IN THE SUPREME COURT OF FLORIDA

JOHN MILLS, JR.,

Appellant,

vs. CASE NO. 63,092

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant in the trial court below.

The record on appeal consists of the record proper and a transcript of proceedings bound together. References to the record will be designated by the symbol "R" followed by the appropriate page number, in parenthesis.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT MILLS' MOTION FOR A CHANGE OF VENUE

A. THE TRIAL COURT ERRED IN REFUSING TO TAX COST FOR A PUBLIC OPINION SURVEY NEEDED TO AIDE APPELLANT MILLS IN PRESENTING HIS MOTION FOR CHANGE OF VENUE

Appellee is attempting to divert the court from the true issue in this case. The issue is not whether public opinion surveys are reliable. The question here is whether or not use of public funds for preparation of a defense should be the controlling factor in determining if an indigent defendant gets a fair trial in a capital case.

The Appellee wishes to completely ignore the principle set out by the United States Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1956).

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance hears no rational relationship to a defendant's guilt or innocence and could not be used an as excuse to deprive a defendant of a fair trial. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

Further, as pointed out in Appellant's initial brief, the issue of the reliability of public opinion surveys was never really discussed and cannot be used as a diversionary screen by Appellee. The Appellant's trial counsel requested that the be allowed to submitt a memorandum on the issue of the reliability of public opinion surveys. The court denied this request and instead chose to dispense with the matter based on the court's perception of what was necessary to prepare a change of venue motion for trial.

Appellee mentions Irvin v. State, 66 So.2d 288 (Fla. 1953), but fails to note that the opinion states:

> We think such a survey might as this witness said, indicate the attitude of a prospective customer "towards the products of a company," but as it was conducted and attempted to be applied here, it was useless. In no sense did it indicate an aroused public against a prospective defendant in a court of justice.

This language indicates that the court did not say that all public opinion surveys were inadmissible. The court was simply stating that the way that particular survey was done in that particular case made it less reliable. The methods of taking and analyzing public opinion surveys has changed substantially since 1953. Two courts in this Circuit have accepted public opinion surveys in two recent cases. These decisions are controlling in this jurisdiction until the Supreme Court or another court of competent jurisdiction says otherwise. This was pointed out in State v. Johnny Copeland, Victor Hall, Frank Smith, Jr., _____ So.2d _____ (Fla. Cir. Ct. Case No. 78-66) and the Ted Bundy case. The reliability of public opinion surveys is not a significant issue here.

The record clearly shows from the Prosecutor's statements that he was more concerned with expenditures of money and not that the Appellant receive adequate representation (R 2365).

Here the issue of a public opinion survey goes much deeper than mere expenditures; it goes to the adequacy of the defense. Each trail attorney is allowed to and indeed has to make decisions on how to best present his case and what is significant. As a general rule, wide latitude is always given to trial attorneys in framing their presentations - especially in captial cases. In this instance, because of a lack of funds allotted to the trial attorney repre-

senting an indigent defendant, the defendant was never given an opportunity to adequately present a defense on a critical issue. Appellant was eventually tried by an all white jury. Because of the lack of funds for the public opinion survey, no statistical data on county size, population, race, or attitudes of citizens in Wakulla county exist in the record. It was fundamental and constitutional error for the trial court to deny the defendant an opportunity to prepare his case properly simply because he was unable to pay the cost of preparing for trial. See Bodie v. Connecticut, 401 U.S. 371 (1971); Tate v. Short, 401 U.S. 395 (1971).

B. THE TRIAL COURT ERRED IN DENYING THE APPELLANT MILLS' MOTION FOR CHANGE OF VENUE IN THAT THE EVIDENCE PRESENTED DURING THE OCTOBER 26, 1983 HEARING AND DURING THE TRIAL CLEARLY INDICATED A NEED FOR A CHANGE OF VENUE.

The Appellant filed a motion for change of venue on October 13, 1982 (R 85-88). The trial court denied this motion in a hearing held on October 26, 1982 despite overwhelming testimony showing the liklihood of prejudice in the minds of the citizens of the community (R 2073-2107).

Furthermore, during the trial the judge was forced to take safety precautions to insure that the Appellant was not harmed in anyway. One such measure was that during the trial the judge requested that no one be allowed to sit in the row of seats directly behind the Appellant for fear of possible violence (R 1403). During the trial, the Appellant's attorney had to have a police escort and was escorted out of town after the trial. In addition, the victims father made threatening gestures at the Appellant during a recess outside the courtroom. These factors support the assumption that the

trial atmosphere was utterly corrupted by the effects of the media coverage and sympathy for the victim's father.

Appearantly Appellee is saying that as long as a jury says the magic phrase "fair and impartial" then all other factors are irrelevant and not worth consideration. He seems to state that the court need not look behind the circumstances surrounding the statements made by the jury in determining whether or not they are capable of rendering a fair and impartial verdict and whether or not a defendant could receive a fair and impartial trial under the circumstances. Appellee implies that the courts should apply a blanket rule with on the requirement that the jury state that they can be "fair and impartial.

> Each case must be judged on its own merits as to whether under the circumstances, the inhabitants of the community are so infected by knowledge of the incident and accompanying prejudice that jurors from the community could not possibly try the case soley on the evidence presented in the courtroom. Manning v. State, 378 So. 2d 274 (Fla. 1980).

In addition to the aforementioned incidents, it must be stressed that the victim here was the son of the pastor of the largest white church in the community and as such he had a great deal of influence in the community. Because of his position he evoked a great deal of sympathy in the community.

Furthermore, the expression of knowledge by the jurors showed that although they could utter the magic words, they had preconceived opinions that they really could not put out ot their minds completely.

The Appellee in his brief did not really explain away the exposure of the citizens to the events of the crime in the newspapers. Nor did he explain away the fear of violence on the part of the judge or the violent threats by the victim's father. He states that they

are insignificant, that they were corrected.

> A trial judge is bound to grant a motion for change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. Manning, Supra at 276.

In view of the aforementioned facts it is clear that the community was so inflamed that the Appellant could not have possible gotten a trial before a fair and impartial jury. The trial court's decision should be reversed.

POINT II

THE COURT ERRED IN FAILING TO EXCUSE JUROR JOHN C. BYRNE FOR CAUSE

Appellee places a great deal of emphasis on the juror Bryne's utterance of those magical words "fair and impartial." Appellant is not implying that a juror's statement that he can be fair and impartial is not an improtant factor in jury selection. Appellant is simply pointing out that there are other factors that are of equal improtance. Most Florida Courts also consider other statements made by the prospective juror that bear on his state of mind regarding the innocence or guilt of the defendant.

The Florida Supreme Court in Singer v. State, 109 So.2d 7 (Fla 1959), found error on the part of the trial court for failing to dismiss several jurors for cause because of certain juror's statements. The statements indicated that the jurors had preconceived opinions of the defendant's guilt or innocence. Even though those jurors stated that despite these prior statements, they could be "fair and impartial," the Court still found error in the trial court's failure to dismiss for cause. The Court, citing a passage form Andrews v. State, 21 Fla. 598, ruled:

> . . . The fact that he states that if taken upon the jury he would give a verdict according to the evidence is not of itself sufficient to overcome the effect of what he has said as to the fixed character of his opinion. Singer v. State, Supra at 22 (emphasis added).

The Court, citing from Olive v. State, 15 So. 925, goes on to say:

> . . .[T]he statement of a juror that he can readily render a verdict according to the evidence, not withstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and steeled nature as not readily to yeild to the evidence. Singer v. State, Supra at 22 (emphasis added).

The Court further states:

> . . . if there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based soley on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion. Too, a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so. Singer v. State, Supra at 23-24 (emphasis added).

In the case at bar, the juror, Byrne, told the Appellant's attorney that he was related to the victim's family (R 699). Byrne also stated that he knew members of the Appellant's family. When asked if his relationship with the Appellant's family would prevent him for being fair and impartial his answer was "No, not really" (R 1007). Further, Appellant's attorney informed the court that Byrne had had a conversation in which he stated "I think they should hang him (Appellant) at this time" (R 700). The trial court denied Appellant's request for a hearing to bring in testimony of the conversation in which Byrne suggested that Appellant be hung. While, there appears to be no authority for supplementing the record on a

prospective juror, the use of the words "other evidence" in Singer, strongly suggest that not only cna the jurors prior vior dire statements be used but extrinsic evidence may be used as well.

Even without the extrinsic evidence offered, Byrne's comments on the record and his relationship to the victim's family alone are enough to raise a legitimate question as to Byrne's ability to render an impartial verdict.

Appellee further alleges that Singer is not applicable simply because there was no indication that the trial court in Singer had increased the defendant's peremptory challenges. Whether or not an attorney request additional peremptory challenges is a tactical decision and has no bearing on the principle set out in Singer. The Court does not directly or indirectly imply that the reason for their ruling was because the defendant was not granted additional challenges.

A case cited in Appellant's principal brief, to which Appellee did not address in the answer brief is Leon v. State, 396 So. 2d 203 (Fla. 3rd DCA 1981). (See pages 7-8, Appellee's answer brief). The reason Appellee did not respond, is because the Leon case directly contradicts their argument.

In Leon, the Appellant had three (3) peremptory challenges remaining at the time. The court denied his motion to excuse the juror for cause. Appellant, in that case did not use any of his remaining three challenges to strike the juror the court should have excused for cause. The state argued that (1) the failure of Appellant to use one of his three (3) remaining peremptory challenges on the juror (2) to further exhaust his remaining challenges, and (3) to fully renew his "challenge for cause to the juror who was

allegedly biased", forecloses appellate review. The Court in Leon clearly and unequivically rejected their argument. The Court stated:

> "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges. Id at 205.

The situation that Appellant was confronted with at trial was far worse than that of the Appellant in Leon. Appellant only had one remaining challenge. He used that challenge to strike the juror who should have been excused for cause. Thus, Appellant was forced to use his last peremptory challenge to strike the juror who should have been excused or at least an evidentary hearing granted to determine if he was able to reach a fair and impartial verdict.

The fact that appellant was given additional challenges is not relevant and certainly not determinative, as Appelle's suggest. The issue is that the trial court forced the appellant to use his last peremptory challenge to excuse a juror who should have been excused for cause. At a minimal, the Court should have granted Appellant's request for an evidentary hearing to present extrinsic evidence that the juror could not render a fair and impartial verdict.

In view of the aforementioned facts the appellant should receive a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT MOTION FOR A MISTRIAL BASED ON THE PROSECUTIONS IMPROPER CROSS-EXAMINATION CONCERNING APPELLANT'S PRIOR CONVICTIONS

Appellee unbelievably raises some vague equitable estoppel argument as justification for the prosecution's erroneous cross-examination of appellant. Michael Fredrick was not on trial for his

life. Besides, as appellant is well aware, questioning a witness about a conviction involving dishonesty or false statements not amounting to a felony is acceptable. See §90.610(1)(Fla. Stat. 1981) and Cummings v. State, 412 So.2d 436 (4th DCA 1982).

On direct examination, Appellant's trial attorney asked him if he had been convicted before and how many times. Appellant answered truthfully to both these questions. On cross-examination the State asked appellant again about his convictions.

This questioning of appellant by the prosecutor is violative of Fla. Evidence Code §90.403.

> 90.403 Exclusion on grounds of prejudice or confusion
> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cummulative evidence. This section shall not be constured to mean that evidence of the existance of available third-party benefits is inadmissible. F.S. §90.403.

Fla. Evidence Code §90.403 has been found applicable to §90.610. See U.S. v. Toney, 615 F.2d 277,283-84 (5th Cir. 1980);see also Ehrhardt, 5 Florida Practice, 1982 supplement for use during 1983 at 92.

It is acceptable procedure in Florida courts for a defendant to bring out prior convictions on direct examination to soften the effect of an attempt by the prosecutor to impeach his character. See Sneed v. State, 397 So. 2d 931 (3rd DCA 1981). The testimony in the instant case, while it may be relevant, was merely cummulative. Appellant had already admitted his prior felony convictions on direct examination.

Not only was the testimony cummulative, it was highly prejudicial. It's probative value was clearly substantially outweighed by its prejudice. In fact, the testimony had no probative value at all.

The jury had already heard from appellant on direct examination that he had been convicted of four (4) felonies. It served no legitimate purpose for the Prosecutor to ask appellant this question again. The Prosecutor timed this erroneous question perfectly to set the tempo for the rest of his cross-examination. That is why this was the first question that was asked on cross-examination. The only purpose for the Prosecutor asking Appellant about his convictions was to re-emphasize the point to the jury at the most critical point of the trial and attempt, by inference, to show Appellant's propensity for crime.

This testimony amounted to an attack on Appellant's character when Appellant had not put his character in issue. In Wilt v. State, 410 So. 2d 924 (3rd DCA 1982), a case to which Appellee did not address, the defendant was charged with second degree murder. During direct examination he admitted he had been previously convicted of a crime. On cross-examination, the State asked him again about his convictions. The defendant objected but his objection was overruled and his motion for mistrial was denied. The Third District Court of Appeal reversed this holding stating:

> While the fact that a defendant has previously been convicted of a crime is relevant to his credibility, once that admission has been obtained, further questioning must be viewed as an attempt to attack character. For nearly one hundred years, it has been the law in Florida that unless a defendant placed his character in issue, such an attack deprives him of a fair trial and constitutes reversible error. Lewis v. State, 377 So. 2d 640 (Fla. 1980); Young v. State, 141 Fla. 529, 195 So. 569 (1939); Mann v. State, 22 Fla. 6000 (1886); Fla. Evid. Code, §90.610, F.S. (1979). Wilt, supra at 95 (emphasis added).

The Appellant, by taking the stand and admitting his prior convictions on direct examination, did not put his character in issue.

The Prosecution's questioning of Appellant about his prior convic-

tions were cummulative, substantially outweighed by its prejudicial effect, and an improper attack on Appellant's character. Appellant was thus denied a fair trial. Therefore, the trial court erred in admitting the testimony and the conviction should be reversed.

POINT IV

THE COURT ABUSED IT'S DISCRETION BY ALLOWING THE TESTIMONY OF REVEREND GLEN LAWHON, THE VICTIM'S FATHER CONCERNING IDENTIFICATION OF PROPERTY

Appellee's argument that the trial court did not error in allowing Glen Lawhon to testify to the identity of the victim's property is without merit.

Appellee conveniently overlooked §90.403 of the Florida Evidence Code which draws a critical distinction between logical and legal relevancy. Even though evidence may be logically relevant to an issue in the case, it may not be legally relevant. The testimony of Glen Lawhon in the case at bar was clearly not legally relevant. The testimony of Glen Lawhon was highly prejudicial to the appellant and used to evoke the sympathy of the jury.

The states first question to Glen Lawhon was:

Q. How would you characterize that relationship with your son?

To which he responded:

A. We were always very close. He was a boy that never gave us any trouble from the time he was born. I didn't get a chance to hunt...(R 1461).

At that point Appellant's attorney objected because the questioning was clearly irrelevant (R 1461). The prosecutor

stated that it would become relevant. He did not establish the relevancy of this testimony during the questioning.

During the direct examination the prosecutor framed his questions in a way that would allow Glen Lawhon to interject a great deal of information showing the close relationship between he and his son (R 1461-1470). These statements were clearly solicited to envoke the sympathy of the jury as they had no relevance to the issue of identification.

Furthermore, the Appellant's trial attorney had already stipulated to the identity of the property and that the value of the property was sufficient for a grand theft charge. The Fourth District addressed this very issue in Neering v. Johnson, 390 So.2d 742 (4th DCA 1980). The court reversed a lower court ruling because the lower court allowed testimony concerning an issue which had been stipulated to by the parties. The fact that this case involved a civil matter is irrelevant here. The principle set out in the case is consistent with Florida Rule of Evidence §90.403 which is applicable to both civil and criminal matters. Since the evidence was stipulated to by the parties and the form of questioning would allow the admission of clearly irrelevant testimony concerning Glenn Lawhon relationship with the victim; the evidence was not only commulative but highly prejudicial.

Appellee cites the ruling in Foster v. State, 369 So.2d 928 (Fla 1979) as bearing the general rule regarding evidence on stipulated on in criminal cases. Appellant does not advocate that this is not the general rule. However, the language in Foster must be read closely. In Foster, the defendant was

charged with first degree murder and the evidence was offered to establish a necessary element of the case (i.e. the "the deliberate, cold-blooded intent of the defendant).

In the case at bar excluding the testimony of Glen Lawhon would not in anyway have prevented the State from proving any necessary element of any crime charged.
The state was able to establish through the testimony of Roxie Vause, a Deputy Sheriff of Wakulla county; Alvis Horne, identification technician with the Tallahassee Police Department; and Shirley Lawhon, the victim's wife the necessary element of its case (i.e. the identity of the property)(R 1438-1460). It is clear that Glen Lawhon's testimony was cummulative and highly prejudicial pursuant to Florida Evidence Code §90.403.

Furthermore the Florida Supreme Court in Welty v. State, 402 So.2d 1159 (FLa. 1981), a case to which appellee did not address in his answer brief, ruled that family members should not be allowed to give identification testimony when a non related witnes is available to do so.

> The basis for this rule is to assure the Defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt. Welty at 1162 (emphasis added.).

Since the State was not denied the opportunity to establish the identity of the property by calling three witnesses, including the victims wife; had two non-related witneses to assist in establishing the identity of the property; and had a stipulation as to the identity of the property and its value, Glen Lawhon's testimony should never have been admitted. Whether or not appellant should have moved for mistrial or ask for jury instruction concerning the testimony is a tactical decision and

is not dispositive of the issue.

Under some circumstance the testimony of a victim's relative is harmless error. [For example, in the case at bar, the victim's wife's testimony would be harmless error. During her testimony she limited her responses solely to identification of the property. She made no reference to her relationship with the victim (R1454-1460)] Glen Lawhon, on the other hand, was well known within the community because of his position as the pastor of the largest white church in the county and commented quite frequently on his relationship with the victim. This was extremely important since we had an all white jury. Glen Lawhon's testimony was used only to envoke sympathy and thus was not harmless error. Thus appellant should be granted a new trial.

POINT V

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPH B OF STATE'S COMPOSITE EXHIBIT NO. 9 INTO EVIDENCE

The trial court, over the objection of Appellant, allowed photograph B of State's composite exhibit no. 9 to be admitted into evidence. The photograph was comprised of the skull and bones allegedly from the remains of Les Lawhon.

Appellant again acknowledges that photographs are admissible if they are relevant. See Adams v. State, 412 So.2d 850 (Fla. 1982). In order for a photograph to be relevant, it must meet the test set out in Swan v. State, 322 So.2d 485 (Fla. 1975). In Swan the Court ruled:

> ...[P]hotographs may and should be admitted if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the Court and jury in finding the truth. Swan, Supra.

The Court set out a two point test for relevancy of photographs.

One, the photographs must properly depict the crime scene and two aid the court or jury in finding the truth. The photograph in question may have properly depicted the crime scene but it did not aid the Court or the jury in finding the truth. The trial judge stated:

> As an aid to them (the jury and witnesses). I'll let it in. I don't see where it is going to add anything, emphasis added (R.1319).

Even if the photograph was relevant the manner of death had already been established through other sources. The photograph was merely cummulative and should have been excluded pursuant to Florida Evidence Code § 90.403.

Furthermore, the probative value of the photograph was clearly outweighed by its prejudicial effect. The photograph did not show any new evidence and was only used to inflame the jury. In Swan, Supra. the Court ruled that:

> Photographs serving only to create passion should be rejected.

Again, the evidence is violative of Florida Evidence Code §90.403 and should have been excluded. The court erred in admitting this photograph into evidence.

CONCLUSION

Because of the aforementioned urged in Point I through Point V, Appellant's conviction herein should be overturned and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTRIFY that a copy of the foregoing Appellant's Reply Brief has been furnished by U.S. Mail to the Honorable Jim Smith, Attorney General, Department of Legal Affairs, the Capital, Tallahassee, FL 32301, this 7th day of February, 1984.

ROOSEVELT RANDOLPH