IN THE SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,

Appellant,

v. Case No. 92,011

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Issues I and II. Appellant will rely on the arguments presented in the initial and supplemental briefs as to Issues III-VI, and Supplemental Issues I-VII.

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT FIRST-DEGREE MURDER.

In his initial brief, appellant argued the state failed to prove first-degree murder because the evidence showed the shooting was committed on the spur of the moment and in response

to Jenkins' sudden outcry during an attempted drug rip-off by Michael Johnson. The state failed to prove the shooting was premeditated, failed to prove there was a robbery or attempted robbery, and failed to prove the requisite amount of cocaine for trafficking or attempted trafficking.

The state first argues this issue was not preserved. State's Answer Brief at 6-7. As the state recognizes, however, both Brooks and Brown moved for judgments of acquittal at the close of the state's case; Brown's attorney pointed out "there's been absolutely no testimony whatsoever that any of the two defendants had ever formed any kind of premeditated intent to effect any kind of shooting or killing;" Brown's attorney argued robbery was not proved, nor that the cocaine at issue weighed 28 grams; and both attorneys renewed their motions for judgment of acquittal at the close of all the evidence. X 948-949, XI 1096. The defense arguments plainly were specific enough to apprise the trial court of the basis for the JOA motion. This issue was preserved. Furthermore, as the state concedes, even if the issue were not preserved, this Court has an independent duty in all death penalty cases to determine whether the evidence is sufficient to support a first-degree murder conviction. State's Answer Brief at 7 n.3.

The state next argues direct and circumstantial evidence established both premeditated and felony murder, and that it is not this Court's function to reweigh conflicting evidence. State's Brief at 9. On pages 8-15, the state has summarized the facts, with notable exceptions (the state has omitted the testimony of its own witnesses that supports the defense version of events). The state has not pointed to any evidence that contradicts the defense version of what occurred, however--that Brooks pulled his gun not to rob but to get the drugs he already had paid for, and that he shot Jenkins reflexively after Jenkins yelled out.

The state merely argues the shooting itself proves premeditation because Brooks "aimed" his gun directly at Jenkins' chest. The state is speculating, however, that Brooks "aimed" at Jenkins chest. What the evidence showed is that Brooks, Brown, and Johnson were huddled around Johnson's car; Jenkins was seated fifteen feet away; it was nighttime; it was dark; Brooks pulled a gun out of his pocket; Jenkins yelled something; Brooks fired at Jenkins. These facts do not prove a premeditated intent to kill.

With regard to the alleged robbery, the state has ignored the evidence that indicates Michael Johnson, not Brooks or Brown, was attempting a drug rip-off, including testimony (by state

witnesses) that Michael Johnson said he had only 24 rocks in the baggie, I 808, 813, X 870-871; testimony (by state witnesses) that Brown had given Johnson $300, I 808; and testimony indicating Brooks and Brown were dissatisfied with the exchange (state witness Jackie Thompson heard Johnson say, "What man? You want your money back? You ain't satisfied?"). I 813-814.

The state further contends the shots fired at Michael Johnson and Jesse Bracelet prove a premeditated intent to kill Jenkins. The later shots more plausibly suggest Brown and Brooks felt threatened. They may have believed Johnson or someone else in the yard or house was armed or was running to retrieve a weapon. It was nighttime, the drug deal had soured, they were on someone else's turf, they were outnumbered. Moreover, Jenkins did not fall down after being shot; he walked or ran across the street. If Brooks intended to kill him and did not otherwise feel threatened, why let Jenkins walk away?

The cases the state has cited in support of premeditated murder are inapposite. In Griffin v. State, 474 So. 2d 777 (Fla. 1985), the victim was shot at close range with a particularly lethal gun and there was an absence of provocation. Here, the shot was not fired at close range, there was no evidence regarding the lethality of the weapon used, and there was

provocation: the victim's sudden outcry, which Brooks and Brown may have interpreted as an attack or threat. In Alcott v. State, 23 Fla. L. Weekly D1592 (Fla. 4th DCA July 1, 1998), the district court affirmed the defendant's conviction for attempted first-degree murder, relying on Griffin. The only facts given in the opinion are that the masked robber grabbed the victim and "shot [her] right away." In contrast to the present case, Alcott did not involve a drug deal gone bad, the victim did nothing to provoke or incite the shooting, and the shot was fired at close range. In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), the evidence showed Hamblen shot a store clerk in the back of the head--with the gun barrel touching her head--after she tripped the alarm. Although Hamblen did not plan to kill the victim before he began the robbery, the evidence showed he deliberately killed her because she tripped the alarm. San Martin v. State, 705 So. 2d 1337 (Fla. 1997), also is factually inapposite. In San Martin, the robbers boxed in the victims' Blazer with their two Suburbans, exited their vehicles, and began shooting, firing shots directly into the passenger compartment of the Blazer.

The state's argument in support of felony murder based on trafficking, or attempted trafficking, is equally weak. The state relies solely on Michael Johnson's statement that jugglers

weigh a gram a piece. According to the state, Brooks' and Browns' attempt to buy "30 rocks" proves they were trying to buy "28 grams." State's Answer Brief at 24. The state ignores the following: (1) Michael Johnson testified the rock Jackie purchased for $10 as a sample of what Brooks and Brown would be buying was less than a gram; (2) Brown paid, or was prepared to pay, $300 for 30 rocks, at a price of $10 each, whereas "jugglers" usually cost $20 or more a piece; (3) Johnson testified he opened the baggie just moments before the shooting erupted; (4) Johnson admitted he did not know if the rocks were a lighter form of cocaine called "cornbread" because he had not examined them; (5) Johnson testified he made the sale because he was afraid Jenkins might try to "give[] them the smallest rocks out of the bag," thereby admitting the rocks were not uniform in size.

Michael Johnson's testimony did not establish substantial, competent evidence that Brooks and Brown were trying to buy 28 or more grams of cocaine. All the state proved was that Brooks and Brown sought to buy 30 rocks of cocaine for $10 each. Brooks and Brown likely believed they were buying rocks similar in size to the rock Jackie purchased, which was less than a gram. The rocks in the bag Johnson got from Darryl Jenkins may have weighed a

gram, may have weighed 3/4 of a gram, may have been of varying weights. In sum, the state showed appellant was dealing with cocaine "in the neighborhood" of 28 grams," not with cocaine weighing beyond a reasonable doubt 28 grams or more. The state failed to prove Brooks and Brown were trafficking or attempting to traffic in cocaine.

The cases cited by the state are not on point. In Reyes v. State, 581 So. 2d 932 (Fla. 3d DCA 1991), the state apparently agreed post-trial that the conviction should be for attempted trafficking rather than trafficking because there was no expert testimony regarding the nature or quantity of the cocaine. As the opinion does not specify what nonexpert evidence was introduced as to the weight or quantity of the cocaine, Reyes does not support the state's position. In Velunza v. State, 504 So. 2d 780 (Fla. 3d DCA 1987), the issue was whether the state had to prove the weight of the pure cocaine, as opposed to the weight of the mixture containing cocaine. By statute, the state is required only to prove the weight of the mixture; in Velunza, the state proved the cocaine mixture weighed 1006 grams, well above the requisite 400 grams.

The other cases cited by the state, see State's Answer Brief at 24-25, stand for the proposition that convictions for

attempted cocaine trafficking do not require proof the substance involved was actually cocaine. Whether the rocks Johnson was selling were actually cocaine is not the issue here; the issue here is whether the state proved the requisite weight--28 or more grams--to sustain felony murder based on attempted trafficking in cocaine. This the state failed to do. Appellant's conviction for first-degree murder must be reversed.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING MICHAEL JOHNSON TO TESTIFY THE ROCKS OF COCAINE HE WAS SELLING WEIGHED A GRAM APIECE WHEN THE COCAINE WAS NOT HIS, HE HAD NO PERSONAL KNOWLEDGE OF ITS QUALITY OR WEIGHT, AND THE PRECISE WEIGHT OF THE ROCKS WAS CRITICAL TO THE STATE'S PROOF.

In his initial brief, appellant argued Michael Johnson was incompetent to testify regarding the weight of the cocaine he

attempted to sell appellant.

The state argues this issue was not preserved because the objection was made several questions and answers after Johnson's initial statement that the rocks were "about a gram in size." According to the state, because the defense never asked to strike the original, unobjected-to testimony, any error in allowing the challenged testimony was harmless.

This argument is without merit. The sequence of questions were as follows:

> Q Did you know how much was in [the sandwich baggie you got from Darryl Jenkins]?
>
> A Not the exact number, but I know it was enough to sell 50 rocks.
>
> Q All right. Did you look at that crack cocaine that was in that sandwich baggie?
>
> A Yes.
>
> Q What did you observe about the size of the rocks of crack cocaine that were in it?
>
> A They was about a gram in size and identical in shape.
>
> Q Mr. Johnson, how large was this baggie that you were holding?
>
> A It's a sandwich bag. It's what you put a peanut butter sandwich in or something, a sandwich bag.
>
> Q Was it something concealable in your hand?

A Yes.

Q How about your pocket?

A Yes, I could have put it in my pocket.

Q Mr. Johnson, how long have you sold cocaine?

A Off and on for about two years.

Q Are you familiar with the appearance of crack cocaine?

A Yes.

Q Is there any doubt in your mind, based on your experience with selling crack cocaine, that what you had in your hand was at least 50 grams of crack cocaine?

MR. KURITZ: I object, Your Honor. Leading.

VII 388-389.

The trial judge sustained this initial objection, then continued to sustain objections as the state tried to elicit testimony from Johnson regarding the nature and quantity of the cocaine he had gotten from Jenkins. As the state notes in its brief, the trial judge sustained objections based on leading, relevance, and failure to lay a proper predicate. The state then made a proffer of Michael Johnson's testimony outside the jury's presence. After the proffer, the trial judge clarified the issue in the following exchange with the prosecuting attorney:

THE COURT: I'm trying to get it clear in my mind how important this issue is. Initially, it didn't appear to be that important, but apparently it is and I believe the reason is because under the felony murder theory the State has alleged that one of the alternatives is trafficking?

MR. BATEH: Yes, sir.

THE COURT: And apparently sale of cocaine would not be an underlying felony?

MR. BATEH: A sale of cocaine would support a conviction for third degree murder.

THE COURT: So it would go to a lesser but not to the first degree murder?

MR. BATEH: Yes, sir.

THE COURT: So this is a very important issue?

MR. BATEH: Yes, sir.

THE COURT: And the State has to prove that the quantity of crack cocaine was in excess of what?

MR. BATEH: 28 grams, sir.

THE COURT: So this witness is giving an opinion or the State is trying to get him to give an opinion before the jury there were at least 50 one gram rocks in the bag?

MR. BATEH: Yes, sir.

THE COURT: He never weighed it. It's sort of like an expert witness.

MR. BATEH: That's in essence it. He's a user, consumer seller, or at least a

> seller, a dealer experience.
>
> THE COURT: So the question is whether his opinion comes in over defense objection that an improper predicate -- that no proper predicate has been laid?
>
> MR. BATEH: Yes, sir.

VII 404-405.

The judge then heard argument, after which he overruled the objections and allowed Johnson to testify the baggie contained 50 one-gram rocks.

This issue was preserved. Objections need not be made immediately after the challenged testimony. An objection made after several more questions has been held to be within the time frame for a contemporaneous objection. Jackson v. State, 451 So. 2d 458 (Fla. 1984); Roban v. State, 384 So. 2d 683 (Fla. 4th DCA 1980), review denied, 392 So. 2d 1378 (Fla. 1980). Here, as in Jackson, "objection was made during the impermissible line of questioning, which is sufficiently timely to have allowed the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial." See 451 So. 2d at 461. As for Brooks's alleged failure to move to strike Johnson's initial statement about the weight of the rocks, such motion would have been futile, given the trial court's ruling allowing the objected-to testimony.

On the merits, appellant argued in his initial brief that Johnson's testimony was not admissible as a lay opinion because opinion testimony on matters such as distance, time, size, and weight are not admissible when precision as to such matters is critical. In this case, the exact weight of the cocaine was critical to proving an element of the underlying felony for felony murder. Accordingly, this was not a proper subject for opinion testimony by a non-expert witness. Ehrhardt, Florida Evidence, s. 701.1, pp. 516-18, 525. Appellant noted that although in State v. Gilbert, 507 So. 2d 637 (Fla. 5th DCA 1987), the court upheld the lower court's ruling allowing an experienced narcotics officer to testify regarding the weight of a bag of cocaine he saw the defendant throw into a pond, the testimony was admitted only to show the corpus delicti of trafficking in 400 grams or more; the defendant's own admission that he was carrying a pound of cocaine was the basis for his conviction.

Noting the distinction in Gilbert, the state argues Madruga v. State, 434 So. 2d 331 (Fla. 3d DCA 1983), supports the admissibility of Johnson's opinion. In Madruga, however, an officer was allowed to testify he delivered marijuana in excess of 100 pounds to the defendants: 75 bales of a minimum weight of 41 to 55 pounds a bale. This was held sufficient to support a

finding of trafficking in excess of 100 pounds. In Madruga, the bales of marijuana obviously had been weighed; the officer was not guessing the bales ranged in weight from 41 to 55 pounds. Also, the total weight, according to the officer's testimony--3,075 pounds--far exceeded the 100 pounds required for conviction of the offense charged.

The state also argues Michael Johnson's testimony regarding his familiarity with crack cocaine qualified him as an expert. This borders on the preposterous. Is the state seriously contending that crack dealers, users, "consumers" are qualified by their use of drugs to determine by visual inspection the exact weight of pieces of rock cocaine? Nowhere in the record is there any testimony or evidence of any kind demonstrating or attempting to demonstrate that Michael Johnson, or anyone else, can determine the weight of a piece of crack by looking at it. The exact weight of an object is fact, not opinion, and is determined by placing the object on a scale (although, according to Michael Johnson, the weight also depends on what kind of scale is used, VII 489). Therefore, the precise weight of a particular object is not a proper subject for expert opinion testimony at all.

Johnson disqualified himself by his own testimony in which he admitted he had no personal knowledge of the quality or weight

of the cocaine; admitted he did not know if the cocaine was a lighter form of cocaine as he had not examined it; admitted users/sellers sometimes pinch off pieces for their own use and sell the remaining for a full gram; and admitted he jumped in to make the sale because he was afraid Jenkins might try to sell the "smallest" rocks out of the bag, thereby conceding the rocks were not uniform in size or weight.

The trial court reversibly erred in allowing Michael Johnson to testify regarding the nature and quality of the cocaine he obtained from Darryl Jenkins. A new trial is required.

CONCLUSION

Appellant respectfully requests this Honorable Court to grant the relief requested in his initial brief.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Katherine V. Blanco, Assistant Attorney General, by mail to Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366, and a copy has been mailed to appellant, on this _____ day of December, 1998.

_____
NADA M. CAREY