SUPREME COURT OF FLORIDA

CASE NO.: SC06-662

SHANA BARNES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT CASE NO. 1D04-5450

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE JURY IN DEFENDANT'S SECOND TRIAL TO TAKE A TRANSCRIPT OF DEFENDANT'S TESTIMONY FROM THE FIRST TRIAL INTO THE JURY ROOM DURING DELIBERATIONS.

A. Merits

Florida law is clear—the jury is not permitted to take transcripts of testimony into the jury room during deliberations. See Young v. State, 645 So. 2d 965, 967 (Fla. 1994); Janson v. State, 730 So. 2d 734, 734-35 (Fla. 5th DCA 1999), rev. denied, 767 So. 2d 457 (Fla. 2000). This firmly-established rule prevents the jury from placing undue emphasis on the transcript over the witness's oral testimony and other evidence adduced during trial. See Young, 645 So. 2d at 966-67; Janson, 730 So. 2d at 734.

The State argues that the above-stated rule does not apply to defendant's former testimony read to the jury in this case because her testimony contains admissions against her interests. See Answer Brief at 8-19. While acknowledging that "the form of the exhibit admitted here was not a typical transcribed admission of a defendant" (Answer Brief at 16), the State urges this court to treat a transcript of defendant's former testimony in the same manner as written confessions or transcripts of tape-recorded statements when deciding whether to allow these documents into the jury room. The court should reject the State's argument for several reasons.

First, if the court accepts the State's reasoning, any time a defendant testifies at trial and makes an admission against his or her interest, a transcript of the testimony automatically becomes available to the jury during deliberations. This untoward result is inconsistent with Florida law. See Janson v. State, 730 So. 2d at 734-35 (holding that trial court erred by permitting the jury to review a transcript of testimony from two witnesses who testified during trial).

Second, none of the decisions cited by the State from other jurisdictions permits the jury to examine a transcript of defendant's former testimony read during a retrial, regardless of whether the testimony contains admissions against interest. To the contrary, the cases cited by the State all involve confessions and statements obtained out of court. See Thomas v. State, 878 So. 2d 458, 459 (Fla. 5th DCA 2004) (videotaped confession); United States v. Camargo, 908 F.2d 179, 182-83 (7th Cir. 1990) (transcripts of tape-recorded conversations translated from Spanish to English); State v. Kennedy, 122 Ariz. 22, 592 P.2d 1288, 1293 (Ariz. Ct. App. 1979) (transcripts of tape-recorded conversations between defendants and detectives); People v. Fujita, 43 Cal. App. 3d 454, 117 Cal. Rptr. 757, 768 (Cal. Ct. App. 1974) (transcripts of tape-recorded telephone conversations), cert. denied, 422 U.S. 964 (1975); People v. Miller, 829 P.2d 443, 446 (Colo. Ct. App. 1991) (transcript of defendant's confession); People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706, 714 (1968) (written confession); Holloway v. State, 809 So. 2d 598,

608 (Miss. 2000) (transcript of defendant's tape-recorded statement); State v. Ahmadjian, 438 A.2d 1070, 1082 (R.I. 1981) (transcripts of electronically monitored conversations); Bigham v. State, 148 S.W.2d 835, 840 (Tex. Crim. App. 1941) (transcribed notes of conversations); State v. Forrester, 21 Wash. App. 855, 587 P.2d 179, 185-86 (Wash. Ct. App. 1978) (transcript of defendant's tape-recorded confession), rev. denied, 92 Wash. 2d 1006 (1979); State v. Dietz, 182 W. Va. 544, 390 S.E.2d 15, 28-29 (W. Va. 1990) (transcript of defendant's tape-recorded confession).[1]

Third, in the principal case relied on by the State, People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706 (1968), the court described a signed confession as "among the strongest kinds of physical evidence the prosecution may produce," equating a confession to "other physical evidence of a concededly damaging nature such as murder weapons, bloodstained clothing or gruesome photographs insofar as their presence in the jury room is concerned." Id. at 714. The court found that all such physical evidence, including written confessions, "should be governed by the

[1] The State cites Jonathon M. Purver, Annotation, Permitting Documents or Tape Recordings Containing Confessions of Guilt or Incriminating Admissions to be Taken Into Jury Room in Criminal Case, 37 A.L.R. 3d 238 (1971), for the proposition that most jurisdictions permit the jury to take written confessions into the jury room, "distinguishing written confessions from other written forms of evidence, such as depositions . . . ." AB at 12. The annotation further notes "the general principle that depositions, or, in some instances, trial transcripts, may not be allowed in the jury room." Annot., supra, at § 4 (footnotes omitted) (emphasis supplied).

general rule governing exhibits of physical evidence which may be taken to the jury room if the sound discretion of the trial judge dictates that they bear directly on the charge." Id.

The difference between physical evidence and testimony distinguishes Caldwell from the present case. "Physical evidence" (sometimes referred to as "real evidence") refers to tangible objects like knives, drugs, insurance applications or medical bills. See Black's Law Dictionary at 1430 (4th ed. 1968). "Testimony" describes a witness's "'solemn declaration or affirmation made for purposes of establishing or proving some fact.'" Shiver v. State, 900 So. 2d 615, 617 (Fla. 1st DCA 2005) (quoting Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004)). A transcript of defendant's testimony from a former trial which the State reads to the jury is testimony, not physical evidence. Therefore, the general rule from Caldwell permitting physical evidence in the jury room does not apply in this case.

Fourth, the State presented defendant's former testimony to the jury, not as physical evidence, but as though defendant were actually testifying herself with one prosecutor reading the questions and another prosecutor on the witness stand reading the answers. (R-VI 432). As the trial judge explained to the jury before the State read the testimony,

> we are now going to place in evidence sworn testimony of Shana Yvette Barnes, the defendant in this case, which in

> this instance is Miss London Hairston, who is also an assistant State Attorney who is going to act the role of Miss Barnes when she gave this testimony and read her part. And Miss Zima will read the questions and Miss Hairston will read the answers.

(R-VI 432). Because the State presented the jury with defendant's former testimony as though she were on the witness stand herself, the court should treat the testimony in the same manner as live testimony or deposition testimony for the purpose of deciding whether to give the jury a transcript during deliberations.

B. Harmless Error Analysis

Although not argued in the district court, the State now insists that any error allowing the transcript of defendant's former testimony into the jury room was harmless because the transcript exposed only "minor inconsistencies" between defendant's written statement given to the police after her arrest and her testimony from the first trial. Answer Brief at 19. The State further asserts that the transcript actually assisted the defense by offering defendant "an excellent opportunity to present her version of the events without subjecting herself to cross-examination." Answer Brief at 19-20. On the latter point, any benefit defendant realized from the State's reading of her former testimony was substantially outweighed by the glaring inconsistencies highlighted by the transcript which the trial court made available for the jury's inspection.

The State's position in this court that the transcript exposed only "minor inconsistencies" between defendant's written statement and her testimony from the first trial directly contradicts its trial court position. In urging the admissibility of the transcript, the prosecutor argued to the trial judge that "it is important for the jury to be able to have that and compare it [transcript of prior testimony] to her written statements to the police." (R-VI 427). In closing argument, the State did not describe the differences between defendant's statement and her former testimony as "minor inconsistencies." To the contrary, the prosecutor emphasized what she called the "critical distinction" between defendant's written statement in which she reported that the gun was on the seat of her car and her prior testimony in which she said the gun was in her purse. (R-IX 879-80, 952-53). As the State recognized, this distinction was "critical" to defendant's claim that she was acting reflexively in self-defense when she shot her husband.

At another point during closing argument, the prosecutor actually quoted from the transcript to substantiate her argument that defendant's prior testimony "defies common sense." (R-IX 889-90). During rebuttal, the prosecutor emphasized a discrepancy between defendant's written statement and her later testimony about whether her husband had removed the gun from the fanny pack in the bedroom. To resolve this discrepancy, the prosecutor exhorted the jury to "[l]ook at the quotes in the transcript." (R-IX 961). In short, the record indicates

that the inconsistencies between defendant's written statement made after her arrest and her testimony from the first trial were hardly "minor."

The State further argues that allowing the transcript into the jury room was harmless because of "the weakness of petitioner's defense at trial." Answer Brief at 20. The State's contention is based on the following rationale:

> Petitioner claimed that she acted in self-defense, that she used deadly force to prevent[,] not the imminent use of deadly force against her, but to prevent the imminent commission of an "applicable forcible felony" under section 776.041, Florida Statutes. The only "applicable forcible felonies" that Petitioner could present to support her claim that she shot Greg Barnes to prevent the imminent commission of a forcible felony were aggravated assault and felony battery.

Answer Brief at 20. After analyzing the definitions of "aggravated assault" and "felony battery," the State concludes in its brief that "[u]nder no logical construction of self-defense law could a person seriously claim entitlement to self-defense to prevent the commission of only an aggravated assault or a felony battery." Answer Brief at 24. Defendant disagrees.

Section 776.012, Florida Statutes (2000), provides that a "person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony." As worded, this statute gives the defendant two deadly force alternatives: (1) to prevent

imminent death or great bodily harm or (2) to prevent the imminent commission of a forcible felony. "Forcible felonies" include "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual." § 776.08, Fla. Stat. (2000) (emphasis supplied).

Aggravated assault is listed under section 776.08 as a forcible felony justifying the use of deadly force. See id. Although felony battery is not listed, the crime is included in the catchall definition of forcible felony as "any other felony which involves the use or threat of physical force or violence against any individual." § 776.08, Fla. Stat. (2000). Thus, despite the State's skepticism, the legislature clearly authorized a person to use deadly force to prevent the commission of an aggravated assault or felony battery.

Turning to the record, the trial court instructed the jury only on the "forcible felony" alternative at defendant's request (R-VIII 757-58), identifying aggravated assault and felony battery as the forcible felonies:

> An issue in this case is whether the defendant acted in self defense. It is a defense to the offense with which Shana Barnes is charged if the death of Gregory Barnes resulted from the justifiable use of force likely to cause death or great bodily harm.

> A person is justified in using force likely to cause death or great bodily harm if she reasonably believes such force is necessary to prevent the imminent commission of aggravated assault or felony battery against herself or another.
>
> Aggravated assault is an intentional unlawful threat by word or act to do violence to the person of another coupled with an apparent ability to do so and doing some act which creates a well-founded fear that such violence is imminent and is committed with an intent to commit felony battery as I will define this term for you.
>
> Felony battery is when a person actually and intentionally touches or strikes another person against the will of the other and causes great bodily harm, permanent disability or permanent disfigurement.

(R-II 240; R-IX 978).

Applying the definitions included in this instruction to the facts at hand, defendant's husband, Gregory Barnes ("Barnes"), was visibly intoxicated when he arrived home at 2:30 a.m. and obstinately refused to discuss his whereabouts with defendant. (R-V 229, 380). When she persisted, Barnes pushed defendant violently onto the bed in the master bedroom and began choking her. (R-V 229). Defendant grabbed a fanny pack from the headboard which contained a pistol but Barnes snatched it from her. (R-V 230). Defendant dialed 911 on the bedside telephone but Barnes grabbled the telephone and hung it up. (R-V 229). He then pushed defendant to the floor and left the bedroom. (R-V 230). Defendant then started to leave the house and took a gun for protection. (R-V 230). She knew,

however, that she and her husband kept another gun in the bedroom. (R-VI 438). As she went into the garage, Barnes called defendant a "bitch." (R-V 218). As she was pulling out of the driveway, defendant stopped to hear what Barnes was saying at which time he struck defendant through the open car door window. (R-V 230).

Based on these facts, the district court determined that the issue of whether defendant acted in self-defense or whether she killed her husband in a fit of anger was a jury question. See Barnes v. State, 922 So. 2d 380, 381-82 (Fla. 1st DCA 2006) (slip op. at 2-3). Thus, in light of the conflicting evidence of guilt, the State cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. " State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

II. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF SECOND-DEGREE MURDER WITH A FIREARM.

The State declined to address this point under the apparent belief that the court's order accepting jurisdiction limits review to the transcript issue. Defendant acknowledges that the court accepted "jurisdiction of this case as to the First District Court of Appeal's opinion with respect to permitting the jury to take an exhibit into the jury room." Barnes v. State, No. SC06-662 (Fla. Jan. 22, 2007). Nevertheless, once the court accepts jurisdiction to review a district court decision based on conflict, it may consider issues other than the conflict issue if properly

briefed and argued. See, e.g., State v. T.G., 800 So. 2d 204, 211 n.4 (Fla. 2001); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982).

CONCLUSION

The court should quash the decision of the district court with directions to the trial court to vacate defendant's conviction and sentence and discharge defendant or, alternatively, grant defendant a new trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bill McCollum, Esquire, Attorney General, Thomas D. Winokur, Esquire, Assistant Attorney General, and Trisha Meggs Pate, Esquire, Tallahassee Bureau Chief, Criminal Appeals, Office of Attorney General, The Capitol PL-01, 400 South Monroe Street, Tallahassee, Florida 32399, attorneys for respondent, by U.S. Mail on this 1st day of June, 2007.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman proportionally spaced font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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