IN THE SUPREME COURT OF FLORIDA

DOMINIQUE WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1534

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

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Wright." Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State. The following are examples of other references:

IB – Petitioner's Initial Brief

R – Record

SR – Supplemental Record

T - Transcript

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts, but makes the following clarifications and additions:

1. In the motion to suppress hearing, the victim, James Howard, testified that when he was in his car at a friend's house, as he was rolling out of the driveway, a red Corolla approached with the visors down and cut him off (T4, 12). He said that his car was backed up in the driveway facing the road (T4, 12). He testified that when the car cut him off, the driver jumped out and the other car continued to roll (T4, 12).

Mr. Howard testified that the person had something covering his face and described it as a shirt tied around a ski mask (T4, 13). He said that as the man moved around, the mask must have unraveled and the shirt fell down (T4, 13). He said that he looked at the man eye-to-eye from about 7 feet away (T4, 14). He did not know this person (T4, 15). He testified that he saw him shooting through his front windshield (T4, 14).

Mr. Howard said that as he threw his elbow up when the shooting started, he looked out his driver's side window and saw the person on the opposite side of the car shooting (T4, 14). He said that this person was about 10 feet away (T4, 14). He said that this person also had something over his face but that it fell down when the car rolled and almost hit him (T4, 15). He testified that the

other car only stopped when it hit a brown car that was parked in the driveway (T4, 15).

Mr. Howard said that he had seen this person [passenger] before (T4, 16). He explained that he had seen him at Wells Gym, where everybody who grew up in the neighborhood went for recreation (T4, 16). He said that he had a "pretty good time to look and see" because what happened seemed like it was in slow motion (T4, 16). He said that he had four bullets hit him through his cheek and that he had to have his jaw wired shut (T4, 17).

Mr. Howard said that a few days after the shooting, the police came to see him and brought a photographic lineup (T4, 18). The one with regard to the driver was recorded on videotape (T4, 19-22). He picked out Fritz Murdock as the driver (T4, 22). The second lineup, conducted on another day, was with regard to the passenger (T4, 22-26). It was recorded only on audio tape (T4, 24). He identified the passenger as Appellant (T4, 27).

The co-defendant's counsel, Mr. Haddad, was the first to conduct cross-examination of Mr. Howard. He clarified that Mr. Howard was sitting in his car with Raphael Acker waiting to head off to work (T4, 28-29). Mr. Howard said that they sat in the car talking for about 10 or 15 minutes because Raphael's uncle had called and said that he was running late for work (T4, 30-31). He said that they were talking about the job that they had to do and about a guy named Melvin (T4, 31-33).

Mr. Howard stated that when the car pulled up, both occupants got out of the car, and he remained (T4, 33). He said that the driver got out holding a gun (T4, 34). He said that he was headed east towards him (T4, 35). He said that there was no hesitation between the car pulling up, the occupants getting out, and the firing (T4, 36). It happened very quickly (T4, 36). Mr. Howard testified that 9 shots were fired (T4, 37). He thought that the driver fired 5 and the passenger fired 4 (T4, 37). He said that a concerned citizen came to his aid and took him to the hospital (T4, 38).

Mr. Howard testified that prior to the lineup, the police did not show him anything or ask him anything (T4, 39). He said that he doesn't know Mr. Murdock (T4, 41). He said that he knows Dane Robinson and explained that he knows him from Wells Gym (T4, 41-42).

He said that he had an altercation with Mr. Robinson from which charges were filed against him [Mr. Howard] (T4, 42). He said that Mr. Robinson wanted to rob him of his chain and that he saw him at a car shop (T4, 45). He said that he and his dad were talking when Mr. Robinson came out of the car shop with a pistol at his side and said "when you leave here you know what it is." (T4, 45). He said that Mr. Robinson came towards them and reached for his weapon and grabbed his father, and his father got shot (T4, 45). This happened six years before (T4, 44).

Mr. Haddad, the co-defendant's counsel, by reference to Mr. Howard's deposition, had Mr. Howard clarify that while he did not know Mr. Murdock, he had seen him before around the area (T4, 47-48). Mr. Howard later offered that he could say that he heard of Mr. Murdock but maintained that he did not know him (T4, 49).

Petitioner's counsel, Mr. Hanrahan, conducted a separate cross-examination. Mr. Howard said that he never gave a description of the perpetrators prior to the photo lineups (T4, 50). He said, "Uh, I didn't know nothing about that" when Mr. Hanrahan asked him about when the police told him that they found a cell phone (T4, 51). He said that he could not have told the police that Dominique was one of the people who jumped out of the car because he had his jaw wired shut (T4, 51-54). Mr. Howard suggested that he did not tell the police about Petitioner because he was being presented with a photo lineup (T4, 54).

Mr. Howard admitted that he put his hand up to protect himself but stated that he did not duck down (T4, 56). He said that he stayed straight up (T4, 56). He demonstrated how quick the shots were (T4, 59). He said that his car engine was already running and in gear so he sped off down the street (T4, 61). He said that he did not meet with police until the lineup, about a week after the shooting (T4, 61-62).

Mr. Howard stated that he guessed that Mr. Robinson was Appellant's uncle (T4, 63). He agreed that he had testified that

Mr. Robinson had wanted his necklace and that he'd do anything to get it (T4, 64-65). Mr. Howard said that he had seen Petitioner more than 10 times prior to the photo lineup and that he did not know anybody else in the lineup (T4, 67).

On re-direct, Mr. Howard said that the police did not contact him between the lineup of the driver in the hospital on the 1st and the date that he was released and did the lineup of the passenger on the 3rd (T4, 70). He was positive that he picked out the person who was the passenger in the car (T4, 71-72).

On re-cross examination by Mr. Haddad, Mr. Howard said that he had not been aware that Mr. Robinson was related to Mr. Murdock but that it had been 4 years since the shooting and now he learned that (T4, 73).

2. At the status hearing, in which use of Mr. Howard's former testimony due to his death was discussed, Mr. Hanrahan stated that if Mr. Howard were available to testify, he would impeach him with his deposition on matters such as the direction they were facing, the number of people that were there, how far they drove, and along those lines (T4, 99). Mr. Haddad, co-defendant's counsel, independently said that he would ask about relationships that Mr. Howard had with other people and the animosity between Mr. Howard and Mr. Robinson (T4, 103-104). The trial court found:

> I went back and looked at the transcript, there was no limitation. There was hardly an objection that I sustained by the State. And that the ID is the primary issue here. I know you – and I appreciate you preserving your record and

> carving out your arguments, but really that's what it's about. It's not your 2 guys. Not that it's self defense or anything like that. And that under the Rossencoolus case does this satisfy it? To me if it does at a bond hearing or some preliminary hearing, it certainly did at a hearing that I think took close to 2 hours. I'm not sure. It was extensive.

(T4, 107-108).

3. At trial, Raphael Acker testified that he and James Howard were sitting in Howard's car in the driveway of his grandmother's house and as they were pulling out, they were cut off by a car, from which two masked men jumped out and started shooting into their car (T7, 505-508). He said that he never told the police in his interview that the shooters were tall or what their build was like (T7, 522). He said that after he saw that Mr. Howard was shot and realized that he had been shot, he put Mr. Howard's car in drive, and they went around the car and onto the sidewalk and grass (T7, 527). Someone from the neighborhood then jumped in and gave them a ride to the hospital (T7, 528-529).

4. Officer Raymond Sorrells, who was parked down the street on Avenue J, said that he heard something that sounded like firecrackers just before someone ran up to him and hollered that someone was shot (T7, 543). He canvassed the neighborhood and found 3 casings (T7, 545). The 3 nine millimeter shell cartridge casings were located at the south side of the residence by the driveway, laying in the grass by the hedge (T7, 560). They were fired from the same firearm (T7, 583).

5. Detective Nancy Aspenleiter testified that she had been to Petitioner's house and said that she recognized the rooms in the video, State's Exhibit 12, as those in his house (T8, 668). The video was published to the jury (T8, 669). Detective Aspenleiter stated that she recognized the person and voice in State's Exhibit 13, and this video was published to the jury (T8, 677, 685).

6. At trial, James Howard's former testimony was played for the jury (T8, 763-791). Defense counsel asked afterwards that he be permitted to impeach this testimony with potions of Mr. Howard's deposition where he said something different than he said in his former testimony (T8, 799, 802-805). He claimed that he wanted to introduce part of the deposition that would contradict the former testimony when Mr. Howard said that this incident was not about his necklace (T8, 806-808). The prosecutor argued that this would not even amount to a prior inconsistent statement because Mr. Howard said in his testimony that he did not know what the shooting was about (T8, 811). The trial court ruled against allowing admission of the deposition (T9, 845-848).

7. Detective James Evans testified that he was involved in the recovery of a video from Petitioner's cell phone that was dated October 20, 2011, when a criminal case with Petitioner as the defendant and James Howard as the victim was pending (T8, 792).

SUMMARY OF ARGUMENT

ISSUE I: The Fourth District properly ruled that the trial court did not err in not permitting the use of the deposition statements as prior inconsistent statements. The Fourth District's ruling is not expressly or directly in conflict with law permitting a party to impeach hearsay statements with prior inconsistent statements by the declarant. The State argued at trial that the deposition statements were not inconsistent with the testimony, and the Fourth's holding is likely premised on this argument. Petitioner failed to show that the statements were inconsistent with the testimony. Regardless, the proposed impeachment was not on a material matter and called for speculation. Any error is harmless for these reasons, as well as the fact that the deposition statements were not inconsistent with the testimony. In addition, defense counsel argued to the jury that the witness' action in not telling the police that Petitioner was a shooter was unreasonable, and asserted that the witness only identified Petitioner because of a dispute that he previously had with Petitioner's uncle.

ISSUE II: The trial court did not abuse its discretion in allowing at trial the motion hearing as former testimony. Petitioner had a similar motive at the suppression hearing as he would at trial to develop the witness' testimony. At both proceedings, counsel's objective was to attack the credibility and reliability of the witness' identification. Petitioner did not explain why he did

not have the same motive at the hearing to address subjects. Petitioner was not prejudiced by the trial court's ruling.

ISSUE III: The trial court did not abuse its discretion in admitting the videos of Petitioner's raps. The videos were relevant to show Petitioner's consciousness of guilt, if they were not also relevant as implicit admissions. Petitioner failed to preserve for review argument that the probative value of the videos was substantially outweighed by the potential for prejudice because he did not rely on this ground at trial. There was no undue prejudice due to the admission of the videos. Reference to the weapon seen in the video was warranted because the evidence showed that a similar weapon was used in the instant offenses.

ARGUMENT

ISSUE I: THE FOURTH DISTRICT PROPERLY RULED THAT THE TRIAL COURT DID NOT ERR IN NOT PERMITTING THE USE OF THE DEPOSITION STATEMENTS AS PRIOR INCONSISTENT STATEMENTS.

A. The Fourth District's ruling is not expressly or directly in conflict with law permitting a party to impeach hearsay statements with prior inconsistent statements by the declarant.

In this case, the Fourth District ruled that the trial court did not err in not permitting portions of the depositions to be used as inconsistent statements. However, it did not hold that the former testimony could not be impeached at trial, or that it is always impermissible to impeach hearsay at trial with prior inconsistent statements.

At trial, James Howard's former testimony was played for the jury (T8, 736-791). Defense counsel asked afterwards that he be permitted to impeach this testimony with potions of Mr. Howard's deposition where he said something different than he said in his former testimony (T8, 799, 802-805). He specifically requested to read into the record a specific portion of the deposition (T8, 799, 804-805).

In this portion, counsel asked the witness about whether he assumed that he had been shot because of the chain since he thought Dante Robinson was going to get the chain (T8, 804). The witness first said, "yes," but then later said that counsel was asking him about the relationship of Petitioner, but that one case did not have anything to do with the other (T8, 804). Mr. Howard agreed that he said that he thought he had been shot because of the chain, but then said, "it's basically all around a chain, it's not like I got shot about a chain" (T8, 804). Mr. Howard said that the reason that he did not know why the two young men shot him was because he had not done anything to them (T8, 405). He added, "I had a dispute with his uncle, cousin or whatever," "Dominique Wright your client, and your client's motive that be the only reason for him because I don't – I don't – I haven't done nothing to you for you to shoot me" (T8, 805).

Counsel claimed that he wanted to introduce this part of the deposition because Mr. Howard denied that this was all about a

chain in his testimony, but that these couple of pages indicate that the whole incident was about the chain (T8, 805, 806-807). The prosecutor argued that this would not even amount to impeachment because Mr. Howard said in his testimony that he did not know what the shooting was about (T8, 811, 815-816). She pointed to the deposition and stated that a little further along in the deposition, Mr. Howard explained that he did not know why they did it, "I don't know why this incident happened because the necklace incident is with Dante Robinson." (T8, 811).

The trial court ruled against allowing admission of the deposition relying on two specific cases, Rodriguez v. State, 609 So. 2d 493 (Fla. 1993) and Leighty v. State, 981 So. 2d 484 (Fla. 4th DCA 2008) (T9, 845-848). On appeal, in the initial brief, Petitioner argued that Rodriquez and Leighty do not apply to this case, because they hold that discovery depositions due not comply with rules on the admission of substantive evidence, while this case involves impeachment, and not substantive, evidence. Petitioner advanced that use of a discovery deposition for impeachment is permissible. He never cited in his initial brief to section 90.806(1), Florida Statutes, or to Reaves v. State, 639 So. 2d. 1 (Fla. 1994) and Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005), on which he now relies (IB. 11-13).

The Fourth District on appeal found no error in the trial court's ruling not to allow the use of certain portions of the

victim's deposition "as inconsistent statements." It cited, in part, to Mattox v. United States, 156 U.S. 237 (1895) for the proposition that the trial court properly excluded an alleged inconsistent statement since the defendant did not lay a proper foundation. This being so, the State asserts that the Fourth District's ruling that the trial court did not err in not permitting the introduction of the deposition statements was because Petitioner failed to show that the statements were inconsistent, as the prosecutor argued to the trial court.

B. The Fourth District properly ruled that the trial court did not err in not permitting impeachment with the deposition statements because Petitioner failed to show that the statements were inconsistent with the witness' testimony.

The portion of the deposition proffered by Petitioner does not impeach Mr. Howard's hearing testimony with a prior inconsistent statement. To be inconsistent, a prior statement must either directly contradict or be materially different from the expected testimony at trial. Pearce v. State, 880 So. 2d 561, 569 (Fla. 2004).

At the hearing, counsel asked Mr. Howard if it was true that he believed that this incident has to do with a necklace (T4, 64; T8, 782). Mr Howard responded, "This incident I didn't say that, sir. I didn't say that. . ." (T4, 64; T8, 782). He admitted that the prior incident with Mr. Robinson had to do with the necklace and acknowledged that Mr. Robinson wants, and would do anything to

get, the necklace (T4, 64-65; T8, 782-). However, he said that the incident with Dante Robinson was "old" and "over," and said that this incident was not about the necklace and that he did not know what it was about (T4, 64-65; T8, 782-783).

In the proffered portion of the deposition that counsel wanted to use to impeach Mr. Howard, the witness said that prior to the shooting, he thought that Mr. Robinson was coming after him for the chain, but denied that he assumed that he had been shot because of the chain (R1, 117). In fact, he said, "I didn't assume nothing." (R1, 117). He said that one incident didn't have anything to do with the other, stated that he didn't have anything to do with the shooters, and claimed that he only had a dispute "with his uncle, cousin or whatever" (R1, 118). He stated, "The reason why I don't even know why these two young men shot me, sir" (R1, 118).

It is true that Mr. Howard indicated in the deposition that he could not think of another motive for the shooting besides the chain. Mr. Howard said that the chain would be Appellant's only motive because "I haven't done nothing to you to shoot me," and said that he did not know Petitioner's co-defendant's reason (R1, 119). The State maintains that this deposition statement is significantly different than counsel's question at the hearing about whether Mr. Howard had claimed that the instant incident was about the chain, because it is obvious from the deposition

testimony that Mr. Howard was stating the only possible motive that he could attribute to Petitioner, and not that it was absolutely Petitioner's motive. As Mr. Howard advanced both in the deposition and the hearing, he could not say why the perpetrators shot him.

C. The proposed impeachment was not on a material matter, and rested on speculation by the witness.

Defense counsel attempted to impeach Mr. Howard on a matter for which he was not competent to testify because, at best, he could only speculate as to a reason for the shooting. For admissibility, inconsistency of a prior statement must involve a material, significant fact rather than mere details. Pearce, 880 So. 2d at 569. The opinion of a witness on a fact in issue is not admissible where the jury is as well qualified as the witness to form an opinion, and lay witnesses are ordinarily required to confine their testimony to facts. Sharp v. State, 500 So. 2d 673, 674 (Fla. 4th DCA 1986). Here, Mr. Howard admitted that the prior incident with Mr. Robinson had to do with the necklace and acknowledged that Mr. Robinson wanted the necklace (T4, 64; T8, 782). He just could not say what Petitioner's motive in the instant shooting was (T4, 65; T8, 783).

D. Any error was harmless beyond a reasonable doubt.

Any error was harmless beyond a reasonable doubt. See State v. DiGuillio, 491 So. 2d 1129, 1139 (Fla. 1986). As stated above, the prior statements were not actually inconsistent with the hearing testimony. Mr. Howard never contested that he had said that the prior incident with Mr. Robinson was about the necklace or that he wanted the necklace; he only asserted that he did not know what this incident was about (T4, 64-65). In the proffered portion of the deposition that counsel wanted to use to impeach Mr. Howard, the witness said that prior to the shooting, he thought that Mr. Robinson was coming after him for the chain, but denied that he assumed that he had been shot because of the chain (R1, 117). Mr. Howard said, "I didn't assume nothing." (R1, 117). He said that one incident didn't have anything to do with the other, stated that he didn't have anything to do with the shooters, and claimed that he only had a dispute "with his uncle, cousin or whatever" (R1, 118). He stated, "The reason why I don't even know why these two young men shot me, sir" (R1, 118).

Moreover, the proffered deposition statements went only to what Mr. Howard might have thought was the reason for the shooting, a fact for which the jury realized that he did not have first-hand knowledge, especially since he said that he had no idea what the reason for the shooting was. Mr. Howard said at the hearing, "I don't know even why this incident even took place." (T8, 783).

The State also points out that because the former testimony was admitted, the defense actually got before the jury matters that it otherwise would not have been permitted to explore at the trial. The former testimony included the cross-examination and recross-examination by the co-defendant's counsel, Mr. Haddad (T8, 748-770, 790-791). In cross-examination by the co-defendant's counsel, Mr. Howard revealed that he was previously charged with attempted murder, which was nolle prossed (T8, 763-765).

Finally, at trial, defense counsel contended that it was important for the defense to impeach Mr. Howard with the deposition because Mr. Howard knew Petitioner but never told the police that he shot him (T8, 805). He maintained that it was unreasonable to believe that Mr. Howard would not have told the police who shot him, and said that the reason that Mr. Howard picked out Petitioner's photo from the lineup was because of the necklace incident with Mr. Robinson (T8, 805-806). However, Mr. Howard's testimony directly refuted this argument sine he stated that he did not talk with the police because he was taken to the hospital and into surgery, and that he did not have contact with the police until they came to the hospital to show him the photo lineup, which they presented to him before they gave him any information, or asked him for information. He further claimed that he could not have named Petitioner as the shooter since his jaw was wired shut.

Mr. Howard testified that the police were not able to talk to him because he was taken to the hospital and was in surgery (T8, 742). He did not talk to the police until officers came and talked to him a few days after the shooting and brought a photo lineup (T8, 742-743, 758-759, 780, 788). He said that he picked out Petitioner's photo from the lineup, and that he knew Petitioner but not the other perpetrator (T8, 747, 789). He was certain in his identification (T8, 789). He said that the officers immediately presented him with the lineup and that they did not first give him information, or ask him for information or a description (T8, 759-760, 786). He later said on cross-examination that he could not have told the officers that Petitioner did it because his mouth was wired shut (T8, 771-772).

Nonetheless, in closing, defense counsel argued to the jury that Mr. Howard's testimony that the police burst into the hospital and showed him a lineup was not likely because the police would have treated him like a victim and would have told him why they were there (T9, 880). He stressed that despite knowing Petitioner, Mr. Howard did not tell the police that he was the shooter (T9, 879). He said that this was not reasonable (T9, 882, 884). He argued that Mr. Howard picked out Petitioner's photo because he knew him and knew his family, Dante Robinson, and knew that there was a problem between them, "so he must have done it" (T9, 883).

ISSUE II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING AT TRIAL THE MOTION HEARING AS FORMER TESTIMONY BECAUSE PETITIONER HAD A SIMILAR MOTIVE AT THE HEARING TO DEVELOP THE TESTIMONY.

Under the Florida Evidence Code, the prosecution may admit former testimony of a witness against a defendant when the witness is unavailable and the defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Section 90.804(2), Florida Statutes; Muehleman v. State, 3 So. 3d 1149, 1163(Fla. 2009). Petitioner argues that he did not have a similar motive to cross-examine Mr. Howard at the suppression hearing. The State disagrees.

A. Counsel did not explain why he did not have the same motive at the hearing to address subjects.

In Thompson v. State, 995 So. 2d 532 (Fla. 2d DCA 2008), the court ruled that the trial court did not abuse its discretion in permitting the introduction of the victim's former testimony in a preliminary hearing where the victim was deceased at the time of trial. It noted that the defendant was present at the preliminary hearing and that he was represented by counsel, and he had the opportunity to, and did, cross-examine the victim, particularly on the matter of identification, which was at issue. 995 So. 2d at 535.

The court in Thompson pointed out that the defendant did not elaborate on what else he would have explored with the victim at trial that he was unable to ask during the preliminary hearing.

Id. Counsel only stated that he would have had the opportunity to impeach the victim at trial with proper felonies. Id. The court in response stressed, "He had that chance," having noted earlier that "[t]he rule [on preliminary hearing] places no limitations on the extent of cross-examination." 995 So. 2d at 534, 535. See also James v. State, 254 So. 2d 838, 843 (Fla. 1st DCA 1971)(witness gave statement in circumstances like trial – placed under oath, represented by same counsel, had every opportunity to conduct cross, hearing before judicial tribunal with record of hearing).

Here, defense counsel told the trial court that he would have impeached the witness with his deposition, which he did not do at the hearing (T4, 99). He also said that he would have asked about the direction that the witness was facing, the number of people that were there and how far he drove away (T4, 99). At least the first three areas of exploration named by defense counsel were pertinent to the identification issue, which was the focus of the suppression hearing. Yet, counsel never indicated why he did not ask such questions on cross-examination at the suppression hearing. Instead, counsel focused on what Mr. Howard would have testified to had he been available at trial (T4, 100).

B. Defense counsel had the same motive at the hearing on the motion to suppress the identification as he did at trial: to attack the identification by Mr. Howard.

Relying on Garcia v. State, 816 So. 2d 554 (Fla. 2002), the court in Rousssonicolos v. State, 59 So. 3d 238, 240-241 (Fla.

4th DCA 2011) stated that the motive to develop testimony by cross at a hearing does not have to be identical or the same, but just similar to that at trial. In this case, like in Thompson, the motive to develop testimony by cross-examination in the motion to suppress hearing was similar to the motive for cross-examination at trial.

At both the pretrial hearing and trial, the crux of Mr. Howard's testimony was that he saw and was able to identify both shooters, only one of whom he claimed to have previously known. Therefore, counsel's motive at the hearing was to discredit the identification by questioning the circumstances of the witness' observation, and by noting the witness' relationship to Petitioner. The Fourth District in Wyatt v. State, 183 So 3d 1081, 1084-1085 (Fla. 4th DCA 2015), relying on Garcia and Roussonicolos, held that the State had the opportunity to cross-examine the witness at the prior forfeiture hearing. It also held that it had a similar motive to "discredit the witness's testimony and show it to be not worthy of belief." Wyatt, 183 So. 3d at 1085. Like the defendant in Wyatt, Petitioner had the opportunity, and similar motive, to conduct cross-examination at the earlier hearing.

Petitioner claims that his cross-examination at the hearing was limited to addressing matters raised by defense counsel in his cross-examination of the witness (IB. 17). This argument was never raised in the trial court. Moreover, Petitioner's cross-

examination of Mr. Howard was never limited; he was free to ask the witness about matters raised on both direct and cross by co-defendant's counsel, as well as to otherwise impeach the witness.

With regard to the scope of cross-examination at a suppression hearing, generally speaking, in pretrial hearings on motions to suppress, the court shall receive evidence on any issue of fact necessary to be decided to rule on the motion. See Rule 3.190(g)(3) and (h)(4), Florida Rules of Criminal Procedure. Certainly, Mr. Howard's credibility, and, therefore, any meaningful differences between what he said in his deposition and what he was testifying to at the hearing, would have been necessary to decide in order to rule on the motion. Indeed, the co-defendant's counsel was permitted to impeach Mr. Howard by reference to his deposition during his cross-examination of the witness (T4, 47-48).

The bottom line is that counsel was given the opportunity to fully cross-examine Mr. Howard on all subjects to which he testified on direct-examination at the hearing. In Ibar v. State, 938 So. 2d 451, 464 (Fla. 2006), this court concluded, "The first trial was a judicial proceeding, and Casas was subject to crossexamination on substantially the same issues involved in his trial." Respondent asserts that a similar ruling is warranted here.

C. The trial court did not abuse its discretion in admitting the former testimony.

Respondent reminds this court that the sum total of the subjects on which Mr. Howard presented testimony were those actually addressed at the suppression hearing. Those were the same subjects on which counsel and co-counsel were given an opportunity to test and explore on cross-examination. While the co-defendant's counsel claims that he would have explored other subjects at trial, the State submits that this was not rendered necessary since Mr. Howard was unavailable, and, therefore, the extent of direct examination at trial remained the same as at the suppression hearing.

Petitioner claims that his co-defendant's cross-examination was prejudicial to him (IB. 17). This claim was not previously raised. Regardless, as support, Petitioner points to the prosecutor's closing argument, in which the prosecutor stated that the fact that Petitioner is related to Dante Robinson, with whom Mr. Howard has a prior incident, provides motive (IB. 17-18). However, this statement was made in rebuttal, after defense counsel argued that Mr. Howard chose Petitioner's photograph because he recognized Petitioner as Dante Robinson, with whom he had an altercation over a necklace (T9. 882-884). It was always defense counsel's position that had Mr. Howard recognized Petitioner at the time of the shooting, he would have told the police this (T9, 879-880).

ISSUE III: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE VIDEOS OF PETITIONER'S RAPS.

A. Petitioner failed to preserve argument with regard to undue prejudice.

Petitioner failed to preserve his arguments of undue prejudice. At the hearing on the motion in limine, the co-defendant's counsel contended that the probative value as it pertains to Mr. Murdock was minimal and contended that the prejudicial effect was extreme (SR2, 18). Petitioner's counsel did not adopt co-counsel's argument, which really pertained just to the co-defendant (SR2, 18). See Smith v. State, 574 So. 2d 1195, 1196 (Fla. 3d DCA 1991)(defendant who does not adopt co-defendant's argument cannot raise it on appeal).

When Petitioner's counsel presented his argument on the motion in limine, he stated that the information violated discovery rules (SR2, 18-19, 44). He said that he thought that the prejudicial effect was obvious, but he never spoke of section 90.403, Florida Statutes, or stated a position on its probative value in relation to prejudice (SR2, 18-19). Instead, he specifically stated later, "So I feel like ruling on the 403 is putting the cart before the horse." (SR2, 20).

In subsequent discussion, counsel for Appellant stated again that the prejudicial effect is obvious and that it is quite strong, but again did not compare the prejudice to the probative value (SR2, 30). Instead, he contended that the State had to show the

relevance of the video, stating that just because there was a pending criminal trial does not mean that the "unfinished business" had anything to do with the victim (SR2, 33-34, 40). He stated that weight of the evidence is not something that is considered unless the State can first prove its relevancy (SR2, 41).

At trial, prior to voir dire, counsel argued again that the State had not shown the relevance of the videos because it had not tied them to Petitioner (T5, 199-121). When the State sought to introduce the video, defense counsel objected that the foundation for admissibility had not been laid, as well as objections that he made pretrial (T8, 660-667, 675, 678). Counsel never contended that the prejudicial effect substantially outweighed the probative value or that the videos were becoming a feature during the trial. Therefore, he failed to preserve this issue for review. See Bass v. State, 35 So. 3d 43 (Fla. 1st DCA 2010)(issue of unfair prejudice due to cumulative witnesses testifying to child hearsay statements not preserved for review).

An objection at trial must be on the specific ground raised on appeal. See Reynolds v. State, 660 So. 2d 778, 780 (Fla. 4th DCA 1995)(objection to cumulative nature of testimony was not sufficient to preserve for review the issue of whether the probative value of the evidence outweighed its prejudice). A general relevancy objection, which is what counsel made below since he claimed that the videos were not relevant so that their weight

need not be considered, does not preserve an undue prejudice argument. See Datus v. State, 126 So. 3d 363, 365 (Fla. 4th DCA 2013).

Respondent asserts that no error, much less fundamental error, occurred due to the admission of the rap videos. In Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991), this court said that no fundamental error occurred in allowing a witness to recount threats of harm or death that were made by the defendant's relatives to a potential witness in the case, along with argument by the prosecutor that the jury could draw inferences as to why the defendant's mother did not testify.

B. The rap videos were relevant to show Petitioner's consciousness of guilt.

Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a wish to evade prosecution is admissible against a defendant if the relevance of such actions is based on a consciousness of guilt that may be inferred from those actions. See Sloan v. State, 104 So. 3d 1271, 1273 (Fla. 4th DCA 2013); Bowers v. State, 104 So. 3d 1266, 1270 (Fla. 4th DCA 2013). In addition, "Threats made to discourage a witness from testifying are relevant to show consciousness of guilt." Ford v. State, 801 So. 2d 318, 320 (Fla. 1st DCA 2001). This court in England v. State, 940 So. 2d 389, 401 (Fla. 2006) expressed that a defendant's attempt to intimidate

a state witness is "relevant and admissible." Hence, it held relevant the evidence, that the defendant told another "if he got me in trouble I would kill him" with regard to a witness, because it showed the defendant's desire to evade prosecution. In Partin v. State, 82 So. 3d 31, 39-40 (Fla. 2012), the trial court permitted the introduction of a statement by the defendant to a police officer that he keeps a gun with him at all times in case law enforcement came for him and that he would consider using it. It also permitted a jail call statement by the defendant to a friend that it took a year and a half for them to get him and that it would take longer next time. This court held that there was a nexus between the statements and the charged crimes because they tended to show that the defendant knew that the police were aware of his criminality and that he sought to escape. Partin, 82 So. 3d at 40-41.

In this case, the videos were relevant to Petitioner's consciousness of guilt (SR). In the U-Tube video, he refers to "unloyal niggas" and does a motion across his neck as he states that he has "unfinished business." He said, "Going to business on the person attempted murder." He stresses that he is facing 25 years. He holds up a hand-written letter and says that he got a letter from "Murdog." The video reads at the end, "No deed shall not go unfinished." In the cell phone video, he raps that he is

going to go to prison because a "nigga be snitching." He states that he wants "his face on a shirt" and "I want that nigga whacked."

C. There was no undue prejudice due to the introduction of the video.

In Partin, this court determined that the appellant's recorded statements to others were not unduly prejudicial, even though the first referred to the fact that he had a gun that he might use on law enforcement and the second referred to possible escape, since the crime at hand did not involve a shooting and the possibility of escape was not made a feature. Id. at 41-42. Yet, the trial court also permitted testimony that the defendant attempted to obtain someone else's social security number and that he was in possession of someone else's social security card at the time he was arrested, along with the statement to a friend that he had told the police that he was just walking by when the fight occurred. Id.

In Faust v. State, 95 So. 3d 421, 426 (Fla. 4th DCA 2012), the court held that the defendant's jail phone calls were admissible where the defendant used code words to direct others to get rid of the murder weapon. The court rejected the argument that the admission of the recordings of the calls were unduly prejudicial. 95 So. 3d at 426. In Hayward v. State, 24 So. 3d 17, 38-39 (Fla. 2009), this court also upheld the admission of the recorded jail calls between the defendant and his girlfriend, in which the

defendant engaged in profanity-laced speech and directed his girlfriend to get rid of the murder weapon, which he referred to in code as "reefer." This court stated that the conversations tended to show consciousness of guilt and held that the probative value was not substantially outweighed by undue prejudice. 95 So. 3d at 39.

The State submits that the probative value of the videos is not substantially outweighed by undue prejudice. The lyrics do not detail anything having to do with the events of the charged crimes, and do not refer to separate crimes. While Petitioner does state a desire to have the "snitch" "whacked," he does not purport to direct any particular person to do it, does not instruct exactly how it should be done, and does not suggest in any way that Petitioner planned to do it. Instead, the rap is primarily about Petitioner's disappointment at what he views as disloyalty due to his friends and family not helping him out when he is facing 25 years, as well as his desire to get rid of the "snitch."

The production of the U-tube video is somewhat professional and shows Petitioner dressed nicely on a couch, or at a table with another, in an attractive home, or singing at a mike with headphones, in what appears to be an empty closet space. The other scenes are of the neighborhood. There is a steady, rhythmic beat playing in the background, and Petitioner repeats a refrain about "unfinished business" and "unloyal niggas." The cell phone video

does not have nearly the same visual or audio quality as the U-tube video. It depicts Petitioner standing in a corner near the front door of a house, swaying and rapping. There is a beat that seems to drown out the words more often than not. Some points are clear, though, like when Petitioner states that he wants him "whacked." Petitioner has a firearm in his right front pocket, which is partially exposed.

Because the videos do not highlight collateral crimes or graphic actions, Respondent submits that their probative value of establishing motive and consciousness of guilt, if not also an admission as to "unfinished business" in this attempted murder case, is not substantially outweighed by undue prejudice.

Petitioner points out that even though there was no independent evidence that he had the particular weapon in the video at the time of the attempted murder, the prosecutor argued that semi-automatic casings were found at the scene and that in the cell-phone video, Petitioner has a semi-automatic firearm (IB. 25). The fact that Petitioner possesses a semi-automatic weapon in the rap is relevant to the charged offenses, in which a semi-automatic weapon was used, and, therefore, strengthens the probative value of the video. See Gartner v. State, 118 So. 3d 273, 276-277 (Fla. 5th DCA 2013)(BB gun was used in robbery, and a BB gun was later found in defendant's vehicle); Holloway v. State, 114 So. 3d 296, 297 (Fla. 4th DCA 2013)(bullets found were of same caliber a used

to kill the victim); Johnson v. State, 93 So. 2d 1066, 1069 (Fla. 4th DCA 2012)(photograph of firearm that tended to corroborate witness' testimony); Maldonado v. State, 64 So. 3d 166, 168 (Fla. 4th DCA 2011), rev. denied, 90 So. 3d 271 (Fla. 2012)(cartridges and gun box found at defendant's home matched type used in shooting).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court find that the trial court properly permitted the former testimony and rap videos, and did not abuse its discretion in not allowing impeachment of Mr. Howard with the portions of the deposition advanced by defense counsel.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to on January 12, 2017, to Gary Caldwell, Assistant Public Defender, by service via filing with the Florida e-Portal.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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