IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DEMETRICE ARMICLE McNEAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-6875

Opinion filed February 28, 2013.

An appeal from the Circuit Court for Escambia County.
Michael G. Allen, Judge.

Nancy A. Daniels, Public Defender, Diana L. Johnson and Glen P. Gifford, Assistant Public Defenders, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Donna A. Gerace, Assistant Attorney General, Tallahassee, for Appellee.

THOMAS, J.

Appellant raises three issues on appeal. He argues the trial court erred by: 1) not holding a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975); 2) failing to timely renew the offer of assistance of counsel; and 3) admitting a

written statement as a past recollection recorded when the writer did not confirm that she was under oath at the time the statement was written, and neither recalled whether an officer was present, nor whether she wrote a statement at all. We affirm as to the first two issues without further comment. With respect to the third issue, we affirm for the reasons explained below.

Factual Background

Appellant was charged with felony battery arising out of a domestic violence incident in which he physically assaulted his then girlfriend. The victim attempted to have the charges dropped before the trial, but the State decided to pursue its prosecution. The State subsequently requested the court to declare the victim a hostile witness.

During a hearing to address the State's motion, the victim testified that she could not remember whether she completed a written statement in the presence of law enforcement but, when shown the statement, admitted the signature on the document was hers. She reiterated she could not remember if she had completed the statement in the presence of law enforcement. The State then showed victim pictures of herself and, when asked if law enforcement took the pictures when they came to her house, she replied that she was not sure. She also admitted she wanted the charges dropped, and that she did not want to be there. When asked whether she discussed her testifying and dropping the charges in jail phone calls with

Appellant, the victim responded, "I plead the Fifth," and insisted she did not have to answer. The court informed the victim that she did not have the right to remain silent as to the question and could be held in civil contempt and jailed until she agreed to testify. When the State repeated the question, the victim again replied that she was "not sure." The victim also admitted she had tried to drop the charges against Appellant, but denied that he had ever asked her to do so. When informed of the existence of recordings of the conversations and warned about the penalty for perjury, the victim responded, "I can't remember," when asked the question again. The trial court granted the State's motion to declare the victim a hostile witness.

As she did during the hearing, at trial, the victim testified she was "not sure" whether law enforcement came to her apartment in June 2011. The victim also testified that she could not remember whether she completed a written statement for law enforcement. After being shown the statement and given a chance to read it, she admitted that the signature on the statement was hers. "I can't remember" was also her response to questions about whether she signed the statement in the police officer's presence, how long after police arrived that she gave her statement, and whether she was placed under oath when she gave the statement. She gave the same response to each of the prosecutor's questions about what happened on the night in question. She admitted, however, that she was the person in the pictures

taken by law enforcement. Finally, when asked, "This occurred in Escambia County; correct?" she replied, "Yes."

The investigating officer testified that, upon arrival, he observed that the victim was "very upset . . . fearful," and "had been crying off and on, you could tell from her eyes." She had swelling on the left side of her face and some redness around her neck, and complained of pain in various parts of her body. The officer also testified that the victim completed a written statement during the 45 minutes he was at the scene. He watched the victim write the statement and denied giving her any facts or suggesting any information. He confirmed the victim was under oath at the time she wrote the statement. After the officer identified the statement, the State asked that it be admitted into evidence.

During the ensuing bench conference, the court stated that the paper statement itself was not admissible because it was not being offered by the adverse party, but that it could be published to the jury. Appellant objected, arguing that the victim "never confirmed" the statement or any of the allegations in it, "so it would just be hearsay when [the officer] reads it." The court replied that it was not necessary for the victim to acknowledge the contents of the statement when it is past recollection recorded, the victim identified her signature on the document, and the officer testified the statement was given within 45 minutes of his arrival and confirmed it was given under oath. Also, the court explained, the victim testified

she did not remember anything about what happened. The court granted the State's request and the officer read the statement to the jury, which included the victim's description of Appellant's physical assault on her. He also testified that what he just read was the statement the victim wrote in his presence and that she wrote it of her own accord, while under oath.

Appellant argues that the trial court reversibly erred by allowing the statement to be published to the jury under the "past recollection recorded" exception to the hearsay rule, because the victim did not testify that she wrote the statement or that the statement correctly represented her knowledge or recollection at the time of making the statement. As explained below, we disagree.

Legal Analysis

A trial court's ruling on the admissibility of evidence will not be disturbed absent a finding that the trial court abused its discretion. Carpenter v. State, 785 So. 2d 1182 (Fla. 2001).

Here, the trial court allowed the State to publish the victim's written statement she prepared for law enforcement. It did so pursuant to the "past recollection recorded" exception to the hearsay rule. Section 90.803(5), Florida Statutes, addresses this exception:

> (5) Recorded recollection.--A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter

> was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

Here, the State established that the victim wrote a sworn statement during the 45-minute police investigation, which commenced shortly after the victim called 911 for assistance; thus, the details of the incident were "fresh in the witness' memory." Also, the details of the assault, of which the victim later claimed to have no recollection, qualifies as "a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately." Appellant contends, however, that only the victim could establish that the written statement reflected her knowledge correctly.

Section 90.803(5), however, does not require this. We agree with the Fifth District's opinion in Polite v. State, which held:

> Section 90.803(5) simply requires as a foundation that the statement is 'shown to have been made by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.' The statute does not say that this "showing" must always (or only) be made by testimony from the declarant. A plain reading of the statute would allow admission of the statement so long as the state presented evidence (from any source) sufficient to support a finding that the statement was made when the matter was fresh in the witness' mind, and that it was accurate.

41 So. 3d 935, 940 (Fla. 5th DCA 2010), review granted, 56 So. 3d 767 (Fla. 2011).

Here, the State presented a recording of the 911 call where the victim is heard requesting police assistance due to a "domestic situation" that involved a threat of harm to her children. The State also presented the officer's testimony concerning the victim's physical and mental state when he arrived at the location given by the victim. He took photos of the victim which showed her injuries, which were shown to the jury. The officer also testified that he placed the victim under oath and watched as she wrote and signed her statement identifying Appellant as her assailant and describing the physical assault leading to her injuries. The victim acknowledged it was her signature on the statement and, although she claimed to have no memory of the events described in the statement, she admitted that the incident in question occurred in Escambia County. The State also played recordings of jailhouse phone conversations between Appellant and victim in which Appellant persistently urged the victim to drop the charges and tell the State she would not cooperate in his prosecution.

Taken in its totality, the foregoing evidence was such that the trial court could reasonably find that the victim's written statement correctly reflected her knowledge of the events that led to her call for police assistance. "A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." San Martin v. State, 717 So. 2d 462, 470-471 (Fla. 1998). "If reasonable men could differ as to

the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Here, the trial court did not abuse its discretion by allowing the statement to be published to the jury.

We acknowledge that Polite is currently under review by the Florida Supreme Court, and that it, and now this opinion, conflicts with the contrary conclusion reached by the Second District in Smith v. State, 880 So. 2d 730 (Fla. 2d DCA 2004), and the Fourth District in Kimbrough v. State, 846 So. 2d 540 (Fla. 4th DCA 2003). We respectfully disagree with the approach taken by our sister courts in those cases.

The court in Smith held: "In order for a memorandum or record to qualify as recorded recollection, the witness must testify that he made an accurate record of the fact or event or that he is confident that the facts would not have been written unless they were true." 880 So. 2d at 736. In our view, this imposes an additional requirement for admissibility of statements under the statute, one that is not supported by the statute's plain language and which the Legislature could have added if it so desired.

In Kimbrough, the issue involved a recorded statement by the appellant who testified he did not know if he gave a statement to police, claimed to know nothing about the incident (despite having pled guilty to a lesser-included charge related to

the incident), and, "[w]hen the tape was played for him, he denied being able to recognize his voice [and] said nothing would refresh his memory, as he 'ain't been in my right mind the last couple of days, I don't know nothing.'" 846 So. 2d at 542. Similar to here, the trial court in Kimbrough allowed the tape to be played for the jury after the State presented testimony from the investigating detective, who identified the witness and the witness's voice on the tape. Id. The Fourth District reversed, "because [the witness] not only had no recollection of giving the statement but could not recognize his voice on the tape," and the detective's testimony was not sufficient to overcome this. Id. The court held that the State failed to establish the proper predicate for admitting the statement because the appellant "could not testify either that the statement was his or that it was accurate." Id. at 544. Again, nothing in the statute limits the "showing" of the statement's accuracy to the witness herself. Thus, the Fourth District also added to the statute a requirement that is simply not there – a requirement the Legislature could easily have inserted if it desired to do so.

Because of the conflict, however, and the supreme court's decision to address it, we address whether, assuming allowing publication of the statement to the jury was error, that error was harmless. We hold that it was.

Even absent the victim's written statement, the State presented sufficient evidence of Appellant's guilt: The victim's 911 call in the wake of a domestic

incident involving threats to her children; testimony from the investigating officer as to the fresh injuries he noticed on Appellant's body as well as her distressed mental state; and photographic evidence of the victim's injuries. In addition, after discussing the incident with the victim, police left with the understanding that Appellant was the assailant. Further, during the jailhouse phone conversations which were played for the jury, there is no discussion of Appellant's innocence; rather, the conversations center around Appellant pressuring the victim to drop the charges and to refuse to cooperate with the prosecution. Finally, although the victim claimed to have no recollection of the details of the incident, she never denied that it took place or recanted. Indeed, she acknowledged that "it" occurred in Escambia County.

Conclusion

For the foregoing reasons, we AFFIRM Appellant's conviction and sentence.

MARSTILLER, J., CONCURS; WOLF, J., DISSENTS WITH OPINION.

WOLF, J., Dissenting.

The alleged victim's written statement made at the time of the incident in question was improperly admitted as a past recollection recorded pursuant to section 90.803(5), Florida Statutes (2011), where the victim failed to testify that the statement, when made, was an accurate account of what had occurred. In addition, because it is the only evidence of how the victim sustained her injuries, the admission of the statement cannot constitute harmless error.

Section 90.803(5) specifically requires that for a statement to be admitted as a past recollection recorded, the "memorandum or record concerning a matter . . . [must] reflect that knowledge correctly." The overwhelming precedent and experts in the field of evidence require that the person having recorded the statement verify the accuracy of the facts contained in the statement. See generally Charles W. Ehrhardt, Florida Evidence, § 803.5 (2011); Kimbrough v. State, 846 So. 2d 540, 543 (Fla. 4th DCA 2003) ("The witness must be able to assert now that the record correctly represented his knowledge and recollection at the time of making.") (quoting Ringgold v. State, 367 A.2d 35, 36 (1976) (citing 3 J. Wigmore, Evidence §§ 734, 746(2) (Chadbourne rev. 1970)). This interpretation is consistent with the reason behind the exception and is consistent with the Florida Supreme Court's application of other hearsay exceptions. Finally, while strong policy arguments may be made for easing the historic admissibility standards for past recollections

recorded in the context of domestic violence cases, such matters are appropriate for the Legislature and not for this court.

1. Overwhelming Precedent Supports Requiring the Declarant to Testify As to the Accuracy of Statements Prior to Their Admission as Past Recollections Recorded

The Eleventh Circuit Court of Appeals recently addressed the admissibility of statements as past recollection recorded in U.S. v. Jones, 601 F.3d 1247 (11th Cir. 2010).

> Rule 803(5) also requires that the witness verify the contents of the past statement. "The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he knew it to be true at the time." Lopez v. United States, 373 U.S. 427, 448 n.1, 83 S.Ct. 1381, 1393, n.1, 10 L.Ed. 2d 462 (1963) (citation and internal quotation marks omitted).

Id. at 1262.

Every case in Florida that has addressed the issue, except for the Fifth District's opinion in Polite v. State, 41 So. 3d 935 (Fla. 5th DCA 2010), rev. granted 56 So. 3d 767 (Fla. 2011), has rejected the concept that the accuracy of the statement at the time it was made may be proven by circumstantial evidence. See Bartholomew v. State, 101 So. 3d 888 (Fla. 4th DCA 2012); Hernandez v. State, 31 So. 3d 873 (Fla. 4th DCA 2010); Smith v. State, 880 So. 2d 730 (Fla. 2d DCA 2004); Kimbrough, 846 So. 2d 540.

2. The Traditional Approach to the Admissibility of Past Recollection Recorded is Consistent with the Reasons for Allowing the Admission of Past Recollections Recorded and the Supreme Court's View of Admissions of Evidence Pursuant to Hearsay Exceptions

In Kimbrough, 846 So. 2d at 543, Judge Warner explained the history behind the past recollection recorded hearsay exception and concluded that its purpose was to allow a witness who had a true loss of memory and who was able to swear positively that the previous statement was accurate at the time it was given be allowed to give that evidence. Under these limited circumstances, the "'ends of justice'" would be served. Id. at 543 (quoting Ringgold, 367 A.2d at 36). As noted by the Fourth District in Bartholomew:

> The requirement that the witness acknowledge the accuracy of the recorded recollection at trial is consistent with the belief that this exception is justified because the witness, who is subject to cross-examination, "incorporates into [his] testimony by reference the record of past recollection."

101 So. 3d at 892 (quoting Montano v. State, 846 So. 2d 677, 681 (Fla. 4th DCA 2003)).

The purpose of the exception is not to allow the State to call "a recalcitrant witness who is seeking to avoid giving testimony favorable to the party calling the witness and is fabricating memory loss." Charles W. Erhardt, Florida Evidence, § 803.5, 893-94 (2011). Nor is the reason for the use of the past recollection recorded exception to give the State a vehicle for improperly impeaching its own witness. Hernandez, 31 So. 3d at 878-79.

The Fifth District's focus on external factors to determine reliability is misplaced because, as the Fourth District recognized in Montano, 846 So. 2d at 681-82, "[u]nlike exceptions to the rule against hearsay which derive their reliability from the circumstances that surround the making of an out-of-court statement, *the reliability of a recorded recollection depends on the credibility of its maker*." (Emphasis added).

In addition, the supreme court, in a similar context, rejected the idea that a prior statement could be admitted based on some level of reliability where it did not meet the standards enumerated within the statutory hearsay exception. See State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986), adopting Delgado-Santos v. State, 471 So. 2d 74 (Fla. 3d DCA 1985).

3. We Should Not Apply the Fifth District's Reasoning in Polite v. State to the Facts in This Case

As previously addressed, the Fifth District's opinion in Polite, 41 So. 3d 935, is inconsistent with the well-reasoned traditional approach to admissions of statements as past recollection recorded. There are several additional reasons not to apply the Polite rationale to this case.

Most importantly, unlike this case, in Polite, the witness: 1) testified at trial to a number of the details contained in the prior statement; 2) acknowledged not only that it was the witness's signature at the bottom of the statement, but also that the witness told police what had occurred when they arrived; and 3) there was

specific independent verification of a number of the details contained in the statement. Id. at 941. None of that is present in this case. Thus, even if circumstantial evidence and reliability could be taken into account in applying the hearsay objection, the facts in Polite are far more compelling for doing so than in the instant case.

I would also note that in Polite, the court acknowledged that the issue concerning the admissibility of the past recollection recorded was not properly preserved. Id. at 939.

4. The Legislature is the Correct Branch of Government to Determine Whether Past Recollection Recorded Should be Expanded in Domestic Violence Situations

There are many valid policy arguments as to why past statements of domestic violence victims should be admissible in prosecutions of the alleged batterers. Financial and emotional pressures, the involvement of children, and threats of physical violence are but a few of the reasons why a victim would be unwilling to testify in accordance with facts related at the scene. The weighing of these policy considerations, however, and the potential expansion of the exception, should be left to the Legislature for a number of reasons.

First, and most important, we as a court are unable to draft an exception applicable to only domestic violence cases. Such a change would involve rewriting the statute. We can only do what the majority in this case is doing and

what the Fifth District did in Polite: expand the exception to all cases. This expansion would be problematic. In other types of cases, policy considerations may not outweigh the traditional reasons for requiring the declarant to acknowledge the accuracy of the previous statement. The question of expansion and how broad it should be, should be up to the Legislature. See, e.g., § 90.803(23), Fla. Stat. (proscribing a hearsay exception for statements of child abuse victims).

Second, the change in the law being proposed involves complicated substantive policy questions concerning the extent criminal trials should involve the use of past statements, whether and to what extent reliability and circumstantial evidence should be considered in determining admissibility of these prior statements, and as previously stated, whether more liberal standards should only be allowed in those types of cases where obtaining live testimony may be problematic. While the courts may properly review the constitutionally of these substantive-type policy decisions made by the Legislature under traditional concepts of separation of powers, the courts should not be setting public policy. See Delgado-Santos, 497 So. 2d 1199.

5. The Admission of These Statements Did Not Constitute Harmless Error

I also cannot conclude that this error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1138-1139 (Fla. 1986). The test is

not whether the State presented other sufficient evidence of appellant's guilt. The test is whether we can say beyond a reasonable doubt that the error did not contribute to the conviction. Id. at 1135. While there was some evidence of the surrounding circumstances, the only evidence of how the victim actually sustained her injuries was contained in the disputed statement. Under these circumstances, I cannot say the error was harmless.