IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 10-1837

(4th DCA 4D09-1224)

BOBBY LEE AKIEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are those set forth in the appellate opinion sought to be reviewed:

Akien v. State, 35 Florida Law Weekly D1836
(Fla. 4th DCA August 11, 2010)

> The issue presented is whether the trial court erred by admitting the victim's telephone call to 911 as an excited utterance. We find the trial court did not err, and we affirm the conviction and sentence imposed.
>
> The victim, who at the time was seventeen years old, went to sleep only to be awoken some time later by a man with his hand around her neck. The assailant threatened to kill her if she did not stop fighting and increased pressure to her neck. A blanket was placed around the victim's face so she was unable to see, and she was unable to recognize the man's voice. The man removed her clothes, forced his penis into her vagina and raped her for thirty to forty-five minutes.
>
> After raping the victim, the man ordered the victim to take a shower. He then took a picture of the victim nude on his mobile phone and ordered the victim to write a note, with her signature, stating that the sex was consensual. Before departing, the man removed the bed sheets, took the victim's keys, and asked for her mobile phone number. He told the victim that he would hurt her mother or grandmother if she called the police.
>
> Roughly five minutes after the attacker left, the victim telephoned her mother. The victim related the events to her mother, and the mother convinced the victim to call the police and report the assault.

The victim suspected appellant as her attacker, because she could smell cigarette smoke on her assailant, and the attacker said he would leave her keys on her washing machine when he left her home. The victim believed only a neighbor would know that the washer and dryer were located outside the unit. Finally, appellant had openly flirted with the victim and in the past asked the victim to perform sexual favors in exchange for an automobile.

The victim met appellant when she was five years old. The victim described appellant as a kind man who would look after the victim's grandmother. A forensic analyst testified at the trial that appellant was the only source of the semen found in the victim's vagina, as well as the source of the other DNA evidence found on the victim's neck. Appellant was found guilty on the charge of burglary with an assault or battery, sexual battery, and sexual activity with a minor.

[1] Appellant contends the trial court erred in allowing the admission of the victim's call to 911 to report the assault. As recently noted by the Florida Supreme Court,

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Alston v. State, 723 So.2d 148, 156 (Fla.1998). The trial court's discretion is constrained, however, by the application of the rules of evidence, Johnston v. State, 863 So.2d 271, 278 (Fla.2003), and by the principles of stare decisis. McDuffie v. State, 970 So.2d 312, 326 (Fla.2007).

Hayward v. State, 24 So.3d 17, 29 (Fla.2009). At trial, appellant objected to the admission of the 911 call, arguing that there had been too much time from the attack to the call such that the victim could have engaged in reflective thought. The trial court overruled the objection.

[2] [3] The “excited utterance” exception to the hearsay

rule allows the admission of a hearsay statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat. "[T]here must be "an event startling enough to cause nervous excitement," "the statement must have been made before there was time to contrive or misrepresent," and "the statement must be made while the person is under the stress of excitement caused by the event." State v. Jano, 524 So.2d 660, 661(Fla.1988). The court will look to the interval of time between the startling event and the making of the statement. Id. at 662; Bienaime v. State, --- So.3d ----, ---- (Fla. 4th DCA 2010).

The exact amount of time between the event and the statement which will justify a finding that the declarant engaged in "reflective thought" will depend on the specific facts of each case and may vary substantially between cases. See, e.g., Henyard v. State, 689 So.2d 239 (Fla.1996); Bienaime, --- So.3d at ---- - ----. The Florida Supreme Court has held that the "[f]actors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." Hayward, 24 So.3d at 29 (quoting Hudson v. State, 992 So.2d 96, 108 (Fla.2008)).

Where the startling event was a shooting, the Florida Supreme Court has found that an interval of eight to ten minutes from the shooting to the time of the statement was properly admitted as an excited utterance. Rogers v. State, 660 So.2d 237 (Fla.1995). In Rogers, the court found although there was "conceivably" time to engage in reflective thought, the record indicated the declarant was "hysterical," and after the declarant called the police, she collapsed. After being revived, she drank a soda and made her statement. The declarant remained "very excited" and never appeared "relaxed or calm as she recounted the evening's event." Id. at 240.

In this case, the declarant is a seventeen-year-old girl who called the 911 operator soon after being raped for thirty to forty-five minutes. After this extremely "startling" event, the victim spoke to her mother, who, in turn, convinced the victim to call 911. While the victim may have had an opportunity to engage in reflective thought, we cannot say that the trial court abused its discretion by allowing the introduction of the 911 tape. The record does not clearly refute the contention that the victim spoke to the 911 operator "under the stress of excitement caused by" her rape. As "reasonable men could differ as to the propriety" of the admission of the phone call, we affirm the trial court's ruling. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980).

Finally, even if we found that the admission of the tape to be in error, we find the error to be harmless where the state has proven "beyond a reasonable doubt there is no reasonable possibility that the error contributed to the conviction." Arrieta-Rolon v. State, 36 So.3d 124, 127 (Fla. 4th DCA 2010); see also Ventura v. State, 29 So.3d 1086 (Fla.2010) (rejecting an overwhelming evidence test for harmless error). The tape merely corroborated the victim's own trial testimony regarding the attack.

SUMMARY OF THE ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT OR THE SUPREME COURT.

Petitioner seeks this Court's review under Florida Rule of Appellate Procedure, Rule 9.030(a)(2)(iv) which provides that discretionary jurisdiction of the supreme court may be sought to review, arguing that the opinion of Fourth District Court of Appeals expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The State maintains that the cases cited by Appellant do not create a direct or express conflict with the Fourth District's Opinion in this case.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THE SUPREME COURT.

Petitioner seeks this Court's review under Florida Rule of Appellate Procedure, Rule 9.030(a)(2)(iv)which provides that discretionary jurisdiction of the supreme court may be sought to review arguing the opinion expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The State argues that none of cases cited Petitioner in the instant jurisdictional brief, are in conflict with the Fourth District's holding in this case. In Caster v. State, 365 So. 2d 701 (Fla. 1978), this Court primarily addressed the contemporaneous objection rule, holding that counsel's failure to object or request certain jury instructions was precluded appellate review. In Davis v. State, 661 So. 2d 1193 (Fla. 1995), this Court held that petitioner could not raise the issue of a trial court's failure to file contemporaneous written reasons for departing from Sentencing Guidelines for first time in a collateral relief proceeding, citing to the contemporaneous objection rule. In Cardenas v. State, 867 So. 2d 384 (Fla. 2004), this Court held that a defendant who did not object to an alleged improper instruction did not preserve the

issue for Appellant review.

Petitioner's jurisdiction brief focuses on the contemporaneous objection rule and fundamental error. However, in the case at bar, the issue of preservation was neither raised or argued on direct appeal. The issue the Fourth District addressed on the merits was whether the trial court erred by admitting the victim's telephone call to 911 as an exited utterance.

In his only brief references to the abuse of discretion standard, which the Fourth District Applied in this case, Petitioner cited to Berezovsky v. State, 350 So. 2d 80 (Fla. 1977). In Berezovsky, the conflict of decisions which brought case to Supreme Court involved the availability of probation as sentencing alternative in rape prosecution, this Court held that it would resolve the sentencing issue but would not provide a full second review of the evidence. The State maintains that a plain reading of this opinion shows that it addressed none of the issues raised by Petitioner or addressed in the Fourth District's opinion.

The Fourth District Court of Appeals held:

> The "excited utterance" exception to the hearsay rule allows the admission of a hearsay statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat. "[T]here must be "an event startling enough to cause nervous excitement," "the statement must have been made before there was time to contrive or misrepresent," and "the statement must be made while the person is under the stress of excitement

caused by the event." State v. Jano, 524 So.2d 660, 661(Fla.1988). The court will look to the interval of time between the startling event and the making of the statement. Id. at 662; Bienaime v. State, --- So.3d ----, ---- (Fla. 4th DCA 2010).

The exact amount of time between the event and the statement which will justify a finding that the declarant engaged in "reflective thought" will depend on the specific facts of each case and may vary substantially between cases. See, e.g., Henyard v. State, 689 So.2d 239 (Fla.1996); Bienaime, --- So.3d at ---- - ----. The Florida Supreme Court has held that the "[f]actors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." Hayward, 24 So.3d at 29 (quoting Hudson v. State, 992 So.2d 96, 108 (Fla.2008)).

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In this case, the declarant is a seventeen-year-old girl who called the 911 operator soon after being raped for thirty to forty-five minutes. After this extremely "startling" event, the victim spoke to her mother, who, in turn, convinced the victim to call 911. While the victim may have had an opportunity to engage in reflective thought, we cannot say that the trial court abused its discretion by allowing the introduction of the 911 tape. The record does not clearly refute the contention that the victim spoke to the 911 operator "under the stress of excitement caused by" her rape. As

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Akien v. State, 35 Florida Law Weekly D1836 (Fla. 4th DCA August 11, 2010).

Based on the foregoing arguments, the state argues that no conflict is presented. Therefore, this Court does not have discretionary jurisdiction and this Petition must be denied.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court DENY Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Bobby Lee Akien, DC182209, F4-202L, Jackson Correctional Institution, 5563 10th Street, Malone, Florida 32445-3144 on this _____ day of November, 2010.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210, counsel for the State of Florida, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

_____
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