IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DONNA HORWITZ,

Respondent.

Case No. SC15-348

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

****

INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner is the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court. Respondent is Donna Horwitz, the Appellant in the DCA and the defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court, except that the Petitioner may also be referred to as the State.

The following symbols will be used:

R = Trial Court Record on Appeal (3 Volumes)

T = Trial Court Trial Transcripts (19 Volumes)

STATEMENT OF THE CASE

On October 27, 2011, Respondent was charged by indictment with first degree murder with a firearm (R 11). Prior to trial, Respondent moved in limine to exclude any evidence she invoked her right to remain silent (R 43) and more specifically her refusal to answer when Officer Coleman asked Respondent if she was in the room when Lanny Horwitz was shot (R 104-13). The State in turn moved in limine to introduce evidence Respondent remained silent before being arrested or read her rights (R 124). The trial court denied Respondent's motion. The trial court held Respondent was not in custody when she refused to answer Officer Coleman's questions, as there was no evidence anyone forced Respondent to sit in her SUV or told her she was not allowed to leave (T 136). The trial court also noted Respondent did not expressly invoke her right to remain silent (T 142, 185).

On January 17, 2013, a jury found Respondent guilty as charged (R 173). The trial court adjudicated Respondent guilty (R 175) and sentenced her to life in prison (R 171). Respondent appealed, and the Fourth District Court of Appeal reversed, holding the trial court erred in admitting evidence of Respondent's pre-arrest, pre-*Miranda* silence when Respondent did not testify at trial. *Horwitz v. State*, 40 Fla. L. Weekly D474, 476 (Fla. 4th DCA Feb. 18, 2015). In doing so, the

Fourth District certified the following question to this Court as one of great public importance:

> WHETHER, UNDER FLORIDA LAW, THE STATE IS PRECLUDED FROM INTRODUCING EVIDENCE OF A DEFENDANT'S PRE-ARREST, PRE-*MIRANDA* SILENCE WHERE THE DEFENDANT DOES NOT TESTIFY AT TRIAL?

Id. This Court accepted review on March 27, 2015.

STATEMENT OF THE FACTS

Respondent and Lanny Horwitz, the victim, divorced in 2000 or 2001, remarried, and divorced again, with Respondent moving out of their home in Admiral's Cove after the second divorce (T 1192). In March 2011, Respondent moved back in to the Admiral's Cove home (T 1222). The couple's son, Radley Horwitz, also lived in the home (T 1212). Lanny began to socialize with Francine Tice, who lived nearby and was Lanny's business partner (T 1219-20). Respondent began to make comments about the relationship, and Radley began to hear Respondent and Lanny argue about the relationship (T 1224, 52-53). Portions of Respondent's journal were introduced at trial, reflecting that she was excited to move back in with Lanny and Radley in March 2011 (T 2045), but that over the following months, she became obsessed with Lanny's relationship with Tice (T 2046-47). Respondent complained that Lanny was being mean and nasty towards her (T 1254), and her health began to physically deteriorate (T 1259).

Respondent's final journal entry mentioned how Lanny was lying and being mean to her: "Another long day of lies, of being Mr. Meany. I stayed home all day. Very tired." (T 2047).

On September 29, 2011, Lanny took Radley and his daughter to dinner, and Lanny told Radley he was going to North Carolina the next day with Tice for business (T 1259-60, 1322). Respondent found out when she noticed Lanny's packed bags on top of the washing machine (T 1262). Radley went to sleep with earplugs, because of noise from their dogs and other household noises (T 1268). His parents were still up when he went to bed (T 1271). He was awakened by the sound of gunshots (T 1272). Radley removed his earplugs and then heard a few more gunshots (T 1273). When he heard the clicking sound of an empty gun (T 1274), he exited his room and found Respondent running back and forth, screaming Radley's name (T 1275). Radley looked and saw Lanny on the floor in the bathroom (T 1279). Radley went back to Respondent in the kitchen, who at one point said "he was so horrible." (T 1282).

Christopher Fisher, the lieutenant in charge of site security at Admiral's Cove (T 966), received an alarm from the Horwitz residence a minute or two before 7 a.m. (T 970). Fisher called the residence, but there was no answer, so he dispatched Luis Garcia (T 971-72). Garcia responded and was met at the door of the residence by Radley (T 1005). Radley appeared to have just gotten out of bed

(T 1007). Radley said he didn't know what had happened, but Respondent was screaming. Garcia asked if there was anyone else in the house besides Radley and Respondent, and Radley said his father (T 1006). Garcia entered the house and saw Respondent, who was very upset and screaming "I think he's dead." Respondent pointed Garcia to the master bathroom (T 1008). Garcia found Lanny face down and unresponsive in the bathroom but still breathing (T 1009, 1013, 1016). There was a gun in Lanny's right hand at an angle which Garcia thought was consistent with a self-inflicted gunshot wound (T 1017-18). Garcia moved the gun and checked for a pulse but could not find one (T 1023). Respondent told Garcia "he said he would do this." Radley told Garcia that Lanny and Respondent had been fighting (T 1015). Garcia ordered Radley and Respondent out of the house (T 1285-86).

Radley and Respondent went to wait in their SUV (T 1288). At some point, Radley noticed several drops of blood on Respondent's foot (T 1289). When Respondent saw the drops, she stated "oh god, oh god," and wiped the drops of blood off (T 1290). Officer Kristi Coleman responded to the scene and made contact with Respondent and Radley in the SUV (T 1052). Coleman spoke to Respondent, asking her if she needed anything. Respondent didn't answer. Coleman then asked Respondent if she wanted a bottle of water. In response, Respondent put her fingers in her ears and said she couldn't hear Coleman (T

1056-57). Coleman then asked Respondent if she was in the room when the gun went off, but Respondent didn't answer. Coleman testified Respondent appeared to be in shock (T 1057). Coleman observed one drop of blood on Respondent's left foot (T 1060-61). Respondent called an audioprosthologist to testify who tested Respondent for hearing loss. The audioprosthologist testified Respondent had lost 48% of her ability to hear in each ear (T 2146).

Traci McClendon, crime scene investigator, testified that there was no evidence of forced entry into the home (T 1502). There was a bloody fingerprint smudge on the gate to the courtyard (T 1503-04). McClendon conducted a gunshot residue test on Radley, which was negative (T 1505-06). McClendon collected two earplugs from Radley's bedroom (T 1508). Lanny's body was in the master bath (T 1521-22). Blood was found all over the bathroom and the shower stall door was shattered (T 1522-23). In the master bedroom, there were two suitcases and a gun on the floor near the master bath (T 1511). A second gun in a holster was located on the dresser (T 1520). Both guns were five shot revolvers (T 1956). Five empty casings were collected from each firearm. Bullets and bullet fragments were also recovered (T 1542). A suitcase was found with Respondent's name on the tag. Ammunition was found inside the bag (T 1614-16) matching the ammunition used in the guns (T 2005). Napkins were collected from the Horwitzs' SUV (T 1620). Stuart James, a blood spatter expert, testified Lanny was shot

while standing in the shower, as he fell to the floor, and then as he lay on the floor (T 1860). Omar Felix, a firearms examiner, testified that the bullet fragments found at the scene came from the firearms recovered at the scene (T 1807). Radley identified the two guns found at the scene as his parent's guns (T 1298). Radley was convicted of a federal firearms offense in 2006, and therefore was not allowed to possess guns (T 1202-03).

Angela Spessard, DNA analyst, testified that the blood smudge on the gate contained a mixture of two DNA profiles, one of which was Lanny and the other for a person not tested (T 1722-25). The gun on the floor near the bathroom also had a mixture of two DNA profiles, one of which was Lanny. Radley was excluded as the other contributor, but Respondent could not be excluded, with only a 1 in 15 chance that she was not the contributor (T 1730-34).

Dr. Glen Axelson, associate medical examiner (T 1084), conducted the autopsy on Lanny (T 1096). Lanny's body had some lacerations on his back, leg, feet and hand, a piece of glass in his knee, and some stippling on his left chest (T 1099). Lanny had a total on nine gunshot wounds (T 1132). Lanny had a gunshot wound to the left side of his jaw that went through the tongue and ended in the neck (T 1109). The entry wound suggested the gun was in contact with Lanny's skin when it was discharged (T 1110). A second gunshot wound was to Lanny's chest (T 1113). The bullet traveled at an angle and downward, between two ribs

and through the heart (T 1116). Other gunshots struck Lanny in the shoulder, chest, and back (T 1117-28). The stippling on the chest suggested the shooter had to be very close to Lanny, within a couple of feet (T 1134).

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in holding that evidence of pre-arrest, pre-*Miranda* silence of a defendant where the defendant did not testify at trial is inadmissible. The admission of pre-arrest, pre-*Miranda* silence is not barred by the U.S. Constitution as interpreted by the U.S. Supreme Court, as the admissibility of silence is dependent on when *Miranda* warnings are given. The admission of pre-arrest silence is not barred under the Florida Constitution, as the privilege against self-incrimination does not apply until a person is in custody and under interrogation. Further, pre-arrest, pre-*Miranda* silence should not be categorically barred under evidentiary rules as its probative value is not always substantially outweighed by its prejudicial effect.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT EVIDENCE OF PRE-ARREST, PRE-*MIRANDA* SILENCE OF A DEFENDANT WHERE THE DEFENDANT DID NOT TESTIFY AT TRIAL IS INADMISSIBLE AS SUBSTANTIVE EVIDENCE.

A. STANDARD OF REVIEW

"A trial court's decision to admit or exclude evidence is reviewed by utilizing the abuse of discretion standard of review. However, this discretion is limited by the rules of evidence." *Alexander v. State*, 103 So. 3d 953, 954 (Fla. 4th DCA 2012) (citation omitted).

B. ADMISSIBILITY OF PRE-ARREST, PRE-MIRANDA SILENCE UNDER THE U.S. CONSTITUTION

The United States Supreme Court has made clear that the use of pre-arrest, pre-*Miranda* silence for the purpose of either impeachment or substantive evidence does not violate the Fifth Amendment when, as in this case, a defendant does not expressly invoke his or her right to remain silent or waives that right.

Jenkins v. Anderson, 447 U.S. 231 (1980) addressed the admissibility of silence to impeach a defendant during cross-examination. In *Jenkins*, the defendant testified at trial that he acted in self-defense in killing the victim, who the defendant claimed was trying to rob him. On cross-examination, the prosecutor asked if the defendant turned himself in or reported his story to the police after the killing, and the defendant admitted he didn't turn himself in until

two weeks later. *Id.* at 233. The prosecutor also referred to the defendant's prearrest silence during closing argument, suggesting the defendant would have turned himself in if he actually acted in self-defense. *Id.* at 234. The defendant argued the prosecutor's actions violated his right to remain silent. The Supreme Court held that once a defendant takes the stand, he is subject to cross-examination just like any other witness; thus, any right to remain silent is waived. *Id.* at 235–36. Further, using pre-arrest silence to impeach the defendant's credibly did not deny him fundamental fairness when no governmental action induced the defendant to remain silent and the silence occurred prior to arrest and the giving of any *Miranda* warnings. *Id.* at 240. However, the Court noted that evidentiary rules could limit the use of silence for impeachment when the silence is not probative of credibility or prejudicial. *Id.* at 239. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held use of silence at the time of arrest and after *Miranda* warnings were given violated the Due Process Clause, but in *Fletcher v. Weir*, 455 U.S. 603 (1982), the Court held due process does not prohibit the use of post-arrest, pre-*Miranda* silence for impeachment purposes. Thus, under the U.S. Constitution, the giving of *Miranda* warnings is what implicates due process in using silence to impeach a defendant.

Salinas v. Texas, 133 S. Ct. 2174 (2013) addressed the constitutionality of admitting silence as substantive evidence. In *Salinas*, the defendant voluntarily

answered questions during a police interview both parties agreed was noncustodial and pre-*Miranda*. The defendant answered most of an officer's questions during an hour-long interview. But when the officer asked the defendant whether a ballistics test would show that shell casings found at the scene of the crime would match his shotgun, the defendant "looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up." *Id.* at 2178 (alterations omitted). After a few moments, the officer asked another question, and the defendant resumed answering questions. *Id.* At trial, the defendant did not testify and the prosecution argued the reaction to the officer's question suggested he was guilty. The defendant argued the use of his silence at trial violated the Fifth Amendment. *Id.* at 2179.

The U.S. Supreme Court noted that a defendant must expressly invoke the privilege against self-incrimination at the time he relies on it in order to benefit from its protection. There are only two recognized exceptions to the privilege: a defendant need not take the stand at trial to assert the privilege at trial, and failure to invoke the privilege can be excused when the government coerces a person to speak. *Id.* at 2180. As the defendant did not dispute that his interview with police was voluntary, he could not claim coercion. *Id.* at 2181. While the defendant argued that a witness can invoke the privilege against self-incrimination by standing mute and refusing to answer an incriminating question, the Court rejected

that argument. The Court noted that a defendant normally does not invoke his Fifth Amendment privilege by remaining silent, and that there is no unqualified right to remain silent, as the right to refuse to answer questions depends on his or her reason for refusing. *Id.* at 2182–83.

Thus, under U.S. Supreme Court precedent, silence is categorically inadmissible only after *Miranda* warnings are given. Admission of pre-*Miranda* silence is not prohibited under the U.S. Constitution except when the privilege against self-incrimination is expressly invoked or there is evidence of coercion or other governmental action that induces the silence. As neither occurred in this case, admission of Appellant's pre-arrest, pre-*Miranda* silence did not violate the U.S. Constitution.

C. ADMISSIBILITY OF PRE-ARREST, PRE-MIRANDA SILENCE UNDER THE FLORIDA CONSTITUTION

As the due process clause of the Florida Constitution has been interpreted to be more protective than the U.S. Constitution, *Rigterink v. State*, 66 So. 3d 866, 904 (Fla. 2011), Florida courts have held that post-arrest silence is inadmissible even if *Miranda* warnings have not been given, notwithstanding *Fletcher*. In *Lee v. State*, 422 So. 2d 928 (Fla. 3d DCA 1982), the state commented in closing on the defendant's failure to report to the police after he was arrested what he testified to at trial. *Id.* at 929. The court noted the comment directly called to the jury's attention the defendant's post-arrest silence. The state argued that, as no *Miranda*

warning had been given, the comment was not prohibited. *Id.* at 930. The Third District agreed that the comment did not violate the defendant's federal due process rights but held the comment violated the defendant's right to remain silent under the Florida Constitution. The Third District relied on *Webb v. State*, 347 So. 2d 1054 (Fla. 4th DCA 1977), which held the right to remain silent upon arrest under the Florida Constitution does not depend on being advised of the right. *Id.* at 1056.

In *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998), this Court concluded that a defendant could not be impeached with pre-*Miranda* silence at the time of arrest. The Court held that post-arrest silence includes silence at the time of arrest, and noted that Florida courts have found that the right to remain silent precluded the use of post-arrest silence for any reason, including impeachment. *Id.* at 767. The Court identified two reasons Florida courts treat post-arrest silence differently than the U.S. Supreme Court. First, the right to remain silent at the time of arrest in Florida is not waived when a defendant testifies in his own defense. *Id.* at 769. Second, while post-*Miranda* silence is inadmissible under due process principles, the absence of *Miranda* warnings does not involve the right to remain silence at the time of arrest. Thus, the admissibility of post-arrest silence does not depend solely on whether *Miranda* warnings were given. The Court noted that other Florida courts have held, consistent with *Jenkins*, that pre-arrest, pre-*Miranda* silence is

admissible for impeachment purposes. For example, *Rodriguez v. State*, 619 So. 2d 1031 (Fla. 3d DCA 1993) held that impeaching a defendant's credibility with pre-*Miranda* silence was proper because the defendant has not been assured his silence was used against him, and does not violate his right to remain silence because that right is waived when he takes the stand. *Id.* at 1032; *see also Mann v. State*, 787 So. 2d 130, 135 (Fla. 3d DCA 2001); *Lebowitz v. State*, 343 So. 2d 666, 667 (Fla. 3d DCA 1977). In a footnote, this Court noted: "This is true, however, only if the silence was inconsistent with the defendant's testimony at trial. *See Reaser v. State*, 356 So. 2d 891, 892 (Fla. 3d DCA), *cert. denied*, 366 So. 2d 884 (Fla.1978)." *Hoggins*, 718 So. 2d at 770 n.11.

In its opinion below, the Fourth District relied on footnote 11 of *Hoggins* to hold that admitting Appellant's pre-arrest silence as substantive evidence was error. But as *Hoggins* involved the admissibility of *post*-arrest silence as *impeachment* evidence, footnote 11 is obiter dictum. *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) (defining obiter dictum as "a purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination.") Obiter dicta is not controlling authority and has no precedential value. *Id.*

Further, the reasoning of *Hoggins* does not apply in the instant case because Respondent's silence occurred prior to her arrest. This Court has held the privilege against self-incrimination contained within article I, section 9 of the Florida Constitution applies only to statements obtained in custody and though interrogation. *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992); *see also State v. Busciglio*, 976 So. 2d 15, 19 (Fla. 2d DCA 2008). A person is in custody if "a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." *Traylor*, 596 So. 2d at 966 n.16. For example, in *State v. Jones*, 461 So. 2d 97 (Fla. 1984), the state presented testimony from a store security officer that two women walked out of the store with stolen clothing. The officer stopped the women outside the store and asked them to return inside. The state then asked the officer if the women offered any explanation for their conduct, and the officer stated "No, none." *Id.* at 98. The defendant objected, arguing he had a right to remain silent. The court held that the detention by the store security officer was not state action, and thus the right to remain silent did not apply because the defendant was not in state custody. *Id.* at 99. A person is being interrogated when "a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response." *Id.* at 966 n.17.

Thus, pre-arrest, pre-*Miranda* silence is not categorically inadmissible under the privilege against self-incrimination in the Florida Constitution, as that privilege only applies once a person is under arrest. Appellant was not under arrest when she refused to respond to Officer Coleman. Appellant's freedom was not curtailed while she was sitting in her SUV. Officer Coleman asked Appellant (1) if she needed anything; (2) if she wanted a bottle of water; and (3) if she was in the room when the gun went off. None of these questions were incriminating in nature. Thus, admission of Appellant's pre-arrest, pre-*Miranda* silence did not violate the Florida Constitution.

D. ADMISSIBILITY OF PRE-ARREST, PRE-MIRANDA SILENCE UNDER EVIDENTIARY RULES

In *Hoggins*, this Court ruled that even if the use of the defendant's post-arrest, pre-*Miranda* silence did not violate the Florida Constitution, it violated Florida evidentiary rules because the defendant's silence was not inconsistent with his trial testimony. 718 So. 2d at 770. This Court noted that "in Florida, a defendant takes the stand in a criminal case subject to impeachment by prior inconsistent statements to the extent that the probative value of the prior inconsistent statements is not outweighed by the risk of unfair prejudice to the defendant." *Id.* at 771. This applies to impeachment by silence. Silence is only inconsistent with a statement at trial if "the prior silence occurred at a time when it would have been natural for the defendant to deny the accusations made against him." *Id.* Since a

defendant may have many reasons to stay silent at the time of arrest, that silence is not necessarily inconsistent with a statement at trial. *Id.* at 771–72. As the defendant's silence has a significant potential for prejudice and lacked any probative value, it was inadmissible. *Id.* at 772.

While this Court has addressed the use of post-arrest silence under Florida Statute section 90.403, it has not considered the question of whether *pre*-arrest silence is also always excludable under section 90.403. The State would submit that such silence should not always be excludable under section 90.403, as it has long been recognized that there are situations where a defendant's silence can be admissible, even as substantive evidence. A defendant's out-of-court silence can be admissible as an admission by adoption under section 90.803(18)(b), Florida Statutes if a reasonable person would have denied the statements under the circumstances. *See Brennan v. State*, 754 So. 2d 1, 5 (Fla. 1999) (defendant's silence in the face of a co-defendants statements regarding their involvement in a murder can be admissible to prove guilt). Evidence of a defendant's refusal to take a field sobriety test, considered a comment on the right of silence, *see Smith v. State*, 681 So. 2d 894, 895 (Fla. 4th DCA 1996), is admissible to show consciousness of guilt if it occurs pre-arrest because there is no compulsion to refuse. *State v. Taylor*, 648 So. 2d 701, 704 (Fla. 1995). Silence in the face of possession of recently-stolen goods is admissible to infer guilty knowledge.

Cridland v. State, 338 So. 2d 30, 30 (Fla. 3d DCA 1976). A probationer's refusal to discuss his compliance with the terms of probation is admissible in a probation revocation proceeding. *State v. Mangam*, 343 So. 2d 599, 600 (Fla. 1977).

Here, where Appellant was not under arrest or in custody, and Officer Coleman's questions were not accusatory in nature but directed at Appellant's well-being after her husband had died, Appellant's silence and general demeanor is probative evidence of her state of mind that should be admissible to prove guilt. The normal balancing test under 90.403 should be applied to determine whether this evidence is admissible. In this case, even if it was prejudicial for the State to introduce evidence of Appellant's silence in response to Officer Coleman's questions, such prejudice did not substantially outweigh its probative value. Here, the State presented evidence that only two people were present in the home when Lanny was murdered, Radley and Appellant, and both person's reactions and statements immediately after the murder are probative in determining whether Appellant or Radley committed the murder. Appellant's theory of defense was that either Radley committed the murder or hired someone to do so, and Appellant tried to undermine the State's case by presenting evidence of Radley's demeanor on a phone call right after the murder and particularly Radley's failure to mention to his ex-wife that the murder had just occurred (T 2236). Under the facts of this case, the State would submit that evidence of Appellant's silence was probative in

rebutting Appellant's theory of innocence by showing her apparent lack of concern for Lanny's death, and should not be per se inadmissible under evidentiary rules.

CONCLUSION

WHEREFORE, based on the arguments and authorities cited in this brief, the State respectfully requests this Honorable Court quash the decision of the Fourth District Court of Appeal and remand for further proceedings.

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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I CERTIFY that (1) this brief has been prepared in Times New Roman font, 14 point, and double spaced, and (2) a true and accurate copy of this brief was served on Grey Tesh, Esq., 515 N. Flagler Drive, Suite P-300, West Palm Beach, FL 33406 by email at info@greytesh.com and Jonathan T. Mann, Esq., The Law Offices of Robin Bresky, 6111 Broken Sound Pkwy NW, Suite 260, Boca Raton, FL 33487-3643 by email at manni@breskyappellate.com on May 21, 2015.

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