IN THE SUPREME COURT OF FLORIDA

CASE NO. 94, 673

THE STATE OF FLORIDA,

Petitioner,

-vs-

BERNARD EVANS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, Bernard Evans, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the Record on appeal and Transcripts will be designated by "R. Vol." and "T. Vol." respectively, followed by the appropriate volume number and a colon to indicate the appropriate page number.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in 12 point Courier New type size and style.

STATEMENT OF THE CASE AND FACTS

The State relies on its version of the Statement of the Case and Facts in its Initial Brief as to Point I and Point II. However, the State adds the following facts on all remaining points on appeal.

Point III: After the jury was sworn, the Defendant's counsel argued to the court reasons that the case should be transferred back to another judge. (T. Vol.I: 168-174). Defense counsel's reason was that prior to this case, defense counsel was waiting to appear before this judge and the judge required various attorneys in various cases to remain present until the end of the day although a jury was being selected in one case. (T. Vol. I: 168). Subsequently, defense counsel bumped into the judge at Publix and told him that he was being hurt by his insistence that counsel remain at the courthouse all day while other trials were proceeding. (T. Vol. I: 168). Subsequent to that, defense counsel appeared before the judge in another case and filed a motion to recuse based on those prior dealings. (T. Vol. I: 168). The trial judge only vaguely remembered seeing defense counsel. (T. Vol. I: 169). The judge stated:

> **I vaguely remember talking to you or bumping into you. That's about it.**

(T. Vol. I: 169).

> **This conversation at Publix--was this a major thing to you? I didn't realize it. It was a very minor thing to me. You explained something about you had been kept all day and, you know, I guess I kind of sympathize with you frankly.**

(T. Vol. I: 173). At that time, the trial court reserved ruling until a motion to recuse was filed in writing. (T. Vol. I: 175).

Later, the trial court reviewed the motion to recuse that was filed. (T. Vol. II: 272). The trial court denied the motion. (T. Vol. II: 276).

Point IV: During the prosecutor's closing argument, he argued,

> **Because you can't ignore, despite what the Defense is asking you to do, the testimony of Sylvia Kennedy. He essentially stood up there and said she is a liar. He can say whatever he wants, I guess, but the question is for you to decide if she is a liar or if she is able to be believed. We ask, are you going to decide if this woman is lying on the witness stand because she failed to specifically identify the defendant or say that she had seen him shoot before when she told you that she was scared to death? Is that reasonable that a person who witnessed a crime might initially withhold identifying the person they saw do it because they are afraid, particularly if they are a single parent with a young ill child living in the same neighborhood that person is? Is that so unreasonable? I mean, are you going to assume from that that that person is lying, or are you going to look at her on the witness stand and weigh and evaluate her testimony? Consider her demeanor, how she acted, the details that she provided you, her emotion. Did she seem real? Did it seem as though she was experiencing the thing that she testified about, or did she seem distant, or was she recounting it to you as though she had been**

> **coached or as though she was simply reading something displayed on the wall behind her? I submit not. She was real and her testimony was real and her testimony was true. She testified from the heart. She testified based on what she knew, what she saw. And she told you the truth. And the defense makes a big deal. They say, well, she lied because she didn't say to the police at first that she saw Bernard Evans do the shooting, but we know that she is being truthful, and we know that that's what she saw. And how do we know it? It is corroborated by the defendant himself because he admitted to the police that he shot Thaddeus Scott...**

(T. Vol. III: 465-467). There was no objection to this testimony. Later, the prosecutor talked again about the testimony of Sylvia Kennedy Green:

> **Well, he called Sylvia a liar. I already talked about that. That's a judgment that you have to make. You saw her on the stand. You saw her demeanor. She wasn't a liar. She was telling the truth. But again, you have to decide that and I trust that you make the right decision on it.**

(T. Vol. III: 476). There was no objection to this testimony.

The prosecutor argued that the Defendant "looked Sylvia in the eye and Thaddeus and he said, "I'll kill Thaddeus, I'll put an end to this. I'll put an end to this." (T. Vol. III: 468). The defense objected and the objection was denied, although the trial court instructed the jury to "[p]lease depend upon your own recollection of the testimony of the witness." (T. Vol. III: 468).

The prosecutor also argued to the jury that "[t]he law puts in

there the reasonableness standard so if the defendant simply says I thought that he was going to kill me, that's enough. (T. Vol. III: 469). The defense counsel objected, the trial court sustained the objection and instructed the jury that it will instruct the jury on the law at the conclusion of the case and to ignore the last comment by counsel. (T. Vol. III: 469-470).

QUESTIONS PRESENTED

I.

WHETHER THE WITNESS'S CHANGED TESTIMONY SUPPORTS A MOTION FOR A RICHARDSON HEARING AND RISES TO THE LEVEL OF A DISCOVERY VIOLATION?

II.

WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE TESTIMONY THAT BRENDA BROWN WAS PREGNANT WHERE THE OBJECTION TO THE TESTIMONY WAS SUSTAINED AND A CURATIVE INSTRUCTION WAS GIVEN?

III.

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION FOR RECUSAL WHERE THE FACTS WOULD NOT HAVE PLACED A REASONABLY PRUDENT PERSON IN FEAR OF NOT RECEIVING A FAIR AND IMPARTIAL TRIAL?

IV.

WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL WHERE THE COMMENTS BY THE PROSECUTOR WERE NOT PROPERLY PRESERVED, FAIR REBUTTAL TO THE ARGUMENT BY THE DEFENSE COUNSEL AND THE JURY WAS INSTRUCTED TO DISREGARD ANY IMPROPER STATEMENTS?

SUMMARY OF THE ARGUMENT

The Third District erred in finding that the trial court failed to conduct a timely and adequate Richardson hearing. Green's pre-trial and trial testimony was laid side-by-side for the jury to consider in order to discredit the witness which was favorable to the defense. The inconsistencies in Green's testimony had no effect on the defense trial preparation and strategy. Thus, Green's changed testimony does not support a motion for a Richardson hearing and does not rise to the level of a discovery violation.

The Defendant next contends that the trial court should have granted his motion for mistrial where Sylvia Kennedy Green testified that Brenda Brown was pregnant. The State submits that the motion was properly denied because the objection to the testimony was sustained and a curative instruction was given to disregard the testimony.

The Defendant next alleges that the trial court should have granted the motion for recusal. However, the State submits that the motion was properly denied where the facts would not have placed a reasonably prudent person in fear of not receiving a fair and impartial trial.

Finally, the Defendant alleges that the trial court should have granted his motion for mistrial based on the comments of the

prosecutor during closing argument. The State submits that many of the comments the Defendant now complains of were not objected to, which deems the argument to these comments not properly preserved for appellate review. Further, the comments were fair rebuttal to the argument by the defense counsel and the trial judge instructed the jury to disregard any improper statements.

ARGUMENT

I.

THE WITNESS'S CHANGED TESTIMONY DOES NOT SUPPORT A MOTION FOR A RICHARDSON HEARING AND DOES NOT RISE TO THE LEVEL OF A DISCOVERY VIOLATION.

The issue before this Court on conflict jurisdiction is whether the Third District erred in finding that the trial court failed to conduct a timely and adequate Richardson hearing based on Green's pre-trial and trial testimony. The State submits that the Third District erred where Green's changed testimony does not support a motion for a Richardson hearing and does not rise to the level of a discovery violation. The Defendant in his Answer Brief alleges that the reversal must stand based on cases and authority which hold that the failure of the State to advise the defense of the existence of a defendant's statement is a discovery violation. The State submits that this is not the issue before this Court.

The issue of the existence of the Defendant's statement the night before the shooting was briefed in the Third District. The opinion of the Third District mentions the fact that the Defendant objected to this testimony. However, the opinion never again mentions anything regarding this statement. The errors found by the Third District all pertained to the changed testimony of Green, not the failure of the State to provide the statement of the Defendant.

Although the Defendant objected to the testimony regarding the Defendant's statement, the defense counsel objected to the question as leading. The objection was sustained and the prosecutor requested a sidebar conference in which he explained that the reason he was leading was so that the witness would not blurt out anything else about Brown's pregnancy. (T. Vol. II: 257). The defense counsel never objected to this testimony because the statement was not disclosed to him. Therefore, a Richardson hearing was neither requested or appropriate. The trial court was never put on notice that this statement was not disclosed to the defense. Thus, a Richardson hearing was clearly waived because counsel never requested one when the testimony was made. Taylor v. State, 589 So. 2d 918 (Fla. 4th DCA 1991); Lucas v. State, 376 So. 2d 1149 (Fla. 1979); Brown v. State, 640 So. 2d 106 (Fla. 4th DCA 1994).

Although the Defendant does mention the change in Green's testimony, he does not cite any cases or authority which state that this change in testimony supports a motion for a Richardson hearing or rises to the level of a discovery violation. The only law cited pertains to the existence of a defendant's statement not being provided in discovery.

The Defendant attempts to distinguish the cases cited by the State by attacking the credibility of the witness. The Defendant

states that "[t]he concealment of Ms. Green's 'perjury' is not a 'testimonial discrepancy." (Answer Brief, 20). However, the State submits that the change in Green's pre-trial and trial testimony is precisely the type of "testimonial discrepancy" addressed in Bush v. State, 461 So. 2d 936 (Fla. 1984).

The Defendant alleges that the Defendant's ability to prepare for trial was compromised. However, as the State discusses at length in its Initial Brief, Green's trial testimony does not change the version of the events so dramatically that the defense counsel would have materially changed the preparation and trial strategy. The defense counsel questioned Green regarding the change in testimony. (T. Vol. II: 327). The defense counsel's closing argument almost entirely concentrated on the fact that Green's testimony is "not capable of being believed." (T. Vol. III: 460). Even if Green had not changed her testimony, the defense counsel likely would have argued to the jury that Green was not capable of being believed since she was the State's key witness. Thus, the trial preparation or strategy would not have been materially different.

The Defendant cites Mobley v. State, 705 So. 2d 609 (Fla. 4th DCA 1997), which held that the trial court's failure to hold an adequate Richardson hearing regarding the state's late disclosure of newly discovered witness was harmful error. This case is easily

distinguishable from the case at bar. In Mobley, the prosecution advised the trial court on the morning of trial that it intended to call a previously undisclosed witness. In the instant case, Green was the State's key witness throughout discovery. The defense counsel deposed Green. Green had given her statement to the police. The defense counsel's trial preparation and strategy was not changed upon the change in Green's testimony. Thus, this case is substantially different from the facts in Mobley.

The changed testimony of Green did not rise to the level of a discovery violation and did not support a motion for a Richardson hearing. The Defendant's trial preparation and strategy was not materially changed by the change in Green's testimony. Thus, the Defendant's conviction and sentence for second degree murder must be reinstated.

II.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE TESTIMONY THAT BRENDA BROWN WAS PREGNANT WHERE THE OBJECTION TO THE TESTIMONY WAS SUSTAINED AND A CURATIVE INSTRUCTION WAS GIVEN.

After this Court accepts discretionary jurisdiction, this Court has jurisdiction over all the issues and in this Court's discretion, can decide them. Feller v. State, 637 So. 2d 911 (Fla. 1994); Florida Law Weekly Federal: O'Sullivan v. Boerckel, 12 Fla. L. Weekly Fed. S304 (U.S. June 7, 1999).

The Defendant contends that the trial court should have granted his motion for mistrial where Sylvia Kennedy Green testified that Brenda Brown was pregnant. The State submits that the motion was properly denied because the objection to the testimony was sustained and a curative instruction was given to disregard the testimony.

It is clear that a motion for mistrial should be granted only in circumstances where the error committed was so prejudicial as to vitiate the entire trial. Dixon v. State, 630 So.2d 1242, 1243 (Fla. 3d DCA 1994); Solomon v. State, 596 So.2d 789, 790 (Fla. 3d DCA 1992); Duest v. State, 462 So.2d 446 (Fla. 1985). A motion for mistrial is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity.

Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

Furthermore, where the trial court sustains an objection and provides a curative instruction, a mistrial is not invariably warranted. Hamilton v. State, 703 So. 2d 1038, 1044 (Fla. 1997). In Haliburton v. State, 561 So. 2d 248, 251 (Fla. 1990), the defendant alleged that the prosecutor had shifted the burden of proof. The trial court provided a curative instruction explaining to the jury the burden of proof. Id. On appeal, this Court held that the trial court had not abused its discretion in refusing to declare a mistrial. Id; Accord, Cedno v. State, 545 So. 2d 495 (Fla. 3d DCA 1989); See also, State v. Bermudez, 515 So. 2d 421, 422 (Fla. 3d DCA 1987).

In the instant case, the Defendant objected to the improper testimony and the objection was sustained. (T. Vol. II: 248-251). The trial court instructed the jury to disregard the testimony. (T. Vol. II: 251). Thus, a mistrial is not warranted in this case and the trial court did not abuse its discretion in denying the motion.

III.

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR RECUSAL WHERE THE FACTS WOULD NOT HAVE PLACED A REASONABLY PRUDENT PERSON IN FEAR OF NOT RECEIVING A FAIR AND IMPARTIAL TRIAL.

After this Court accepts discretionary jurisdiction, this Court has jurisdiction over all the issues and in this Court's discretion, can decide them. Feller v. State, 637 So. 2d 911 (Fla. 1994); O'Sullivan v. Boerckel, 12 Fla. L. Weekly Fed. S304 (U.S. June 7, 1999).

The Defendant alleges that the trial court should have granted the motion for recusal. However, the State submits that the motion was properly denied where the facts would not have placed a reasonably prudent person in fear of not receiving a fair and impartial trial.

The standard of trial courts, in reviewing a motion to disqualify, is set forth in McKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990). This Court held that "[i]n order to decide whether the motion is legally sufficient, 'a determination must be made as to whether the facts alleged would have placed a reasonably prudent person in fear of not receiving a fair and impartial trial.'" Id. at 1334-35. The facts alleged in the motion for disqualification must be taken as true and viewed from the movant's perspective. See Dura-Stress, Inc. v. Law, 634 So. 2d 769 (Fla. 5th DCA 1994).

Here, the defense counsel made it known to the trial court that he had waited in a prior case to appear before this judge and the judge required various attorneys in various cases to remain present until the end of the day although a jury was being selected in one case. (T. Vol. I: 168). Subsequently, defense counsel bumped into the judge at Publix and told him that he was being hurt by his insistence that counsel remain at the courthouse all day while other trials were proceeding. (T. Vol. I: 168). Subsequent to that, defense counsel appeared before the judge in another case and filed a motion to recuse based on those prior dealings. (T. Vol. I: 168). The trial judge only vaguely remembered seeing defense counsel. (T. Vol. I: 169). The judge stated:

> **I vaguely remember talking to you or bumping into you. That's about it.**

(T. Vol. I: 169).

> **This conversation at Publix--was this a major thing to you? I didn't realize it. It was a very minor thing to me. You explained something about you had been kept all day and, you know, I guess I kind of sympathize with you frankly.**

(T. Vol. I: 173).

Unlike the situation in Pistorino v. Ferguson, 386 So. 2d 65 (Fla. 3d DCA 1980), where the judge voiced his opinion of one of the parties in the action as "not playing with a full deck" and "I think she is crazy", the judge's admission that he remembered the

meeting at Publix did not provide "convincing evidence of his own awareness of bias". Id. at 66.

The judge did not refute the factual basis of the motion to disqualify as he freely admitted the prior contact. The judge appropriately applied the correct standard of review of the motion and determined that the facts alleged would not have placed a reasonably prudent person in fear of not receiving a fair and impartial trial. A reasonably prudent person would not believe that the one meeting between the judge and defense counsel would cause the judge to be biased in favor of the State. As the judge pointed out he only met him that one time and vaguely remembered the incident. See Parnell v. State, 627 So. 2d 1246 (Fla. 3d DCA 1993)(held that the judge's ex-parte conversation with the prosecutor was not sufficient to establish a well founded fear of bias or prejudice towards the defendants.). This is unlike the situations in McKay v. McKay, 488 So. 2d 898 (Fla. 3d DCA 1986) and Pool Water Products, Inc. V. Pools by L.S. Rule, 612 So. 2d 705 (Fla. 4th DCA 1993), in which the appellate courts ruled the trial judges should have disqualified themselves from the cases based on their close personal and/or family relationships with a party in the action.

IV.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL WHERE THE COMMENTS BY THE PROSECUTOR WERE NOT PROPERLY PRESERVED, FAIR REBUTTAL TO THE ARGUMENT BY THE DEFENSE COUNSEL AND THE JURY WAS INSTRUCTED TO DISREGARD ANY IMPROPER STATEMENTS.

After this Court accepts discretionary jurisdiction, this Court has jurisdiction over all the issues and in this Court's discretion, can decide them. Feller v. State, 637 So. 2d 911 (Fla. 1994); O'Sullivan v. Boerckel, 12 Fla. L. Weekly Fed. S304 (U.S. June 7, 1999).

The Defendant alleges that the trial court should have granted his motion for mistrial based on the comments of the prosecutor during closing argument. The State submits that many of the comments the Defendant now complains of were not objected to, which deems the argument to these comments not properly preserved for appellate review. Further, the comments were fair rebuttal to the argument by the defense counsel and the trial judge instructed the jury to disregard any improper statements.

During closing argument, the defense counsel stated that the testimony by Sylvia Kennedy Green "were lies, all lies." (T. Vol. III: 456). The argument went on later that "[r]easonable doubt that Sylvia Green is telling you the truth when she comes before you and says that I lied, in essence I lied. The question you must

ask yourselves is, is she lying then? Is she lying now? Can you base your decision upon the statements of someone as incredible as that? I suggest not. (T. Vol. III: 458). Again, the argument continued that, "[t]here are so many inconsistencies in Sylvia Green's testimony. . . Sylvia Green is not capable of being believed, is not credible. There were several holes in her testimony and you all cannot believe her." (T. Vol. III: 460). However, the defense counsel never stated what these inconsistencies were.

During the prosecutor's closing argument, he argued,

> **Because you can't ignore, despite what the Defense is asking you to do, the testimony of Sylvia Kennedy. He essentially stood up there and said she is a liar. He can say whatever he wants, I guess, but the question is for you to decide if she is a liar or if she is able to be believed. We ask, are you going to decide if this woman is lying on the witness stand because she failed to specifically identify the defendant or say that she had seen him shoot before when she told you that she was scared to death? Is that reasonable that a person who witnessed a crime might initially withhold identifying the person they saw do it because they are afraid, particularly if they are a single parent with a young ill child living in the same neighborhood that person is? Is that so unreasonable? I mean, are you going to assume from that that that person is lying, or are you going to look at her on the witness stand and weigh and evaluate her testimony? Consider her demeanor, how she acted, the details that she provided you, her emotion. Did she seem real? Did it seem as though she was experiencing the thing that she testified**

> about, or did she seem distant, or was she recounting it to you as though she had been coached or as though she was simply reading something displayed on the wall behind her? I submit not. She was real and her testimony was real and her testimony was true. She testified from the heart. She testified based on what she knew, what she saw. And she told you the truth. And the defense makes a big deal. They say, well, she lied because she didn't say to the police at first that she saw Bernard Evans do the shooting, but we know that she is being truthful, and we know that that's what she saw. And how do we know it? It is corroborated by the defendant himself because he admitted to the police that he shot Thaddeus Scott...

(T. Vol. III: 465-467). There was no objection to this argument. Thus, any issue regarding these comments is not properly preserved for appellate review.

Later, the prosecutor talked again about the testimony of Sylvia Kennedy Green:

> Well, he called Sylvia a liar. I already talked about that. That's a judgment that you have to make. You saw her on the stand. You saw her demeanor. She wasn't a liar. She was telling the truth. But again, you have to decide that and I trust that you make the right decision on it.

(T. Vol. III: 476). There was no objection to this argument. Again, any issue regarding these comments was not properly preserved for appellate review.

Without abandoning the procedural bar, the State submits that the Defendant's claim regarding these comments is meritless. It is

clear that these comments were fair rebuttal to the argument in defense counsel's closing argument. "The defense counsel cannot invite the comments and then complain that the comments were made." Green v. State, 571 So.2d 571 (Fla. 3d DCA 1990) See also Ferguson v. State, 417 So.2d 639 (Fla. 1982), Street v. State, 636 So.2d 1297 (Fla. 1994). It is clear that defense counsel called Sylvia Kennedy Green a liar and stated that her testimony was all lies. The prosecutor properly replied to this argument that she was not a liar and that the jury should use its own mind to determine whether her testimony was credible. Thus, the Defendant's claims as to these comments is not properly preserved for appellate review, and if they were, they are meritless.

Additionally, the prosecutor argued that the Defendant "looked Sylvia in the eye and Thaddeus and he said, "I'll kill Thaddeus, I'll put an end to this. I'll put an end to this." (T. Vol. III: 468). The defense objected and the objection was denied, although the trial court instructed the jury to "[p]lease depend upon your own recollection of the testimony of the witness." (T. Vol. III: 468). The prosecutor also argued to the jury that "[t]he law puts in there the reasonableness standard so if the defendant simply says I thought that he was going to kill me, that's enough. (T. Vol. III: 469). The defense counsel objected, the trial court sustained the objection and instructed the jury that it will

instruct the jury on the law at the conclusion of the case and to ignore the last comment by counsel. (T. Vol. III: 469-470).

Again, as in Point II, where the trial court sustains an objection and provides a curative instruction, a mistrial is not invariably warranted. Hamilton v. State, 703 So. 2d 1038, 1044 (Fla. 1997). In Haliburton v. State, 561 So. 2d 248, 251 (Fla. 1990), the defendant alleged that the prosecutor had shifted the burden of proof. The trial court provided a curative instruction explaining to the jury the burden of proof. Id. On appeal, this Court held that the trial court had not abused its discretion in refusing to declare a mistrial. Id; Accord, Cedno v. State, 545 So. 2d 495 (Fla. 3d DCA 1989); See also, State v. Bermudez, 515 So. 2d 421, 422 (Fla. 3d DCA 1987).

In the instant case, the trial court instructed the jury to "[p]lease depend upon your own recollection of the testimony of the witness." (T. Vol. III: 468). Additionally, the trial court sustained the second objection and instructed the jury that it will instruct the jury on the law at the conclusion of the case and to ignore the last comment by counsel. (T. Vol. III: 469-470). Thus, a mistrial is not warranted in this case and the trial court did not abuse its discretion in denying the motion.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that this Court reverse the opinion of the Third District Court of Appeal as to Point I, and affirm on the remaining points on appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed to JOHN H. LIPINSKI, Esq., 1455 N.W. 14th Street, Miami, Florida 33125 on this _____ day of _____, 1999.

LARA J. EDELSTEIN
Assistant Attorney General