Appellant admitted to shooting Angel, he contended that the shooting was accidental. Support for this theory was presented by other witnesses. Thus, the improper comments by the prosecutor could in fact have tipped the balance in the minds of the jury. Appellee has not met its burden in proving the objectionable comments could not have affected the verdict. ***State v. DiGiulio***, 491 So.2d 1129 (Fla. 1986)

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9, 16 & 17 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE INCOMPLETE AND CONFUSING JURY INSTRUCTION GIVEN BELOW.

Once again, Appellee argues the instant issue is not preserved for appeal. However, based on the authorities cited in the initial brief, the failure of the trial court to instruct the jury as to any element of an offense which is pertinent or material to what a jury must consider in order to convict amounts to fundamental error which need not be preserved below. ***Stewart v. State***, 420 So.2d 862 (Fla. 1982); ***Sandstrom v. Montana***, 442 U.S. 510 (1979).

Appellee does not dispute that the instruction given by the trial court failed to include an essential element of kidnaping but serves to minimize the error by alleging it benefitted the defendant. One questions how an improper instruction could benefit a defendant when in fact the defendant is convicted. Notwithstanding this assertion, there is no way that this Court can make that determination. Kidnaping was alleged to have occurred on one of two basis: (1) with intent to

facilitate another felony, or (2) with the intent to terrorize one three victims. The terrorizing theory could not have been the basis for kidnaping Angel. By all accounts, Angel had no idea that she was about to be shot. Up until that time, no one believed that anyone had been kidnaped. Yet, the jury was told they could consider this option to support the conviction for kidnaping. Additionally, Sammy picked up Appellant and was driving him around voluntarily. Just where the kidnaping began is certainly questionable. As to Erica, she voluntarily got into the car with Angel. At no time, did it appear that these individuals were being terrorized. Certainly, there were opportunities for the individuals to extricate themselves from the situation. It is because of the peculiar facts of this case, that the improper and incomplete jury instruction on kidnaping constitutes fundamental error.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER AND KIDNAPING.

With regard to the argument that the trial court erred in denying the motion for judgment of acquittal as to kidnaping, Appellee takes exception to Appellant's contention that "Once Angel was shot, it was legally impossible for her to be kidnaped with the intent to terrorize since by all reports she was rendered virtually unconscious after the shot." Responding to this assertion Appellee states, "Undersigned counsel does not know what trial transcripts Defense Counsel read, but they surely were not those of the instant case." (Brief of Appellee, Page 77) The statement concerning Angel's state of consciousness is taken from the testimony of Paul Vasallo, the district medical examiner who performed the autopsy on Angel. When questioned as to how long it would take for the victim to die after she was shot if she was not provided immediate medical attention the doctor responded that it would be just minutes. When asked to pin it down, the doctor responded:

> Clearly, you know, within maybe five minutes, six, ten minutes or less she's going

> to be – **she's going to be unconscious probably sooner than that**. From there to die it would not take too long.

(Vol. XI, 1348, emphasis added) Thus, Appellant stands by the statement in the initial brief concerning the state of consciousness of the victim.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT PORTIONS OF A PRESENTENCE INVESTIGATION DURING THE PENALTY PHASE WHERE DEFENDANT WAS NOT GIVEN ANY OPPORTUNITY TO REBUT THE INFORMATION.

Appellee once again argues that this issue is not preserved for appeal. Again, Appellant is at a loss to understand this argument. Appellant objected to the PSI summaries of the prior offenses on the basis that they constituted improper hearsay and were a discovery violation. The state countered with ***Koon v. State***, 513 So.2d 1253 (Fla. 1987). After further discussion, the trial court ruled that the PSI summaries were admissible. The court then stated that Appellant's arguments were sufficiently preserved for appellate purposes. (Vol. XVI, 2243) As noted by Appellee, defense counsel argued that if they wanted to get the facts of the prior convictions in they needed live testimony to do so. While it may be true that defense counsel may have objected to the live witnesses testimony, this does not detract from the fact that he objected properly to the admission of the PSI

summaries. The trial judge understood this objection and properly ruled that the issue was preserved for appeal.

Koon v. State, 513 So.2d 1253 (Fla. 1987), cited by the prosecution below for the proposition that the PSI is admissible, is simply inapplicable. The issue before this Court in ***Koon*** was whether a trial court could consider a PSI in sentencing. There is nothing in ***Koon*** which extends this rationale to permitting a jury to consider a PSI, particularly where the defense lodges a timely objection to its admissibility. Yet it is clear that the trial court was relying upon the prosecutor's assertion that the PSI was admissible to the jury:

> I will rely on the State's representation then concerning the Coon (sic) at this point and allow the use of the PSIs.

(Vol XVI, 2230) As this Court noted in ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989), the admission of the PSI's in the instant case without affording Appellant any right of confrontation, forced him to take the stand to rebut these. This was error.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Appellee takes issue with Appellant's assertion that some members of the victim's family oppose the death penalty in the instant case. As to this claim, Appellee offers in Footnote 25 of Page 88:

> He offers no record support for this claim and the State does not concede that this representation is accurate.

The record support for this claim came from the ***Spencer*** hearing. Paul Johnson, the victim's father, testified that although Appellant needs to be punished, he did not think that he deserved the death penalty. (Vol. II, 363-364) In the presentence investigation, it was also revealed that several other members of Angel Johnson's family testified that they did not believe that Appellant should receive the death penalty. (Vol. II, 355-356, 365) Thus, there is certainly record support for Appellant's claim. Additionally, Appellant's assertion that Angel Johnson suffered very little after she was shot is supported by the testimony of the medical examiner

who testified that Angel would have lost consciousness within a few minutes after being shot. (Vol. XI, 1348) Appellant contends that the prosecutor below and the trial court must have understood this proposition and accepted it since at no time was it suggested that the aggravating circumstance of heinous, atrocious, or cruel applied in the instant case. The instant crime, however regrettable, is simply not the type for which the death penalty was intended. This Court must reverse the death sentence and remand for imposition of a life sentence.

CONCLUSION

Based upon the foregoing reasons and authorities cited herein as well as in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse his judgment and sentences and remand for a new trial, or to reverse his death sentence and remand for a new penalty phase, or to reverse his death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Wydell Jody Evans, #113416, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 20th day of August, 2001.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 point.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER