IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-183

KEVIN PURYEAR,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

AMENDED BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, KEVIN PURYEAR, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings. The symbol "A." designates the Appendix, which contains a copy of the Fourth District's opinion in this case.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts, but makes the following clarifications and additions:

1. Detective Wardlaw testified that she obtained information from the victim so that she could dispatch a description of the perpetrator (T. 171). Without objection, Detective Wardlaw testified that the victim said that the suspect had every other tooth missing in his mouth and that he had a mustache (T. 173).[1] She said that Petitioner matched the description given to her (T. 177). On cross-examination, she stated that she did not recall Petitioner having a beard, although in the booking photo he had one (T. 180-181).

2. The victim testified that before the perpetrator walked away, she saw the side of his face (T. 195). She said that she did not get a good look at his face (T. 195). She explained that she only got a glance at his face (T. 204). Her in-court identification of Petitioner was based on the side of his face (T. 208).

The victim testified in direct-examination, without objection, that she gave a description of the perpetrator to the police, and said that the description included that the man was missing every

[1] On an earlier objection to the description of the subject, the prosecutor explained that the testimony was not being introduced for the truth of the matter, but was being presented to show that a description was given (T. 172).

other tooth (T. 199-200, 204). She described the perpetrator as a black male, thirty to thirty-five, missing every other tooth in his mouth, wearing faded black jeans, a burgundy shirt, and white tennis shoes, and having body odor (T. 200). She said that she could not remember whether she said that the man had bad breath instead of body odor, because she could not remember exactly what she had told the police (T. 202). She said that she did not remember when she got the opportunity to view the suspect's mouth, but she said that she did not make up information about his teeth (T. 204). Without objection, she also said that she told the police that the subject had a mustache (T. 204).

The victim said that when she was driving around the area with her boyfriend, he asked if a man crossing the street was the perpetrator, and that after observing him, she said "yeah that's him" (T. 202). She said that she was first able to make the identification because the man was wearing the same clothes that he had worn during the robbery (T. 203-204). She also indicated that he was the same height and weight (T. 235). She said that she was sure that it was the same man and that she did not have any doubt in her mind at the time (T. 205-206). She said that she told the police officer who came to the location where she saw that man that she was sure he was the one who robbed her (T. 206). On redirect-examination, she said that she was 100% sure that the man, Petitioner, was the perpetrator based on the clothing he wore, his

size, and the side of his face (T. 240, 250).

When the perpetrator turned a little towards the victim as he walked away from her, the victim got a look at the side of his face (T. 195, 214-215). In court, the victim said that the side of Petitioner's face looked the same (T. 208, 216, 236).

On cross-examination, defense counsel had the victim testify that she did not remember anything unusual about the perpetrator's teeth (T. 226-227). She stated that she did not get to see the subject's face (T. 233).

On redirect-examination, the victim said that she did not remember telling the police about the missing teeth (T. 242). When the prosecutor asked the victim why she would have told the detective about missing teeth, the victim said that she did not know (T. 244). Defense counsel then objected based on facts not in evidence (T. 245). The victim said that nobody told her to tell the police this, and when the prosecutor asked her again why she would have told the detective about missing teeth, defense counsel objected based on a hypothetical (T. 245). The victim then responded that if she had seen them, then she would have said it to the police, but that she did not remember saying that the suspect was missing teeth (T. 245). The victim said again that she saw a mustache on the suspect (T. 246).

On recross-examination, the victim indicated that she did not see anything unusual about the subject's teeth, as opposed to her

just not remembering anything about them (T. 251). On redirect-examination, though, she said that she could have told the police about teeth, but she just could not remember (T. 253).

SUMMARY OF ARGUMENT

The District Court properly held admissible the witnesses' testimony about the descriptions that the victim gave of the suspect which led to the identification. The District Court followed an express ruling from this Court. Like in the precedent, the descriptions in this case were key factors in the victim's identification of Appellant, and, as such, were inherent in the identification. Hence, the testimony was admissible under the identification exception to the hearsay rule. It was also admissible under the excited utterance exception.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD ADMISSIBLE THE WITNESSES' TESTIMONY ABOUT THE DESCRIPTIONS THAT THE VICTIM GAVE OF THE SUSPECT WHICH LED TO THE IDENTIFICATION.

Petitioner focuses his argument on a claim that the district court improperly receded from precedent of this Court. He bases his argument on the notion that this court cannot overrule or refine case law *sub silentio*. He also contends that this Court's consideration of the identification exception to the hearsay rule under section 90.801(2)(c), Florida Statutes, in Power v. State, 605 So. 2d 856 (Fla. 1992) was merely dicta, because this court also ruled that the statements were admissible under another exception to the hearsay rule.

First, Respondent submits that this Court is free to make a ruling in a case, decided independent of a precedent case and, in so doing, decline to follow the precedent case without explanation. Courts have referred to opinions by this Court overruling precedent *sub silentio*. See, e.g., Brazell v. State, 570 So. 2d 919, 922 (Fla. 1990), J. Kogan, concurrence and dissent; Wainwright v. State, 528 So. 2d 1329, 1331 (Fla. 5th DCA 1988); Richardson v. State, 523 So. 2d 746, 746 (Fla. 5th DCA 1988). Indeed, in Fields v. Zinman, 394 So. 2d 1133, 1137 (Fla. 4th DCA 1981), the court noted that this Court had clearly exhibited a preference for the construction of a statute by example, and stated, "We are inclined

to view that the district courts of appeal are no less firmly bound by Supreme Court precedent established peripherally than they are by those explicitly mandated." 594 So. 2d at 1137.

This Court's statements in Power with regard to the identification exception to the hearsay rule did not constitute dicta. Instead, the statements were made as part of this Court's explicit ruling that the testimony in question was properly admitted at trial. 605 So. 2d at 862. In Power, the defendant made the general claim that the testimony was hearsay. This Court first agreed with the State that the statements in question were "probably" admissible as excited utterances, and then stated that "the statement regarding the reddish hair was admissible nonhearsay as one of identification of a person made after perceiving him," citing to section 90.801(2)(c). Hence, if anything, this court acknowledged the State's contention as a possibility, and then stressed that, notwithstanding this, the testimony was nonetheless admissible under the identification exception. This Court's main ruling, then, was that the testimony was properly admitted under the identification exception even if the circumstances did not warrant admission under the excited utterance exception.

To constitute dicta, a court's comments must be ancillary, nonessential, or gratuitous. See Myers v. Atlantic Coast Line R. Co., 112 So. 2d 263, 267 (Fla. 1959). Here, this Courts comments on the identification exception were clearly not ancillary or

gratuitous since they bore directly on the defendant's claim that the testimony was hearsay. They also were not nonessential since this Court's finding on the excited utterance exception was not firm, but was prefaced by "probably."

In any event, the State maintains that "nonessential" does not mean that a ruling has not been made where evidence is admissible on another independent ground. If this were the case, then any time a court proceeds to a harmless error analysis in addition to a finding on the admissibility of the evidence, as this court did in Power, then the finding on admissibility would only be considered dicta. However, all points of law which have been adjudicated become law of the case. See Greene v. Massey, 384 So. 2d 24, 28 (Fla. 1980).

In Parsons v. Federal Realty Corp., 143 So. 912, 920 (Fla. 1931), this court explicitly stated that where several questions properly arise, determination of questions is not dictum merely because a conclusion on another question would dispose of the case on the merits. Because this Court's finding on the identification exception in Power was a ruling, the Fourth District was bound by this most recent precedent from this Court. See generally State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976)(*stare decisis* is fundamental principle that where issue has been decided in Supreme Court, lower courts are bound to adhere to the ruling when considering similar issues).

It is a well settled principle that the conduct of trial proceedings lies within the broad discretion of the trial judge and should not be lightly interfered with by an appellate court. Revels v. State, 59 So. 2d 951, 952 (Fla. 1912); Harris v. State, 229 So. 2d 670, 671 (Fla. 3d DCA 1969). Likewise, the trial court has broad discretion in determining the admissibility of evidence. Heath v. State, 648 So. 2d 660, 664 (Fla. 1994). Thus, the trial court's ruling on the admissibility of evidence is not subject to review except for a clear abuse of discretion. Welty v. State, 402 So. 2d 1159, 1163 (Fla. 1981).

In Power, this Court held that the witness' statement describing the suspect as having reddish hair was admissible as a statement of identification under section 90.801(2)(c). Therefore, the Fourth District properly adhered to Power, and found that the victim's descriptions of the perpetrator were admissible under section 90.801(2)(c).

In this case, the victim's descriptions of the suspect formed the basis of her identification of Petitioner. Compare People v. Skyes, 582 N.W. 2d 197, 205 (Mich. App. 1998)(description merely constituted perception but not identification for police concluded description matched defendant, but witness never made identification). While it is not clear if this point was true in Power, it is clear that the witness in Power, like the victim in this case, testified at trial and was subject to cross-examination.

Moreover, it is clear that some identification was made in Power, because the defendant challenged the introduction of the identifying photograph.

On the other hand, in Swafford v. State, 533 So. 2d 270 (Fla. 1988), the case on which Petitioner relied below, the witness never identified the defendant as the perpetrator. This court, therefore, held that the description of the suspect aired over the dispatch broadcast was not admissible under section 90.801(2)(c): "The witness in this case never made an identification of the person he had seen; he only gave a description." 533 So. 2d at 276. See also Neilson v. State, 713 So. 2d 1110, 1112 (Fla. 2d DCA 1998)(witness never asked about identification).

Long before the codification of the hearsay rule, this Court held that a third party may testify about the victim's identification of the defendant as the suspect, and introduce into evidence the identified photograph of the defendant. In Martin v. State, 129 So. 112, 116 (Fla. 1930), this court ruled that the trial court properly allowed into evidence the photograph which the victim identified. The photograph was chosen to show to the victim based on the victim's description of the suspect. 129 So. 114. This Court stated that provided the identification was grounded on the victim's own knowledge, opinion, belief, judgment, and impression of the identity of the person, then evidence about the identification is admissible. It noted that it is subject to

cross-examination.

Similarly, in United States v. Moskowitz, 581 F. 2d 14, 21 (2d Cir. 1978), the court held that the sketch of the suspect, which was created based on the descriptions given by the witnesses, was admissible into evidence.[2] The Court in Moskowitz held that the sketch was admissible under rule 801(d)(1)(C), Federal Rules of Evidence, the identification exception to the hearsay rule, pointing to its earlier decision in United States v. Manchard, 564 F. 2d 983, 996 (2d Cir. 1977), in which it held that "identification" under the rule includes descriptions and impressions on which the witness formed his identification of a suspect as the perpetrator. See also United States v. Brink, 39 F. 3d 419, 425 (3d Cir. 1994)(witness' statement that robber had dark eyes not hearsay as statement of prior identification).

Later, the court in State v. Motta, 659 P. 2d 745, 750-751 (Haw. 1983) held that a composite sketch is admissible under the identification exception if the witness testifies at trial and is subject to cross-examination, and if the statement is one of identification made after perceiving the suspect. With regard to the sketch, the court acknowledged, "It has the same effect as if the victim had made a verbal description of the suspect's physical

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[2] Section 90.801(2)(c), Florida Statutes, is identical to Rule 801(d)(1)(c), Federal Rules of Evidence. Thus, federal cases dealing with rule 801(d)(1)(c) are persuasive in construing the Florida rule. See, e.g., Moore v. State, 452 So. 2d 559, 561-562 (Fla. 1984); State v. Page, 449 So. 2d 813 (Fla. 1984).

characteristics." It concluded, though, that the danger of hearsay, that the declarant's credibility cannot be assessed, was not present since the witness was subject to cross-examination.

The court in People v. Tyllas, 420 N.E. 2d 625, 627 (Ill. App. 1981) also held admissible the sketch made as a composite of descriptions given by the witnesses. The court in Rowe v. State, 314 N.E. 2d 745, 748-749 (Ind. 1974), in upholding admission of the composite sketch, stressed that the harm sought to be prevented by the hearsay rule had been successfully prevented because the witness had been extensively cross-examined about his descriptions.

In State v. Woodbury, 905 P. 2d 1066 (Idaho 1995), the court held that the victim's descriptive statements about the suspect were admissible under the identification exception to the hearsay rule. It referred to the statements as "identifying declarations." 905 P. 2d at 1069. Likewise, in Sparks v. United States, 755 A. 2d 394, 400 (D.C. App. 2000), the court held that "details" of the assault victim's prior inconsistent statements identifying the defendant were admissible as part of the identification of the defendant after perceiving him. See also Scales v. United States, 687 A. 2d 927, 934 (D.C. App. 1996)(witness' testimony that selected photo because it was light-skinned man admissible as identification). It pointed out that the identification exception is not limited to identifications made at a showup, lineup, or photo identification.

The court in People v. Dixon, 228 A.D. 2d 175, 175 (N.Y. App. 1996) held that the court properly permitted the introduction of testimony concerning prior descriptions made by the victim of his assailant. It referenced People v. Huertas, 553 N.E. 2d 992 (N.Y. App. 1990)(75 N.Y.2d 487). In Huertas, the court stated that testimony about the victim's description of her assailant was not hearsay because it was not offered to prove the truth of the matter asserted. Instead, it reasoned, the testimony was offered as probative evidence of the victim's ability to observe and remember her assailant, and, therefore, was relevant to the accuracy of the identification that the victim made. It stated that while such evidence might not prove that the witness was able to observe accurately, the fact of the description would tend to demonstrate that the witness was able to make observations.

The court in Huertas explained that there is great evidentiary value in an identification made soon after a crime because the suggestions of others had yet to intervene. This Court in State v. Freber, 366 So. 2d 426, 428 (Fla. 1978) similarly stated that an identification made shortly after a crime is inherently more reliable than a later identification in court. This Court held in Freber that testimony of a prior extrajudicial identification is admissible as substantive evidence of identity if the witness testifies to the fact that the identification was made. Hence, this Court reinstated the conviction against the defendant, even

though at trial, the witness said that while the defendant resembled the perpetrator, she could not be certain that it was him because his hair was a different length. 366 So. 2d at 427.

In Grant v. State, 240 So. 2d 169 (Fla. 1st DCA 1970), the defendant argued that the evidence on identity was insufficient because the victim's identification of him at the time of apprehension was based only upon the hat and coat that he was wearing. The court looked at the evidence and decided that the fact of the clothing served as corroborative evidence of the victim's statement that he recognized the defendant as the person who committed the robbery. In this case, like in Grant, the victim's testimony about the perpetrator's clothing substantiated her identification of Petitioner, which was also based on his size and the side of his face. In addition, the jury's view of Petitioner's mouth corroborated the description that the victim said that she gave to the police in her direct-examination, that the perpetrator was missing teeth (T. 200, 307).

The State advances that the description testimony in this case was inherent in the victim's identification, and, therefore, was admissible because, like other identification testimony, it did not pose the common risks of hearsay. In Freber, this Court stressed that the declarant testified under oath. The same is true in this case. In United States v. Owens, 484 U.S. 554, 560 (1988), the court stated that inquiry into the reliability of hearsay

statements is not required by the confrontation clause when the declarant is present at trial and is subject to cross-examination.

Besides being admissible under the identification exception, Respondent contends that the testimony at issue in this case was also admissible under the excited utterance exception to the hearsay rule.[3] At trial, Officer Wardlaw testified that when she approached the victim at the station, "She [the victim] was distraught, upset, on the verge of tears, and actually crying at times during the whole time that we were talking." (T. 171). She said that she talked to the victim fifteen or twenty minutes after the crime occurred (T. 172). Mr. Cratsenberg, the victim's boyfriend, testified that when he found the victim at home, she was crying (T. 257).

Under the excited utterance exception, statements made relating to a startling event while the declarant remains under stress of excitement caused by the event are admissible in evidence. See Section 90.803(2), Florida Statutes. In Brunson v. State, 492 So. 2d 1155 (Fla. 3d DCA 1986), the court held that the sexual battery victim's statements made shortly after the rape were admissible under the excited utterance exception. See also Power v. State, 605 So. 2d 856, 862 (Fla. 1992)(bystander's hearsay statements to officer upon his arriving at scene of crime

[3] Once this Court has conflict jurisdiction, it has jurisdiction to consider all issues necessary to a full and final resolution. See Hall v. State, 752 So. 2d 575, 582 (Fla. 2000).

admissible where bystander flagged down officer and appeared to be shaken).

Moreover, in Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986), this Court held that the victim's statements to the officer at the scene were admissible under the res gestae rule as spontaneous utterances made while the victim was still under the stress, excitement, and pain of the robbery and shooting. See also Rogers v. State, 660 So. 2d 237, 240 (Fla. 1995)(statements made by victim to persons at the house where she fled were admissible as excited utterances, since they were made within ten minutes of the victim arriving at the house and while the victim was still under the effect of what occurred); Romero v. State, 670 So. 2d 129, 130 (Fla. 3d DCA 1996)(victim's statement to police which identified defendant as perpetrator admissible where made relatively short interval of time after crime); Ware v. State, 596 So. 2d 1200 (Fla. 3d DCA 1992)(out-of-court statements of 911 call admissible); McDonald v. State, 578 So. 2d 371, 373-374 (Fla. 1st DCA 1991)(statements made by victim to friend after she fled from rape scene admissible under both the excited utterance and spontaneous statement exceptions to the hearsay rule). Later, in Henyard v. State, 689 So. 2d 239, 251 (Fla. 1996), this Court upheld the admissibility of statements made by the victim when the police responded to her home, finding that they fell under the excited utterance exception. The victim in Henyard told the police what

happened to her and identified her assailants as fitting a certain description.

Even if the statements were prompted by a general inquiry like "What happened?", they nonetheless are admissible. In Garcia, the court held that it was permissible for the officer to testify about what the victim had told him when he asked what had happened, because the response was spontaneous. 492 So. 2d at 365. Likewise, in Cadivad v. State, 416 So. 2d 1156, 1158 (Fla. 3d DCA 1982), the court decided that it was proper for the investigating officer to relay the victim's statements at trial. And, in Conley v. State, 592 So. 2d 723, 728 (Fla. 1st DCA 1992), the court reasoned that the victim's responses to the officer's questions were admissible.

In Pacifico v. State, 642 So. 2d 1178, 1186 (Fla. 1st DCA 1994), the court held that the victim's statements to her roommates after the offense and immediately upon the defendant taking her to her apartment, were admissible under the first complaint doctrine, even though they would not be admissible under the excited utterance and spontaneous statement exceptions to the hearsay rule. In Pacifico, the court allowed the victim's statements as to specifics of what happened.

The first complaint doctrine has sometimes been used interchangeably with the res gestae doctrine to define an exception to the hearsay rule. However, the res gestae doctrine is likely to encompass an exception more broad than the first complaint rule,

since it makes admissible the details of a victim's report of an offense. See State v. Johnson, 382 So. 2d 765, 766 (Fla. 2d DCA 1980)(evidence code did not change law, but just terminology, so that what was the res gestae exception is now a combination of exceptions including excited utterance). In Appell v. State, 250 So. 2d 318, 320-322 (Fla. 4th DCA 1971), the court held that the shooting victim's statements to his mother two hours after the incident, while he was in the hospital, were admissible as part of the res gestae. It reasoned that there was no outside influence exerted on the victim, he received no prompting, his statements were not self-serving, and he was not inclined to be "flip" about what happened.

Respondent submits that these factors apply to the instant case, so that even testimony about what the victim said specifically occurred would have been permissible. See State v. Perry, 567 P. 2d 786, 794 (Ariz. App. 1977)(time is not sole test for either admission or rejection of proof under spontaneous utterance exception; victim's statements admissible because of her excited emotional state and because clear that long period of time had not elapsed between event and statements even though unclear exact time statements were made). Here, the victim made the statements minutes after the robbery when she drove directly home, and then when she left the home with her boyfriend to report the robbery to the police. In Edmond v. State, 559 So. 2d 85, 86 (Fla. 3d DCA 1990),

rev. den., 570 So. 2d 1304 (1991), the statements of the frightened witness who gave the police a description of the assailant two or three hours after the crime were held admissible as excited utterances. See also State v. Webster, 499 A. 2d 749, 750 (R.I. 1985)(excited utterance need not be strictly contemporaneous with startling event so long as statement was made while declarant still laboring under stress of nervous excitement).

The res gestae exception to the hearsay rule finds support in case law other than Appell. The court in Monarca v. State, 412 So. 2d 443, 445 (Fla. 5th DCA 1982) upheld the admission of out-of-court statements made by the victim to a nurse at the hospital where she was taken by the police upon reporting that she had been raped. The court stated that the statements should be presumed to have been spontaneous since they were made sufficiently close in time to the occurrence of events. 412 So. 2d at 445. Citing Monarca, the court in Hack v. State, 596 So. 2d 521 (Fla. 5th DCA 1992) determined that the victim's statement to a police officer at the scene as to who stabbed him was admissible under the res gestae exception.

Any error was harmless. The victim testified in direct-examination, without objection, that she gave a description of the perpetrator to the police, and said that the description included that the man was missing every other tooth (T. 199-200, 204). She said that she did not remember when she got the opportunity to view the suspect's mouth, but she said that she did not make up

information about his teeth (T. 204). Without objection, she also said that she told the police that the subject had a mustache (T. 204). Hence, at trial, the victim's testimony was that she did not get a good look at the subject's face, and that although she did not remember specifics, she told the police that the subject was missing teeth, even though she did not seem to remember that point about the suspect's appearance at trial.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, the decision of the District Court of Appeal should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to, Margaret Good-Earnest, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on August ___, 2001.

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Counsel for Respondent

CERTIFICATE OF TYPEFACE

Respondent certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
Counsel for Respondent