IN THE SUPREME COURT OF FLORIDA

No. SC16-1534

DOMINIQUE WRIGHT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Discretionary Review from the District Court of Appeal,
Fourth District of Florida

PETITIONER'S REPLY BRIEF

CAROL STAFFORD HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit Third Street
West Palm Beach, Florida 33401

GARY LEE CALDWELL
Assistant Public Defender
Florida Bar No. 256919

Attorney for Petitioner

(561)355-7600; (561) 624-6560

appeals@pd15.state.fl.us
gcaldwel@pd15.state.fl.us
cgload@pd15.state.fl.us

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STATEMENT OF THE CASE AND FACTS

The undersigned wishes to correct a misstatement in the initial brief, which said that Acker was the alleged victim of both crimes. In fact, the alleged victim of the attempted murder was Howard.

ARGUMENT

I. THE FOURTH DISTRICT ERRED IN RULING THAT ONE MAY NOT IMPEACH HEARSAY TESTIMONY OF AN UNAVAILABLE WITNESS WITH A PRIOR INCONSISTENT STATEMENT.

When it comes to the testimony of the sole accuser, the defendant's right to impeach has its widest scope. *See Coco v. State*, 62 So. 2d 892 (Fla. 1953); *Davis v. Alaska*, 415 U.S. 308 (1974).

Section 90.806, Florida Statutes (1991), provides that, when hearsay has been introduced, evidence of an inconsistent statement of the declarant "is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it." (Emphasis added.)

The statute contains no exceptions to this rule of fairness. Hence, this Court has held that hearsay testimony may be impeached by an inconsistent statement without the declarant being confronted with it. *See Reaves v. State*, 639 So. 2d 1 (Fla. 1994). *See also Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005).

A. The answer brief says (AB 12) that Petitioner did not cite *Reaves* and *Fitzpatrick* in the Fourth District. But that was because the issue was whether the trial court had erroneously based its ruling on *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), and *Leighty v. State*, 981 So. 2d 484 (Fla. 4th DCA 2008), which hold that depositions may not be use as substantive evidence. (The state seems to have abandoned any argument that the trial court was correct on this point. It also does not seem to dispute the judge's ruling that "if Mr. Howard were present in court today … there would be no question the cross examination would be permissible." T9 810.)

Further, as the state concedes, Petitioner did argue that use of a discovery deposition as impeachment is permissible – exactly as allowed by section 90.806, *Reaves* and *Fitzpatrick*. *See State v. Ayers*, 901 So. 2d 942, 944 (Fla. 2d DCA 2005) ("In short, Ayers asserts that the comment of counsel for the State that 'I don't see a legal reason to depart' was insufficient to preserve the issue. Ayers's position is without merit. The State's objection was 'sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.'") (opinion of then-Judge Canady for the court); *State v. Casey*, 908 So. 2d 600, 601 (Fla. 2d DCA 2005) ("Although the State failed to cite the exact cases on point to the trial court below, it still properly preserved the issue because its objec-

tion was 'sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.'"); *State v. Walker*, 923 So. 2d 1262, 1265 (Fla. 1st DCA 2006) (state's general objection to downward departure preserved issue for appeal).

B. For the rest (AB 13-18), the state essentially makes an extended jury argument for why a fact-finder might not find the impeachment of much value. Of course that argument should be addressed to a jury.

Jurors may or may not find important a witness's inability to testify consistently. Perhaps one juror would agree with the state that the deposition impeachment was no big deal and easily explained.

Another could see it is an important reason to doubt his testimony – which was the basis of the state's case. As the state said at trial, the impeachment "affects our case dramatically because obviously our case rests solely on his testimony." T10 816.

On these facts, the state has not met its "most severe" burden to show that no reasonable juror's verdict could have been affected by the error. *See Holland v. State*, 503 So. 2d 1250, 1253 (Fla. 1987) ("Lastly, we are once again compelled to caution appellate courts that the burden upon the state to prove harmless error whenever the doctrine is applicable is most

severe. *See State v. DiGuilio,* 491 So. 2d 1129, 1139 (Fla. 1986).") (emphasis in original); *Varona v. State*, 674 So. 2d 823, 825 (Fla. 4th DCA 1996).

The burden is on the beneficiary of the error with good reason. After a trial, as with any other contested matter such as an election or a sports championship, it is very easy to say that the result was inevitable – even though at the time the matter was very much contested and those involved knew it could go either way. A blown call or errant pass here, an unexpected late-breaking development there could alter the outcome, yet after the fact pundits say that the game or the election campaign was over before it began.

But such pronouncements – like claims of harmless error – are examples of outcome bias on the hoof. In the appellate context, such cognitive errors must be countered by vigorous application of the rule that the beneficiary shoulders a heavy burden to show no reasonable possibility that the error affected the jurors' verdict.

Justice Shaw wrote long ago:

> The most perceptive analysis of harmless error principles of which we are aware is that of former Chief Justice Traynor of the California Supreme Court. *See* Roger J. Traynor, *The Riddle of Harmless Error* (1970), and the dissent to *People v. Ross,* 67 Cal.2d 64, 429 P.2d 606, 60 Cal.Rptr. 254 (1967) (Traynor, C.J. dissenting), *rev'd sub nom, Ross v. California,* 391 U.S. 470, 88 S.Ct. 1850, 20 L.Ed.2d 750 (1968). In his dissent, Chief Justice Traynor maintained that comments

> on Ross's failure to testify were harmful and that the majority misunderstood and misapplied the *Chapman* harmless error test. Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:
>
> > Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.
>
> *Ross,* 60 Cal.Rptr. at 269, 429 P.2d at 621.

State v. DiGuilio, 491 So. 2d 1129, 1136 (Fla. 1986).

"Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state." *Id*. at 1139 (emphasis added).

> II. THE DEFENSE DID NOT HAVE A SIMILAR MOTIVE IN QUESTIONING HOWARD AT THE MOTION HEARING AS AT TRIAL, SO THAT HIS TESTIMONY AT THE HEARING WAS INADMISSIBLE.

A. Contrary to pages 19-20 of the answer brief, defense counsel showed he did not have a "similar motive" at the sup-

pression hearing as at trial as required by section 90.804(2) Florida Statutes.

As counsel said below, it is not enough for the state to just say the motive was to impeach – there is always a motive to impeach.

He pointed out that at the suppression hearing he concentrated on whether the photo lineup was unduly suggestive: “Your Honor will remember the Motion to Suppress hearing that as far as the Defendant Dominique Wright is concerned the photographic lineup -- the identification of the photographic lineup consisted of like a 2 minute according to the police Officer, a 2 minute audiotape. So the similar motive was only similar to the issue of whether or not the period of time those 2 minutes on that audiotape was enough for this Court to say that was the similar motive throughout the trial.” T3 99.

He pointed out that he would have had a different motive at trial, where the deposition would have been used to challenge the witness’s credibility: “So there’s a different motive at trial that we would be impeaching him for other things such as the direction that they were facing, the number of people that were there, how far he drove away, things along those lines. Those were touched on, and Your Honor could say ‘but you had the opportunity Hanrahan to cross examine him on those issues.’ But the issue that I’m trying to raise here is did we have the

motive to do that at the suppression hearing, and our position is no." T3 99-100 (emphasis added).

Also, Petitioner's cross-examination at the hearing followed cross-examination by the co-defendant whose case was severed before trial, and hence took place in circumstances substantially unlike at trial. Thus, as the co-defendant went into the necklace issue, Petitioner's counsel went into that issue, which he would not have brought up at trial as it was affirmatively harmful to his client's case.

Further, so far as the state says the defense had the opportunity to cross-examine the witness, that fact does not satisfy the statute. The record must show both "an opportunity and a similar motive." § 90.804(2), Fla. Stat. (emphasis added).

B. As just noted, counsel's motive at the suppression hearing focused on the two-minute photo lineup. T3 99. This fact shows the flaw in the state's argument (AB 20-22) that counsel's motive at the hearing was to discredit the identification by questioning the circumstances of Howard's observation of the shooters.

While those circumstances were a consideration at the suppression hearing, the motivation of the cross-examination was substantially different.

III. THE COURT ERRED IN ALLOWING INTO EVIDENCE IRRELEVANT AND PREJUDICIAL VIDEOS OF PETITIONER SINGING OR RAPPING.

A. The state suggests (AB 24-26) counsel failed to argue that the evidence was unduly prejudicial in that he did not explicitly mention section 90.403, Florida Statutes, in arguing that the videos were inadmissible.

Here is what happened:

When the case came up for trial after it had been pending for several years, and after Petitioner had filed for a speedy trial, the state disclosed for the first time its intent to use various items of evidence, including the videos. ST1 2. ("ST1" refers to the first transcript in the supplemental record, a hearing on November 28, 2011.)

At the hearing, the court was totally aware that it had to conduct a determination of prejudicial effect and probative value under section 90.403: "So I would basically just conduct a 403 analysis, right, whether the probative value is outweighed by the prejudicial value?" ST1 12.

Counsel for the co-defendant then argued the evidence was inadmissible under section 90.403. ST1 18.

Counsel for Petitioner pointed out that before considering that issue, the court should consider whether supplying the evidence on the day of trial was a discovery violation. ST1 18-

20. It was only in this context that he said "ruling on the 403 is putting the cart before the horse." ST1 20.

After further discussion, counsel for Petitioner directly argued the prejudicial effect:

> The prejudicial effect of it I think is just obvious. And if you want me to argue that, I will. But, I mean, you know what they want to -- you might know better than I do what they want to use it for her. But they want to prove that my client, or show that my client had some involvement in the homicide.
>
> They don't have any proof of that. If they did, they'd charge him with it. They just want to raise that spec-ter in this attempted homicide case.
>
> So the prejudicial effect is quite strong. If they bring this evidence in and tell the jury, hey, look, he was planning the homicide to get rid of the victim so he couldn't testify against him in the attempted homicide case, what could be more prejudicial than that? I mean, it's an obvious discovery violation.

ST1 30.

He further argued that there was no relevance without a "nexus between the video and what's said on the video, and the case that my client is on trial for." ST1 33-34.

So the court knew it had before it the issue of relevance and the issue of prejudicial impact versus probative value.

The contemporaneous objection rule is not a pointless for-mality. It is intended to serve two purposes: (1) "It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." (2) It "prohibits counsel from attempting to

gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client." *State v. T.G.*, 800 So. 2d 204, 210 (Fla. 2001). "[M]agic words are not needed to make a proper objection." *Williams v. State*, 414 So. 2d 509, 511-12 (Fla. 1982); *Baskin v. State*, 898 So. 2d 266, 267-68 (Fla. 2d DCA 2005) (quoting and following *Williams*) (opinion of then-Judge Canady for the court).

At bar, the transcript shows the judge knew the issue of prejudice-versus-probative-value was before him, and counsel was not seeking to secretly pocket an issue for use on appeal.

Regardless, as noted in the initial brief, and not disputed in the state's brief, "[e]ven after determining that evidence is relevant, a trial court in every case must also consider section 90.403." *Sexton v. State*, 697 So. 2d 833, 837 (Fla. 1997) (emphasis added). *Accord Floyd v. State*, 913 So. 2d 564, 572–73 (Fla. 2005) ("'[e]ven after determining the evidence is relevant, a trial court in every case must also consider section 90.403,' which prohibits the admission of relevant evidence when the danger of unfair prejudice substantially exceeds the evidence's probative value."; quoting and following *Sexton*); *Poole v. State*, 151 So. 3d 402, 414 (Fla. 2014).

B. *Contrary to the state's arguments (AB 26-31), the videos were not relevant and they were so prejudicial as to make them inadmissible regardless of any supposed relevance*.

Instructive is the recent decision of the Supreme Court of New Jersey in *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

The court held that a defendant's rap lyrics are not admissible absent a "strong nexus" between specific details of the lyrics and the circumstances of the offense charged:

> In this case, defendant's graphically violent rap lyrics could be fairly viewed as demonstrative of a propensity toward committing, or at the very least glorifying, violence and death. That prejudicial effect overwhelms any probative value that these lyrics may have. In fact, we detect little to no probative value to the lyrics whatsoever. The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song "I Shot the Sheriff," actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story "The Tell–Tale Heart," simply because of their respective artistic endeavors on those subjects. Defendant's lyrics should receive no different treatment. In sum, we reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced.

Id. at 251–52.

Surveying decisions from other states, the court determined that they supported the need for a strong nexus:

> In sum, it is clear that other jurisdictions rarely admit artistic works against a criminal defendant where those works are insufficiently tethered to the charged crime. The upshot to this approach is that, without a strong connection to the attempted murder offense with which defendant was charged, the admission of defendant's rap lyrics risked unduly prejudicing the jury without much, if any, probative value.

Id. at 253.

It would be an act of willful blindness to deny that such evidence tends to color jurors' views of the defendant's character, thus affecting the entire case. Jurors are more comfortable deciding issues of character than puzzling through confused and contradictory factual assertions.

At bar, the state contends (AB 26-27) that the videos show threats made to discourage a witness from testifying. But the videos do not constitute threats to keep someone from testifying. The state did not show that the rambling assertions about "unloyal nigas" and "unfinished business" were intended as threats to anyone.

The state has not disputed that ambiguous statements have little or no probative value under the authorities cited in the initial brief, *Fiske v. State*, 366 So. 2d 423, 424 (Fla. 1978) and *A.B. v. State*, 141 So. 3d 647, 649 (Fla. 4th DCA 2014).

The state should refrain from presenting "testimony involving racial slurs unless absolutely necessary." *Jones v. State*, 748 So. 2d 1012, 1023 (Fla. 1999) (emphasis added).

The state also argues (AB 27) that the videos showed consciousness of guilt – which is not an element of the crime. The state did not show that the videos addressed the present case. And even if they had, they only show anger about being charged with a crime, which is consistent with innocence – innocent people are angry when falsely charged with a crime.

C. *The state has not shown the error was harmless beyond a reasonable doubt.*

Finally, the state argues (AB 28-31) the error was harmless, saying the videos were "not made a feature" of the case – which is not the test for harmless error. The state has a "most severe" burden to prove beyond a reasonable doubt that the error did not affect the jurors under *Holland v. State*, 503 So. 2d 1250, 1253 (Fla. 1987), and *Varona v. State*, 674 So. 2d 823, 825 (Fla. 4th DCA 1996). The state has not met that burden.

Regardless, the state forgets the enthusiastic use it made of the videos in final argument. T11 868-70, 870-73, 913-16.

D. *The firearm did not strengthen probative value – it increased the prejudicial effect.*

As to the firearm in the cellphone video, the state says (AB 30-31) it strengthened the video's probative value. The video was apparently made in 2011 - three years after the shooting. T9 792. Semi-automatic weapons are prevalent in our society. There was no evidence linking the gun in the video to the crime.

Thus, this case is not like the cases cited at pages 30-31 of the state's brief. In *Gartner v. State*, 118 So. 3d 273, 276 (Fla. 5th DCA 2013), the weapon was found two days after the robbery and the victim recognized the distinct grips and shape of the weapon. In *Holloway v. State*, 114 So. 3d 296, 297 (Fla. 4th DCA 2013), the bullets were found on the day of the murder. In *Johnson v. State*, 93 So. 3d 1066, 1069 (Fla. 4th DCA 2012), a witness testified that Johnson confessed to the murder and said he sold the murder weapon and bought a .45 pistol. Hence, the .45 found when he was arrested directly corroborated the witness to the confession. In *Maldonado v. State*, 64 So. 3d 166, 167 (Fla. 4th DCA 2011), Maldonado was captured directly after shooting a deputy, and his shirt was found near the scene along with a gun and cartridges. He told the police he did not own a gun, but a search of his house turned up ammunition matching the gun at the scene as well as other evidence showing his possession and use of firearms. Hence, this evidence was admissible to link Maldonado to the gun at the crime scene and also to refute his statement that he did not own a gun.

At bar, the state has not met its "most severe" burden to prove beyond a reasonable doubt that the error did not affect the jurors under *Holland*, and *Varona*. A new trial should be ordered.

CONCLUSION

The decision of the Fourth District should be reversed. A new trial should be ordered.

Respectfully submitted,

CAROL STAFFORD HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit

/s/ Gary Lee Caldwell
GARY LEE CALDWELL
Florida Bar No. 256919
Assistant Public Defender

Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on 1 February 2017 a copy hereof has been electronically filed with this Court and furnished to Melynda L. Melear, Esq., Assistant Attorney General, Counsel for Respondent, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, by email to CrimAppWPB@MyFloridaLegal.com.

/s/ Gary Lee Caldwell
Attorney for Petitioner

CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

/s/ Gary Lee Caldwell
Attorney for Petitioner