IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. SC07-201

FAUNCE LEVON PEARCE,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

_____

REPLY BRIEF OF APPELLANT

_____

BILL McCOLLUM
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center #4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7900
Fax: (813) 281-5500

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF FACTS

The State will rely upon the Statement of Facts contained in its initial brief on appeal.

SUMMARY OF THE ARGUMENT

The State will rely upon the Summary of the Argument contained in its initial brief on appeal.

REPLY ARGUMENT

ISSUE I

WHETHER THE POST-CONVICTION COURT ERRED IN FINDING DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO FILE A MOTION IN LIMINE OR OTHERWISE ATTEMPT TO EXCLUDE EVIDENCE THAT PEARCE FORCED THE ATTEMPTED MURDER VICTIM TO PERFORM A SEX ACT UPON HIM UNDER THE THREAT OF DEATH.

Pearce suggests that the post-conviction judge in this case simply exercised his discretion to find that the forced sodomy was inadmissible during Pearce's trial. (Appellee's Brief at 63). Appellee's attempt to recast this issue as a discretionary evidentiary ruling by the post-conviction court is not well taken. The question before the court below and this Court on appeal is that of ineffective assistance. This is a much higher burden for Pearce to meet than simply defending a discretionary ruling of the post-conviction court below. "[T]he Supreme Court

has afforded attorneys wide latitude in prosecuting a cause and, accordingly, erected a high hurdle to those petitioners alleging ineffective assistance of counsel." Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998). Consequently, to prevail on his claim, Pearce "must overcome a strong presumption" of effectiveness and demonstrate that his defense attorneys' performance fell outside the "wide range of reasonable professional assistance." Further, if he does make such a showing, he must also "establish prejudice therefrom." Rivera, 717 So. 2d at 486 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)). Pearce did not carry his burden of demonstrating either deficient performance or resulting prejudice.

As noted in the initial brief, the State believes it is not even a close question in this case. The threat and accompanying sodomy were clearly relevant. They occurred at the same time, between the same parties and tended to show Pearce's domination of, and malice toward the attempted murder victim, Tuttle. Nonetheless, even assuming this Court concludes admission of this evidence is a close question, Pearce cannot carry his burden of showing counsel was constitutionally ineffective. Given the strong presumption of effectiveness, Pearce must show in this context some clear, binding precedent which establishes a reasonable trial court would have had no choice but to exclude

is evidence upon proper motion or objection. See Owen v. State, 854 So. 2d 182, 191-92 (Fla. 2003)(noting that while appellate counsel could have raised this issue on appeal, he also "could have reasonably concluded that the issue had no merit" and in light of the record, "could not effectively and convincingly argue[] against admissibility of the above mentioned testimony."). Pearce has failed to cite such authority. Indeed, as noted in the initial brief, the case most factually analogous to the instant case, Smith v. State, 699 So. 2d 629 (Fla. 1997), clearly supports admission of the evidence at issue here.

Pearce has not cited a single case where an act of malice, sexual or otherwise, committed by a defendant against a murder victim or attempted murder victim was excluded on the grounds of undue prejudice.[1] Indeed, this Court has even allowed a threat against a non-victim to be introduced into evidence when relevant to a defendant's motive and intent. In Muhammad v. State, 782 So. 2d 343, 358 (Fla. 2001) (emphasis added), this Court held a threat was properly admitted over defense objection, stating:

> The defendant's threats to a non-victim are admissible when relevant to prove a material issue, as long as the probative value of the evidence outweighs

[1] The cases cited by Pearce generally involve separate criminal incidents which do not implicate or involve a victim of the charged crimes as in the case *sub judice (Tuttle)*.

> any undue prejudice. *See Pittman v. State*, 646 So. 2d 167, 170-71 (Fla. 1994). Absent an abuse of discretion, a judge's ruling on the admissibility of this type of evidence will not be overturned. *See Chandler v. State*, 702 So. 2d 186, 195 (Fla. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1535, 140 L. Ed. 2d 685 (1998).
>
> The trial court here did not abuse its discretion in ruling that the evidence of the threat was admissible to establish the motive and intent for the murder. The threat was a relevant portion of DeShields' testimony, which established that she had stolen money from Muhammad and that Muhammad knew she and Swanson were acquainted. **The threat, made close in time to the actual murder, showed that Muhammad knew DeShields stole his money. The threat also demonstrated Muhammad's extreme anger over the theft and his willingness to kill in order to get his money back from DeShields.** Without the complete testimony from DeShields, the jury would have been unable to fully understand the significance of Muhammad's statements immediately before the murder when he approached Swanson with two guns in hand and demanded, "Where is the girl?" Thus, the trial court did not err in finding that the probative value of this testimony outweighed undue prejudice to the defendant.

Muhammad v. State, 782 So. 2d 343, 358 (Fla. 2001) (emphasis added).

Pearce's claim that the forced sodomy was "remote in time" from the charged offenses is simply not true. As noted by the State in its initial brief, the sodomy and threat to kill occurred within a single criminal episode, during the course of a single evening, immediately (a matter of minutes, not hours) prior to the charged offenses. Indeed, Pearce appears to concede that the evidence presented by the State regarding his

interaction with victims Crawford and Tuttle was relevant from the time the boys were called to set up a drug deal through the morning of the shooting when Pearce and Smith disposed of the murder weapon. This evidence included extensive misconduct on the part of Pearce, including his threats to the boys when they left with his money, to the threats and assaults on the victims and even the battery on Amanda Havner which occurred when they returned without the money or drugs. Pearce wants to artificially limit the natural course of evidence in this case, taking one incident out, which is temporally close to and logically relevant to the charged attempted murder of Tuttle. Indeed, the jury would be left to speculate about why Pearce left the trailer with Tuttle alone, at gun point, shortly before Tuttle was forced into the car which led to his attempted murder and the murder of Crawford. The jury would be left to speculate about what occurred, and what was said between the two central parties in this case, the defendant and the sole surviving victim, Tuttle.

Pearce fails to address much less counter the State's argument that this evidence was relevant to rebut the defense theory that Tuttle and Crawford voluntarily entered the car and therefore he could not be found guilty of felony murder based upon an underlying kidnapping. This theory was advanced by

defense counsel in opening statement and closing argument.[2] Consequently, Tuttle's state of mind was clearly relevant on the issue of kidnapping. See Peede v. State, 474 So. 2d 808 (Fla. 1985) (holding that victim's state of mind was relevant as an element of kidnapping to show that she was forcibly abducted against her will).

In conclusion, the forced sodomy and accompanying threat to kill showed Pearce's malice toward and control of Tuttle. Such evidence was clearly relevant to a felony murder theory based upon kidnapping. It was also relevant to show Pearce's malice and intent to kill Tuttle. Based upon this record, defense counsel could reasonably conclude that an objection to the threat and sexual battery would have been futile. Consequently, the post-conviction court erred in finding counsel ineffective for failing to object to evidence of Pearce's threat and forced sodomy of victim Tuttle.

ISSUE II

WHETHER THE POST-CONVICTION COURT ERRED IN FINDING COUNSEL INEFFECTIVE FOR FAILING TO INVESTIGATE

[2] In his opening statement, defense counsel stated: "Nobody was angry. Nobody was threatened. None of that. You'll even hear from Steve Tuttle that, 'Nobody threatened me to get into the car.'" (VII, 400). In closing, defense counsel continued: "Bryon Loucks, was consistent in not seeing anybody threatened to get into the car." …"Nobody threatened anybody to go"…"Steve Tuttle and Robert Crawford voluntarily got into the car and left with Faunce Pearce…" (T11, 909-911).

POTENTIAL PENALTY PHASE MITIGATION.

Pearce's answer brief, like the trial post-conviction court below, ignores the fact that it was Pearce who restricted defense counsel's mitigation investigation.[3] In doing so, the post-conviction court's decision runs contrary to precedent from this Court, which recognizes that defense counsel should not be faulted for following the wishes of a competent client. See e.g. Cummings-El v. State, 863 So. 2d 246, 252 (Fla. 2003)(concluding that counsel was not ineffective in limiting mitigation investigation where defendant was adamant about not wanting his family to "beg for his life" and the defendant understood the consequences of his decision not to present such mitigation); Rodriguez v. State, 919 So. 2d 1252, 1263 (Fla. 2005)(finding counsel did not render ineffective assistance in part because trial counsel testified that the defendant "did not want his family involved and refused to offer information that would have helped in the presentence investigation."); Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001)(holding that defendant's failure to communicate instances of childhood abuse to defense counsel or the defense mental health expert precludes an

[3]Pearce told Ware he could only contact "one" person, Pearce's girlfriend. (IX,1273). Ware was told he could only advise her of logistical matters: "Nothing of substance, just to let her know we're going to trial here, we have a hearing here, that

ineffective assistance claim for failing to pursue such mitigation.). Petitioner received exactly the penalty phase he desired. He cannot fault counsel for failing to present evidence which he himself, directed counsel not to pursue or present on his behalf. See generally Mora v. State, 814 So. 2d 322, 332 (Fla. 2002) and Boyd v. State, 910 So.2d 167, 190 (Fla. 2005).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be reversed.

---

type of thing." (IX,1273).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1126 and to Manuel Garcia, Assistant State Attorney, Pinellas County State Attorney, Post Office Box 5028, Clearwater, Florida 33758 this 28th day of January, 2008.

CERTIFICATE OF FONT 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,

BILL McCOLLUM
ATTORNEY GENERAL

_____

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7900
Facsimile: (813) 281-5500

COUNSEL FOR APPELLANT