IN THE SUPREME COURT OF FLORIDA

DARIUS JAMINE POLITE,

Petitioner,

v. CASE NO. SC10-1812

STATE OF FLORIDA,

Appellee.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

Respondent submits the following additions/corrections to the Petitioner's Statement of Facts:

The deputy who responded to the scene of the home invasion testified that the victim and her two daughters were in the front yard; all of them were hysterical. (T. 16-20). He spoke to the victim, who told him what had happened to her and identified the Defendant by name as one of the people who came in the house. (T. 20-22).

The victim was extremely reluctant to testify. Before the victim came in the courtroom, the prosecutor noted that he could not get her to stop crying, as she was terrified for herself and her children. (T. 27-30). The victim tried to avoid testifying, telling the trial judge that she could not answer questions, as she was too traumatized, and initially refusing to even read the statement she had made that day. (T. 30, 34-37).

During her testimony, the victim claimed she could not remember details of the events, such as whether her children were with her that morning. (T. 31). However, she eventually managed to testify that the police came to her home and she and her children told them what happened. (T. 32-33). She further testified that three men came to her house and kicked the door

open. (T. 37-38). She did not give them permission to enter the house. (T. 46). One of the men put a gun in her daughter's face. (T. 39). The victim identified the sworn statement she gave to police approximately an hour after the break-in. (T. 41-42).

In this statement, the victim described the three black men who broke into her house, the largest being 6'2, 200 pounds. (T. 48). The Defendant was 6'5, 250 pounds. (T. 197).

Deputies testified that there was damage to the front door of the victim's home. (T. 22). The door had been kicked in, splitting the door-frame. (T. 82). There were boot prints on the door. (T. 82). In addition, the telephone line was cut outside. (T. 82).

The Defendant was located later that same day. (T. 24). He fled from the marked patrol car, but deputies caught up to him and secured him. (T. 24). He was not wearing shoes when he was apprehended. (T. 82).

A video camera across the street from the victim's house captured the arrival of three men that morning. (T. 51, 54-56, 88-89). One of the men went to the side of the house and then reappeared from the back. (T. 89). The video showed the three men getting out of the car and going to the front door, then

leaving the house and driving away a few minutes later. (T. 89).

At the time of the crime, the Defendant was equipped with a GPS ankle monitor. (T. 23). The reports show the location of the monitor approximately every five minutes, accurate to within 100 feet. (T. 61-62). Reports from the Defendant's monitor established that he was near the victim's house at the time of the crime. (T. 62-65). “Pings” from the monitor placed his location within 100 feet of the front and backyard of the victim's house at the time of the crime. (T. 97).

The Defendant was interviewed by Detective Branch on the same day he was arrested. (T. 112). The Defendant asked many questions about the details of the crime, then denied ever being at the victim's house. (T. 118). He said he went to a diner for breakfast, then went to a nearby convenience store with two friends, then back to a friend's house. (T. 119).

Detective Branch took pictures from the video camera at the convenience store. (T. 120-21). The Defendant was not on the pictures, and the Defendant denied knowing any of the people on the pictures. (T. 120-22, 138). The tape of these conversations were played for the jury in their entirety, at the Defendant's insistence. (T. 141-84).

A judgment of acquittal was granted as to count three, charging aggravated assault on the victim's daughter, because the daughter did not testify at trial. (T. 205-11). The Defendant was found guilty as charged on the other counts. (T. 298-99).

SUMMARY OF ARGUMENT

ISSUE I: The trial court acted within its discretion in allowing the State to introduce the prior sworn statement of the victim, and the district court correctly affirmed that decision. In light of the plain language of the statute governing this issue, the victim's testimony adequately established a foundation for the admission of this evidence, and any claim to the contrary was not properly preserved below. At worst any error was harmless.

ISSUE II: The trial court acted within its discretion in allowing the State to introduce evidence regarding the out-of-court identification of the Defendant where the victim picked him out of a photo line-up, and the district court correctly affirmed that decision. The Defendant had the opportunity to cross-examine the victim regarding this identification, and he took advantage of this opportunity. At worst any error was harmless.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE THE VICTIM'S SWORN STATEMENT TO THE POLICE.

The Defendant contends that the trial court erred in allowing the State to introduce into evidence the victim's sworn statement to the police. The district court properly concluded that the Defendant's argument was not preserved below and is without merit. Polite v. State, 41 So. 3d 935, 939-41 (Fla. 5th DCA 2010).

Preservation

To properly preserve an issue for appellate review, a party must make a timely contemporaneous objection in the trial court, stating the legal grounds for that objection and making the same specific argument in the trial court that is raised on appeal. Sanchez v. State, 909 So. 2d 981, 984 (Fla. 5th DCA 2005). Here, the Defendant is not making the same legal argument that he made in the trial court.

At trial, the Defendant objected to the admission of the victim's statement for several different reasons. He contended that this written statement was admissible only to refresh the witness's recollection, unless the Defendant himself chose to

admit it. He further argued that admitting this statement would violate his Sixth Amendment right to confront witnesses. Finally, he argued that the State was using the document to impeach its own witness, which is improper. (T. 42-46).

On appeal, and in this Court, the Defendant raises a *different* argument, contending that the written statement was inadmissible because the victim never testified that the statement accurately represented her knowledge at the time it was made or that she was being truthful at the time she wrote it. This *specific* argument was never raised below, and accordingly it was not properly raised for the first time on appeal. See Couzo v. State, 830 So. 2d 177, 179 (Fla. 4th DCA 2002) ("The objection 'lack of foundation,' like its first cousin 'improper predicate,' is not a 'specific ground of objection' ... so as to preserve a ruling admitting evidence for appellate review"), rev. denied, 842 So. 2d 843 (Fla. 2003).

Indeed, as Judge Torpy noted in his concurring opinion below, this case represents a quintessential example of a situation where, had the proper objection been lodged below, any missing information could have been fully explored with the witness, rather than second-guessed on appeal. 41 So. 3d at

943. The district court properly concluded that this claim was not preserved for appeal.

Argument

Even if this claim had been preserved, it is without merit. A recorded recollection, defined as follows, is admissible as evidence:

> A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

§ 90.803(5), Fla. Stat.

Here, the victim testified that three men came to her house, kicked the door open, and put a gun to her daughter's face. (T. 37-38). She stated that she could not remember any more details. (T. 31-32, 40). Clearly, then, this event was "a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately."

Further, the victim identified the written statement as the statement she gave to police on the day of the crime, approximately one hour after the events took place. (T. 41-42). She testified that she told the police what happened when they came to her house, as did her children. (T. 32-33). Although

she gave no verbal answer at trial when asked if the statement was true and correct, as defense counsel interrupted with an objection, quickly withdrawn (T.42), she swore/affirmed that the statement was true at the time she gave it (T. 48). Clearly, then, the statement was "shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly."[1]

In support of his argument that testimony from the victim affirmatively adopting the earlier statement was required before the statement could be admitted, the Defendant relies on the decision of the Fourth District Court of Appeal in Montano v. State, 846 So. 2d 677 (Fla. 4th DCA 2003). There, the court concluded that a witness's statement to the police was not properly admitted at trial where the witness never testified that her taped statement accurately reflected her knowledge of the incident at the time it was made or that she tried to be truthful at the time she spoke to the deputy. Id. at 681.

In light of these omissions, the court concluded, the statement did not have an adequate foundation, as "the law

[1]Although the witness later agreed, on cross-examination, that the statement could have been mistaken (T. 49), this back-tracking by the witness affected the weight to be given to the statement, not its admissibility.

requires the maker to adopt the recorded recollection as his own" before such a statement can be admitted. Id. at 682.

Here, of course, the victim specifically testified that this statement was the sworn statement she had given to police on the day of the crime (T. 41-42), and she specifically testified that she told the police what happened when she spoke to them that day (T. 32-33). In light of the difficulty this witness had in testifying, as well as the fact that she specifically swore that the statement was true at the time she made it, when the events were fresh in her memory (T. 48), the State submits that this was sufficient to allow the trial court to conclude that the victim did, indeed, adopt the recorded recollection as her own to the extent necessary to satisfy the statute.

To the extent Montano requires even more than that, it has gone well beyond the plain language of the statute governing this hearsay exception and should be disapproved by this Court. See Kimbrough v. State, 846 So. 2d 540, 544 (Fla. 4th DCA) (finding that Florida Supreme Court precedent required "testimony establishing *either* the witness's recollection of having made the statement, *or*, if the witness has no specific recollection, testimony from the witness that the statement

accurately reflects what was said at the time") (emphasis added), rev. dismissed, 859 So. 2d 515 (Fla. 2003).

As the Sixth Circuit Court of Appeals has recognized in considering the similar federal rule:

> Rule 803(5) does not specify any particular method of establishing the knowledge of the declarant nor the accuracy of the statement. It is not a sine qua non of admissibility that the witness actually vouch for the accuracy of the written memorandum. Admissibility is, instead, to be determined on a case-by-case basis upon a consideration, as was done by the district court in this case, of factors indicating trustworthiness, or the lack thereof.
>
> While Rule 803(5) treats recorded recollection as an exception to the hearsay rule, the hearsay is not of a particularly unreliable genre. This is because the out-of-court declarant is actually on the witness stand and subject to evaluation by the finder of fact, in this case the jury. If the jury chose to believe what [the witness] said in the recorded statement rather than what she said while testifying, that decision was at least made based upon what it observed and heard from her in court.

United States v. Porter, 986 F.2d 1014, 1017 (6th Cir.), cert. denied, 510 U.S. 933 (1993). See also State v. Marcy, 680 A.2d 76, 78-81 (Vt. 1996) (following Porter).

Indeed, even courts explicitly acknowledging that the *best* means of satisfying this exception is for the witness to confirm the accuracy of the out-of-court statement recognize that all circumstances must be considered in evaluating this matter:

> [A commentator] notes that the ideal foundation consists of witness testimony that he or she "presently remembers that he [or she] correctly recorded the fact or that he [or she] recognizes the writing as accurate."
>
> But what is ideal in theory may be some distance from what is possible in practice. [The quoted commentator] implicitly acknowledges this, noting that a witness' testimony that he or she habitually records matters accurately, or would not have signed an inaccurate memorandum, may be sufficient in lieu of an ideal foundation. The facts of a particular case may not allow even this much, however, and we conclude the rule does not require it. Indeed, the rule applies regardless of the declarant's availability to testify, and thus apparently does not contemplate that the declarant will always testify, let alone affirmatively vouch for the record's accuracy. We therefore must decide how best to gauge whether the rule has been satisfied in any given case.
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> * * *
>
> We agree with the Porter court's observation that the rule prescribes no particular method of establishing accuracy, and that the issue must be resolved on a case-by-case basis. We hold that the requirement that a recorded recollection accurately reflect the witness' knowledge may be satisfied without the witness' direct averment of accuracy at trial. The court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of

> reliability establish the trustworthiness of the statement.

State v. Alvarado, 949 P.2d 831, 835-36 (Wash. Ct. App.) (citations and footnote omitted), rev. denied, 960 P.2d 937 (Wash. 1998). See also Pickett v. United States, 822 A.2d 404, 406 (D.C. 2003) (noting that witness must confirm accuracy of recorded statement, but "unless the witness has expressly repudiated it on the stand the trial judge may consider all of the circumstances in finding the requisite confirmation, including the demeanor of the witness in court – evincing, for example, hostility or *reluctance to testify* – as well as the conditions under which the out-of-court statement was made") (emphasis added).

Applying common sense and the plain language of the statute, the testimony of the victim was sufficient to satisfy the statutory requirement that the statement reflected her knowledge correctly. The Defendant's argument that this conclusion somehow violated his Sixth Amendment right to confrontation, raised for the first time in this Court, has no merit. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places *no constraints at all on the use of his prior testimonial statements*." Crawford v. Washington, 541 U.S. 36, 59 n. 9 (2004) (emphasis added).

The trial court acted well within its discretion in allowing the State to introduce this statement as a recorded recollection, and the district court properly affirmed the trial court's ruling. Its decision should be approved by this Court.

Harmless Error

Finally, even if this statement should not have been admitted, any error was harmless. The victim testified directly that three men kicked her door in and entered her house shortly before 8 am on the morning of July 14. Police officers verified the damage to her house, and a video camera captured images of the three men arriving at the house and then departing shortly thereafter. The Defendant's GPS monitoring device placed him at the victim's house during this time period, yet he vehemently denied being there when questioned by police, and he fled when they went to apprehend him.

In light of this other significant evidence of guilt, as well as the Defendant's successful demonstration of the victim's reluctance to accuse him and impeachment of her statement, there is no reasonable possibility that this alleged error affected the jury‘s verdict. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The Defendant's convictions and sentence were properly affirmed.

ISSUE II

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE TESTIMONY REGARDING THE VICTIM'S IDENTIFICATION OF THE DEFENDANT.

As his second point, the Defendant contends that the trial court erred in allowing the State to introduce evidence regarding the victim's out-of-court identification of the Defendant from a photographic line-up. This claim was raised in the district court and briefly addressed in the court's opinion. Polite, 41 So. 3d at 941-42. Notably, the court's ruling on this issue was not raised as a basis for jurisdiction in this case. While this Court has jurisdiction to consider this issue, it is certainly not required to do so.

If this Court chooses to address this issue, it should affirm the lower court's analysis, as its decision is fully supported by the record and legally correct. Id.

Preservation

To the extent the Defendant complains about the admission of the line-up itself, this claim was properly preserved below. (T. 78-81). To the extent the Defendant complains about the testimony of Detective Branch, explaining that the victim picked the Defendant out of the line-up, there was no timely objection

below (T. 75-76) and accordingly this claim was not properly preserved for appeal.

Argument

This claim is also without merit. In Deans v. State, the Fifth District Court of Appeal held that testimony regarding an out-of-court identification is not admissible where the witness who made the identification is "not asked on direct examination to identify the defendant or about their out-of-court identification of the co-perpetrators." 988 So. 2d 1271, 1272 (Fla. 5th DCA 2008). In the absence of such questions on direct examination, the court reasoned, a defendant is precluded from cross-examining the witness about the identification, and the out-of-court identification accordingly does not fall under the hearsay exception for such matters. Id.[2]

Here, however, the victim ***was*** asked about her out-of-court identification of the Defendant, first denying making such an identification (T. 33) and later admitting that she made the written statement introduced into evidence (T. 32-34, 41-42), in which she identified the Defendant by name and said she knew him from the neighborhood (T. 47).

[2]Section 90.801(2)(c), Florida Statutes, provides that "[a] statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the

As the lower court recognized, this direct examination was "broad enough to allow Polite's counsel to cross-examine the witness regarding both her initial out-of-court identification and the later identification when shown a photo line-up." Polite, 41 So. 3d at 942. Indeed, the record reflects that the Defendant *did* have the opportunity to cross-examine the victim about the out-of-court identification, and he took advantage of this opportunity, getting her to admit that she did not know if she "got the right person." (T. 49). Cf. Zerquera v. State, 549 So. 2d 189, 192 (Fla. 1989) ("[W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief.") (quotation omitted).

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statement and the statement is: ... [o]ne of identification of a

In light of this testimony, then, the concerns expressed in Deans and related cases are not present here, the trial court acted well within its discretion in allowing the admission of this evidence, and the trial court's decision was properly affirmed on appeal. See State v. Freber, 366 So. 2d 426, 428 (Fla. 1978) (evidence of out-of-court identification is admissible even when the identifying witness cannot make an in-court identification); A.E.B. v. State, 818 So. 2d 534, 535-36 (Fla. 2d DCA 2002) (trial court properly admitted testimony regarding out-of-court identification by witness where witness testified at trial, even though due to memory loss the witness could not remember talking to deputy at all and was unable to identify defendant at trial); Brown v. State, 413 So. 2d 414, 415 (Fla. 5th DCA 1982) (prior identification is not hearsay when declarant is available at trial for cross-examination and it "makes no difference whether the witness admits or denies or fails to recall making the prior identification").

Harmless Error

Finally, even if the line-up should not have been admitted at trial, at worst any error was harmless. As discussed above (see Issue I), the other evidence of the Defendant's guilt was

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person made after perceiving the person."

overwhelming. Further, in her written statement the victim identified the Defendant by name, as someone she knew from the neighborhood. The photo line-up was insignificant compared to that statement and the other evidence at trial, including the GPS evidence, and there is no reasonable possibility that the admission of the line-up affected the verdict. DiGuilio, 491 So. 2d at 1139. The Defendant's second point was properly rejected by the district court, and its decision on this matter should be approved.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the opinion of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief on the Merits has been furnished by U.S. mail to William R. Ponall, Kirkconnell, Lindsey, Snure & Yates, P.A., counsel for Petitioner, 1150 Louisiana Avenue, Suite 1, P.O. Box 2728, Winter Park, Florida 32790-2728, this _____ day of May, 2011.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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