IN THE SUPREME COURT OF THE STATE OF FLORIDA

GABRIEL BRIAN NOCK,
Petitioner,

vs. Case number SC17-472

STATE OF FLORIDA,
Respondent.
_____/

CORRECTED

PETITIONER'S REPLY BRIEF ON THE MERITS

On Discretionary Review from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner was Appellant and Respondent was Appellee in the Fourth District Court of Appeal and Petitioner was defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Court.

The symbol “T” will denote the Transcript on Appeal

The symbol "R" will denote the Record on Appeal.

The symbol “SR” will denote the Supplemental Record.

The symbol “SR2" will denote the Second Supplemental Record.

The symbol “ST” will denote the Supplemental Transcript.

The symbol “InB” will denote Petitioner’s Initial Brief.

The symbol “AnsB.” will denote Respondents’ Answer Brief.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Petitioner acknowledges Respondent’s acceptance of his Statement of the Case and Facts, subject to its additions, corrections, clarifications and modifications (AnsB. 2-4). Petitioner will rely on the Statement of the Facts and the Statement of the Case advanced in his Initial Brief on the Merits. InB. 2-26.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in holding that the principles of the rule of completeness apply solely to written or recorded statements. It also erred in holding that the credibility of a criminal defendant can be impeached by means of prior felony convictions if he or she, when cross-examining the witness testifying to his or her party-opponent admission, elicits relevant, in-context portions of the admission to correct the misleading nature of the witness's direct-examination testimony concerning what the defendant actually said.

ARGUMENT

THE FOURTH DISTRICT ERRED IN HOLDING THAT THE PRINCIPLES OF § 90.108(1) DO NOT APPLY TO CORRECT MISLEADING TESTIMONY CONCERNING ORAL, OUT-OF-COURT ADMISSIONS BY A PARTY OPPONENT; AND IT ALSO ERRED IN HOLDING THAT THE PARTY OPPONENT IS SUBJECT TO § 90.806 IMPEACHMENT WHEN, IN FAIRNESS, IT SEEKS TO CORRECT THE MISLEADING NATURE OF THE TESTIMONY CONCERNING ITS ADMISSION WITH RELEVANT, EXCULPATORY HEARSAY EVIDENCE.

This Court and Respondent recognize that the concept of the rule of completeness goes beyond the apparent statutory restraints of section 90.108(1), Florida Statutes (2014), and applies to witness testimony concerning the content of a party-opponent's out-of-court statements (InB. 32-3; AnsB. 9-11). Callaway v. State, 210 So. 3d. 1150, 1183-84 (Fla. 2017); Reese v. State, 694 So. 2d 678, 683 (Fla. 1997); Christopher v. State, 583 So. 2d 642, 645-46 (Fla. 1991). Both section 90.108(1) and this Court's authority, id, concern

"fundamental fairness," or procedural due process. See Wiggins v. Florida Department of Highway Safety and Motor Vehicles, 209 So.3d 1165, 1171 (Fla. 2017).

There is no merit to Respondent's contention that the Fourth District's opinion at bar, Nock v. State, 211 So. 3d 321 (Fla. 4th DCA 2017), was correct and the Second District's decision in Foster v. State, 182 So. 3d 3 (Fla. 2d DCA 2016), was wrong and inapplicable to procedural facts at bar (AnsB. 7-8). Respondent is also wrong in claiming that the Fourth District did not err in holding that prior felony or dishonesty crime impeachment, under section 90.806(1), Florida Statutes (2014), is appropriate whenever a criminal defendant would elicit witness testimony of any exculpatory portion of his or her own out-of-court statement (AnsB. 7-8). Respondent incorrectly insists that where the prosecution first elicits misleading or out-of-context testimony concerning the content of a non-testifying defendant's out-of-court statement, the defendant is subject to section 90.806(1) impeachment when rectifying such testimony by eliciting exculpatory evidence. (AnsB. 7-8, 12). This, as well as Respondent's other contentions, are affronts to the right of procedural due process of law. Amend. V and XIV, U.S. Const.; Art. I, § 9, Fla. Const.

Foster was correctly decided in holding that where a State witness offers misleading testimony concerning relevant, in-context portion's of a non-testifying defendant's out-of-court statements,

the State "opens the door" to have the defendant correct the statement on cross-examination, notwithstanding the exculpatory nature of the rectifying evidence, and not be subject to section 90.806(1) impeachment. Id at 4-5.

Respondent and the Fourth District, in Nock, maintain that a writing or recording of a party-opponent's out-of-court admission is different than witness testimony of what the party-opponent stated out of court (AnsB. 11-12). However, this position is unfair and nonsensical, especially at bar when recordings of Nock's interrogation statement existed (AnsB. 11-12). Nock v. State, supra at 324. This claim must also fail, as it could lead to tacit approval of fundamentally unfair trial tactics (InB. 40-42).

Respondent contends that Florida law:

> holds that when the state presents a portion of the defendant's oral statements to police during direct testimony, a defendant is allowed to bring out the rest of the relevant oral statements, including the exculpatory portions, during cross-examination of the state's witness

and that:

> This is exactly what happened at bar [and this] variant of the legal doctrine known as the "rule of completeness" was fulfilled in this case as Nock had full and unfettered cross-examination of Detective Rivera regarding his statement to police.

[emphasis in original] (AnsB. 12). Its argument is, however, highly flawed.

True, Nock had "full" "cross-examination of Detective Rivera regarding his statement to police;" but it was not "unfettered"

(AnsB. 12). As a consequence of exposing Rivera's deceptive direct-examination testimony concerning his interrogation statement, Nock had his "credibility" impeached by means of nine prior convictions for felonies or crimes of dishonesty. Under the Fourth District's Nock holding, this would not have happened had the State admitted the actual audio-video recording of the interrogation, because, under section 90.108(1), the "adverse party is not bound by the evidence introduced under" the rule of completeness. In other words, the adverse, non-testifying party cannot be impeached under section 90.806(1) for making certain his or her out-of-court statement is admitted in a manner that, "in fairness," does not deceive or mislead a jury concerning its actual, relevant content or the actual context in which the statement was made (InB. 39). Petitioner is unaware of any Florida authority to the contrary.

Nevertheless, the written/recorded versus oral testimony dichotomy regarding section 90.806(1) impeachment to correct the unfairness of admitting relevant, but misleading, portions of a party-opponent's out-of-court statement, under the facts at bar, is without logic. Rules of law ought to follow principles of "logic and fair play." See, generally, National Standard Life Ins. Co. v. Permenter, 204 So. 2d 206, 207 (Fla. 1967), ERVIN, J., concurring specially. A proponent of misleading testimony concerning relevant content of a party-opponent's out-of-court statement must be kept

in check and the party-opponent must be able to cure such deception and not be "charged," or impeached, for eliciting the correction of the statement, irrespective of whether it was exculpatory or admitted as a writing or recording or through live witness testimony. Swearingen v. State, 91 So. 3d 885, 886 (Fla. 5th DCA 2012).

While the trial court, at bar, allowed Nock to correct Rivera's deceptive testimony on cross-examination, bringing forth the full, albeit exculpatory, context of various matters addressed in his interrogation statement, it failed to apply "logic and fair play" to the law. National Standard Life Ins. Co. v. Permenter, supra at 207, ERVIN, J., concurring specially. Instead, it rewarded the State for its misleading trial tactic by admitting evidence of Petitioner's nine prior convictions. The Fourth District, citing its own precedent, Cann v. State, 958 So. 2d 545 (Fla. 4th DCA 2007); Kelly v. State, 857 So. 2d 949 (Fla. 4th DCA 2003), approved the trial court's ruling. Nock v. State, supra at 324-5. In so doing, it wrongly drew a bright line distinguishing recorded and written party-opponent statements from those testified to orally. Callaway v. State, supra at 1183-84; Reese v. State, supra at 683; Christopher v. State, supra at 645-46.

Contrary to Respondent's claim (AnsB. 12, 19-20), the Foster decision was not wrongly decided; nor is it inapposite to Florida Supreme Court jurisprudence. Id. While the decision did not cite section 90.108(1), it held that the prosecutor had "opened the door"

by eliciting the defendant's out-of-court admission absent actual, relevant, contextual content, as recorded in the testifying officer's police report. Id at 3-5. The Foster court also held that despite the trial court granting the defendant leave to correct the misleading testimony, it erred by admitting section 90.806(1) impeachment. It maintained the State's deception was contrary to the truth-seeking function of a trial and, notwithstanding the exculpatory nature of the omitted portion, the prosecutor ought to have elicited the defendant's statement in its entirety and entire statement was exempt from section 90.806(1) consequences. Id 4-5.

In Foster, the defendant, charged with burglary and theft, told an officer, after he was searched and a wallet, containing identification belonging to a third person, was found in his pocket, that he found the wallet in the trash and intended to surrender it to police as found property. Id at 4. At trial, the State merely elicited the first part of the statement; that the defendant found the wallet. Id. The balance of the statement was relevant, because: it negated the theft element requiring proof that the accused intended to permanently or temporarily deprive the rightful possessor of the wallet, § 812.014(1), Fla. Stat. (2014); it negated the burglary element requiring proof of an intent to commit a crime within a conveyance whence the wallet was allegedly taken, § 810.02(1), Fla. Stat. (2014); and negated the section 812.022(2), Fla. Stat. (2014), inference that, unless possession is

satisfactorily explained, the possessor of recently stolen property knew or should have known such property was stolen. Francis v. State, 808 So. 2d 110, 134 (Fla. 2001). Absent the relevant, in-context balance of the Foster defendant's statement, the jury would have been mislead as to true nature of the State's evidence, which included the defendant's exculpatory statement.

Likewise, Rivera's omissions and out-of-context assertions in his direct-examination testimony concerning Nock's statement regarding his interactions with Ellison (InB. 17-25), mislead the jury as to Petitioner's intent surrounding the "wrestling moves" and, in particular, the events in Ellison's kitchen (InB. 17-25). Among Rivera's direct-examination mischaracterizations, he testified that Nock told him that Ellison "wasn't suppose to die, it wasn't suppose to happen that way" (T. 1416) instead of the actual statement, "it wasn't suppose to happen, he stopped breathing" (T. 1481, 1483, 1486). He also claimed that Nock stated that while he and Ellison were in the bedroom, they engaged in consensual wrestling moves and oral sex, during which Ellison "tapped out" as a signal to cease wrestling, and, afterward, in the kitchen, Nock put Ellison in a headlock and, after a few minutes, Ellison collapsed and Nock let go of him and he dropped to the floor like a dead weight (T. 1413-19). However, Petitioner had actually stated that he had acceded to Ellison's request for another round of consensual wrestling moves and oral sex in the kitchen and, as Ellison fellated him and he,

believing Ellison was fine, tightened his biceps, Ellison failed to give the "tap out" single to stop and, instead, became heavy in his arms and fell to the floor (T. 1493-7, 1500-1501). Rivera's mischaracterizations of the evidence, if unchecked, would have shown that Petitioner intended to kill Ellison; rather than his death being an accident. Petitioner's actual statement of events was relevant and negated, or "excus[ed]," § 782.03, Fla. Stat. (2009), a "premeditated design to effect death," § 782.04(1)(a)1, Fla. Stat. (2009).

Whether the juries in either Foster or Nock would have believed the defendant's out-of-court statements absent section 90.806(1) impeachment does not control the issue. An accused's out-of-court statement, made during a police investigation or elsewhere, is a fact or piece of evidence in and of itself. § 90.803(18), Fla. Stat. (2014). A prosecutor can pick and choose the evidence it wants to elicit to prove a charged crime. But if the prosecutor chooses to admit the accused's out-of-court statement, he or she cannot edit its content or change its context in order for it to appear inculpatory when it was not. The lesson Foster teaches is that a prosecutor must take the good with the bad. If he or she wants to admit a party-opponent's out-of-court statement, § 90.803(18), Fla. Stat. (2014), its complete, relevant, in-context content must be elicited regardless of whether it includes exculpatory elements.

The prosecutors in Nock and Foster were not compelled to admit

anything the defendants said to police. See Williams v. State, 931 So. 2d 999, 1000 (Fla. 3d DCA 2006); c.f. Huggins v. State, 883 So. 2d 743 (Fla. 2004); c.f. Mathis v. State, 135 So. 2d 484 (Fla. 2d DCA 2014); c.f. ; Fisher v. State, 924 So. 2d 914 (Fla. 5th DCA 2006). Had they elected to forego admitting the defendants' statements and defendants elicited their statements themselves, section 90.806(1) impeachment would have been proper. Id. If a prosecutor were to elicit testimony of only a portion of a defendant's interrogation statement, in its correct context and without misleading omissions, connotations or inferences, section 90.108(1) would not apply. If, thereafter, the accused were to elicit other portions of his or her out-of-court statement, which included exculpatory elements, section 90.806(1) impeachment would then be appropriate. Gonzalez v. State, 948 So. 2d 877 (Fla. 4th DCA 2007); see also Werley v. State, 814 So. 2d 1159 (Fla. 1st DCA 2002).

In that the entirety of a party-opponent's out-of-court admission is a piece of evidence in and of itself, § 90.803(18), Fla. Stat, when a prosecutor elects to admit the statement through an ear-witness, that witness is subject to section 90.608(4), Florida Statutes (2014), impeachment challenging his or her "capacity, ability, or opportunity" to "observe [or hear], remember, or recount" what the defendant actually stated and the context in which it was stated. At bar, much of Petitioner's cross-examination of Rivera concerned section 90.608(4) impeachment and exposed the inaccuracy

of his hearing, recollection and recounting abilities (InB. 17-25). Nock should not have been penalized by section 90.806(1) impeachment under these circumstances, as the State chose the method to admit the interrogation statement and cross-examination exposed it to be less than accurate.

The Fourth District and Respondent cite to Kaczmar v. State, 104 So. 3d 990 (Fla. 2012) and Kelly v. State, supra, for the proposition when a non-testifying defendant elicits his own exculpatory out-of-court statements, he or she risks section 90.806(1) impeachment (AnsB. 16-18). However, running a risk is not synonymous with a quid pro quo that anytime such a defendant elicits his own out-of-court, exculpatory statements he or she will be impeached under section 90.806(1). The Kaczmar trial court correctly admitted the non-testifying defendant's edited, out-of-court statement, concerning his framing of a friend for a murder with which he was charged, and properly excluded the part in which the defendant said that he did so because he was innocent. Id at 1000-1001. The out-of-court statement, as admitted into evidence, was outside section 90.108(1), because it was not misleading and the defendant's personal belief that he was not guilty of the murder was irrelevant and inadmissible. See Jones v. State, 449 So. 2d 313, 314-15 (Fla. 5th DCA 1984); c.f. Brown v. State, 523 So. 2d 729, 730 (Fla. 1st DCA 1988). The Kaczmar defendant's other evidentiary claim, that the trial court erred by limiting his cross-examination of the detective

who testified about his interrogation statement, concerned his choice to forego cross-examining the detective on whether he (defendant), during the interrogation, had denied setting the fire to the house. Id at 1001. However, the Kaczmar and Kelly, id., at 949-950, opinions do not recite procedural facts that illustrate why the rule of completeness did not apply, or why prior conviction impeachment was proper.

Petitioner's cross-examination of Rivera exposed glaring omissions and inconsistencies between his direct-examination testimony of what Nock told him and what Nock had actually said (InB. 17-25). Contrary to Respondent's contention (AnsB. 12), Nock's "full" opportunity to cross-examine Rivera was constitutionally inadequate. The trial court was required to protect the integrity of the trial litigation process. See Bank of New York Mellon v. Condominium Ass'n of La Mer Estates, Inc., 175 So. 3d 282, 285 (Fla. 2015); see Pino v. Bank of New York, 121 So. 3d 23, 30-31 (Fla. 2013). After all, Florida law requires sworn witness testimony to be the truth, the whole truth and nothing but the truth (InB. 40). See In re Standard Jury Instructions--Contract and Business Cases, 116 So. 3d 284, 290-291 (Fla. 2013); § 90.605(1), Fla. Stat. (2014). It failed to maintain trial integrity by admitting evidence of Petitioner's nine prior convictions after Nock corrected Rivera's misleading testimony (InB. 17-25). The trial court and the Fourth District allowed themselves to become entangled in the State's

"gaming" and "gotcha" tactics. See, e.g., Chambers v. State, 880 So. 2d 696, 701 (Fla. 2d DCA 2004); see, e.g., State v. Belien, 379 So. 2d 446 (Fla. 3d DCA 1980). The State's omission of relevant, in-context portions of Nock's statement was highly improper and done to exploit inadequately articulated appellate case law regarding the application of section 90.108(1), the rule of completeness in general, and the appropriateness of section 90.806(1) impeachment.

The error at bar was not harmless beyond a reasonable doubt (AnsB. 21-3). State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Within the overall trial dynamic, the State needed to admit Nock's interrogation statements regarding his interaction with Ellison. This was its sole means to directly prove Ellison's death was an illegal homicide, since both parties' experts agreed Ellison's death was just as likely to have been an accidental homicide (T. 1216-18, 1229, 1642-1650, 1653-4, 1663-7). Rivera's misleading testimony about Petitioner's admissions provided the evidentiary basis for its argument that the homicide was a murder. Omitting Nock's relevant, in-context, exculpatory explanations of the nature of Ellison's death set up the section 90.806(1) impeachment and the State's argument that Petitioner, a nine time convict, was without credibility and lied about Ellison's death being accidental. Absent Nock's interrogation statements about Ellison, the remaining evidence of Petitioner's possession of Ellison's belongings, his shopping spree, his claim of being Ellison and a police officer, and

even his lies about not knowing Ellison would have been weak circumstantial evidence to prove him guilty of murder.

The Fourth District, affirming Petitioner's conviction, erred by opining that section 90.108(1) was inapplicable to live testimony concerning a defendant's interrogation statement and that Nock's elicitation of the relevant, in-context exculpatory portions of interrogation was subject to section 90.806(1) impeachment. This Court should disapprove of the Fourth District's decision in Nock v. State, supra, and approve the Second District's decision in Foster v. State, supra.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal, and the rulings of the trial court, and remand this cause with proper directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Asst. Attorney General Don Rogers crimappwpb@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401, this 18th day of December, 2017.

S/ Ian Seldin
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 12 point Courier New.

S/ Ian Seldin
Of Counsel