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IN THE SUPREME COURT OF FLORIDA

ERNEST LEE ROMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,766

16 pages

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
FOR SUMTER COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

ROBERT Q. WILLIAMS
WILLIAMS & SMITH
221 North Joanna Avenue
Tavares, Florida 32778
(904) 343-6655

CHRISTOPHER J. SMITH
WILLIAMS & SMITH
221 North Joanna Avenue
Tavares, Florida 32778
(904) 343-6655

ATTORNEYS FOR APPELLANT

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ISSUES PRESENTED

ISSUE I

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND BY ADMITTING HIS STATMENTS INTO EVIDENCE AT TRIAL OVER THE DEFENDANT'S OBJECTION.

ISSUE II

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN WITNESS CALVERT TESTIFIED THAT HE HAD OVERHEARD THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, STATE THAT "ERNEST HAD KILLED ANOTHER KILLED A BABY I RECKON."

ISSUE III

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTION ASKED A LEADING QUESTION OF THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, WHICH DIRECTLY INFERRED THAT ROMAN HAD CONFESSED TO HER WHERE THERE WAS NO EVIDENCE TENDING TO PROVE THIS PHANTOM CONFESSION; THE COURT COMPOUNDED ITS ERROR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE BEAUDOIN REGARDING HER OUT OF COURT STATEMENT OF OPINION THAT "ERNIE HAS KILLED A BABY, I RECKON."

ISSUE IV

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A DEPUTY SHERIFF A LEADING QUESTION THAT EXPRESSLY INFERRED THAT THE DEFENDANT HAD A PRIOR CRIMINAL RECORD.

ISSUE V

THE COURT COMMITTED FUNDAMENTAL ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE.

ISSUE VI

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S REQUESTED MITIGATING CIRCUMSTANCE INSTRUCTION DURING THE PENALTY PHASE AND FURTHER ERRED BY SENTENCING THE DEFENDANT TO DEATH.

ISSUE I

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND BY ADMITTING HIS STATEMENTS INTO EVIDENCE AT TRIAL OVER THE DEFENDANT'S OBJECTION.

A. The State Failed to Prove That the Defendant Made A Knowing and Intelligent Waiver of His Rights.

The State of Florida asserts, as it must, that Roman's pre-trial statements were admissible in evidence at trial because Roman was not "in custody" when he gave those statements. It urges that the Miranda warnings read to Roman when he was picked up at the scene and when he was interrogated at the jail were merely "prophylactic", and were given by law enforcement "in an abundance of precaution." Indeed, Roman's status at the time of his statements is critical since it is uncontroverted that there was no probable cause to detain him until after his statement. (R. 2110). See Argument, Section I(B), infra.

In arguing that Roman was a "voluntary" participant in his nearly six-hour interrogation session, the state relies primarily on the after-the-fact protestations of the two sheriff's office investigators. They declare that they did not consider Roman "in custody", and that he was free to go. The state, however, significantly omits from its discussion the fact that Roman was ordered to be "picked up" at the scene by one of these same deputies who was in charge of the investigation. (R. 2109). The instant case is not one where the defendant strolls into the police station and, in talking with the officers, admits his complicity in a crime. Rather, this is a case where law

enforcement targeted Roman as a suspect directed that he be "picked up" by a deputy, and took him to the sheriff's office facility for a lengthy interrogation.

Sumter County Sheriff Adams made it clear that he had not intended to allow Roman to leave if he had wanted to. (R. 2036). In fact, there is absolutely no indication in the record that Roman was ever told he was free to go. Although the state attempts to downplay the sheriff's testimony by suggesting that he had only a "minimal role in the investigation," the fact remains that he was the chief law enforcement agent in the county. Moreover, Sheriff Adams participated in the entire interrogation, spoke by telephone with attorney Coniglio, and eventually broke the defendant by showing him a photo of the girl.

This Court has recently spoken to the issue of custodial interrogations where Miranda applies in Drake v. State, ____So.2d____, 8 FLW 427 (Fla. 1983). The Florida Supreme Court reversed Drake's conviction, ordered that the statements should have been suppressed, and remanded the case for a new trial. The Court distinguished Oregon v. Mathiason, 429 U.S. 492 (1977), the case relied upon by the state in the case at bar. In Mathiason, the defendant responded to a message to call police and went on his own to the police station after work. He was specifically told that he was not under arrest. He admitted his guilt to police within five minutes of his arrival. And he was told at the conclusion that he was free to go and that he was not under arrest.

The facts in Roman's case much more closely align

with those in Drake than with the facts in Mathiason. Roman was "picked up" at home by a deputy at the direction of the case investigator. He was taken to the sheriff's office and jail complex, and may have been held in a secure portion of that building. He was detained and interrogated for nearly six hours before his statement. And he was never told that he was free to go or that he was not under arrest.

The test adopted by the Drake court was one that considers the totality of the circumstances in a reasonable light. Simply stated, the test is "whether a reasonable person would have believed that his freedom of action was restricted in a significant way." Drake v. State, at 428. Accord, Williams v. State, 403 So.2d 453 (Fla. 1st DCA 1981). Under that test, it is abundantly clear that Ernest Roman was in custody from the time he was picked up at the scene by Deputy Foremny.

Once it is established that the interrogation was in a custodial setting and that Miranda applies, the burden of proving voluntariness of any statement lies with the state. State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974). The state's suggestion that Roman's aberrant behavior during the interrogation was the result of his own apprehensions fails to address the lengthy testimony about his diminished mental capacity at the time. In fact, Roman was declared incompetent to stand trial shortly after his arrest. (R. 1698).

The voluntariness of Roman's waiver of his rights is made even more suspect in light of the "christian burial" interrogation technique -- a technique which even the state

admits is "an abominable practice." Although that technique may not have been the one which eventually broke Roman, its use was intended to and did overbear the will of the defendant. See Ware v. State, 307 So.2d 255 (Fla. 4th DCA 1975). The fact that Roman, after his statement had been extracted, said that the statement was of his own free will is completely irrelevant. For these constitutional warnings to mean anything, the knowing and intelligent waiver must precede the confession -- not follow it.

Nor can a voluntary waiver of rights be presumed by the defendant's subsequent statement. In Tague v. Louisiana, 444 U. S. 469 (1980), the United States Supreme Court rejected the suggestion that a defendant was presumed to have waived his rights absent his showing to the contrary. The Court's decision in Tague was after its ruling in North Carolina v. Butler, 441 U.S. 369 (1979), upon which the state relies.

B. The Defendant's Statement Should Have Been Suppressed As Fruits of An Illegal Arrest.

It is clear that no probable cause existed for Roman's arrest until after he gave his statement around 11:00 p.m. on the day of his arrest. (R. 2110). The state again argues that Roman attended the interrogation session "voluntarily." It also again omits any reference to the fact that Roman was "picked up" at the scene by a deputy at the direction of one of the lead investigators.

Whether Roman's "pick up" at the direction of law enforcement constitutes an "arrest" must be determined from the totality of the circumstances in light of the four basic elements set forth in Melton v. State, 75 So.2d 291 (Fla. 1954). The

defendant suggests that a review of the objective facts in this case do not indicate that Roman's participation in the interrogation was voluntary. Rather, it is clear that the actions of the Sumter County Sheriff's Deputies imposed a significant interference with Roman's liberty tantamount to an arrest. McAnnis v. State, 386 So.2d 1230 (Fla. 3d DCA 1980).

The instant factual situation is not, as the state suggests, one where law enforcement officers are merely questioning area residents about a crime. In this case, Roman was targeted as a suspect and, without a hint of probable cause, the sheriff's deputies deliberately set into motion the machinery to detain and extract a statement from him. To allow such actions to go unchallenged can only serve to foster future abuses.

C. Roman Was Impermissibly Denied His Right to Counsel Prior to Giving His Confession.

The facts surrounding this issue are essentially uncontroverted. The narrow but important question is whether law enforcement officials can continue to interrogate a suspect after they have been informed that an attorney is seeking to intervene on that suspect's behalf. A secondary issue is whether they must, as a matter of constitutional law, at least inform the suspect that the attorney has made an inquiry about the suspect.

It is not suggested here that a rule be engrafted requiring waivers of rights to be made only with the advice of counsel. Certainly there will be accuseds who wish to confess crimes, for one reason or another, without the benefit of

counsel. However, it is difficult to envision how a knowing waiver of counsel can be made by a defendant who, unbeknownst to him, has an attorney obtained by the family waiting just outside the jailhouse door. At a very minimum, that defendant must be apprised of the true situation; that is, that concerned people on the outside have sought legal help for him. If he still wishes to make his statement, his waiver is then based on a full disclosure of the facts by law enforcement.

Unfortunately, that did not occur in Roman's case. Not only did the sheriff refuse to cease his interrogation, but he also failed to inform Roman that an attorney had inquired on his behalf. In this instance, the sheriff became an impermissible shield between Roman and his opportunity to exercise his right to counsel.

ISSUE II

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN WITNESS CALVERT TESTIFIED THAT HE HAD OVERHEARD THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, STATE THAT "ERNEST HAD KILLED ANOTHER KILLED A BABY I RECKON."

The defendant's brief advanced the argument that if Beaudoin's telephone statement constituted an excited utterance, which defendant does not concede[1], the statement was nevertheless inadmissible because Beaudoin lacked personal knowledge of the statement she made. Beaudoin's telephone utterance was simply a statement of opinion which was inadmissible notwithstanding the alleged excited context in which it was made. The answer brief responds to the defendant's personal knowledge argument by ignoring it. The state's failure to counter or distinguish the well reasoned "personal knowledge" cases cited by defendant must be construed as a concession of error.

The state contends that if the admission of the Beaudoin telephone statement was error, it was harmless. This Court's test for harmless error is as follows:

> When the error affects a constitutional right of the defendant, the reviewing court may not find it harmless "if there is a reasonable possibility that the error may have contributed to the accused's conviction

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[1]Calvert believed that Beaudoin fell as soon as an ambulance passed. (R. 651). The ambulance's siren was silent. (R. 646). Arguably, if Beaudoin had made her statement when she collapsed, her statement could be construed as an excited utterance The facts indicate that Beaudoin's statement was not made when she collapsed, but several minutes later, after she had been helped into the house. The telephone utterance was not spontaneous, was only an opinion, and was not trustworthy.

> or if the error may not be found harmless beyond a reasonable doubt." Palmes v. State, 397 So.2d 648 (Fla. 1981). See Chatman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

With respect to Calvert's statement that Beaudoin had said that Ernest has killed "another" baby, no reasonable person can debate the extreme harmful impact of this admission. A person intent on denying Roman a fair trial would have trouble conjuring up a more devastating piece of evidence.

The state argues that if the jury heard the word "another", one can only speculate as to how the jury construed the answer or what weight was given to it. The state's "pure speculation" argument, apart from being an incorrect application of law, ignores common sense and logic. If only one juror had heard that Roman had killed another or another baby, one need not speculate as to whether Roman received a fair trial. He did not.

If this court concludes that no juror heard the word "another", the admission of Beaudoin's telephone utterance nevertheless constituted harmful and reversible error for several reasons. First, the jury likely concluded that Beaudoin made such a statement because she had personal knowledge of the facts, or because Roman had confessed to her. The record does not hint of this finding.

Second, the admission of the telephone statement laid the strained foundation for the prosecutor's improper suggestion that Roman had confessed to Beaudoin. (See discussion of Issue

III).

Lastly, the admission of the telephone utterance destroyed Beaudoin's credibility. Since the jury probably accepted Beaudoin's statement of opinion as gospel truth, it was prone to disregard any of Beaudoin's trial testimony that tended to exculpate Roman.

Even without the use of the word "another", the state cannot meet its Palmes burden of proving harmless error. There is a reasonable possibility that the error may have contributed to Roman's conviction. In the alternative, the state cannot prove the error harmless beyond a reasonable doubt.

If this Court concludes that the evidence of guilt is overwhelming, the defendant nevertheless asserts that the cumulative nature of the errors committed in Issues II and IV greatly prejudiced the defendant in the penalty phase deliberations. The jury would have been unfairly weighted in favor of the death penalty if it believed that Roman had killed another or another baby, especially where it was also told that Roman had prior criminal records in Sumter County alone.

ISSUE III

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A LEADING QUESTION OF THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, WHICH DIRECTLY INFERRED THAT ROMAN HAD CONFESSED TO HER WHERE THERE WAS NO EVIDENCE TENDING TO PROVE THIS PHANTOM CONFESSION; THE COURT COMPOUNDED ITS ERROR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE BEAUDOIN REGARDING HER OUT OF COURT STATEMENT OF OPINION THAT "ERNIE HAS KILLED A BABY, I RECKON."

The state submits that the alleged error was not preserved because the defendant did not move for a curative instruction. The defendant moved for a mistrial, but the court determined that the question was proper. It would have been useless for the defendant to request a curative instruction because the court had already ruled the question to be proper.

The state argues that the defendant has raised the alleged confession argument for the first time on appeal. The state's argument is misplaced. The defendant's motion for a mistrial was predicated upon the fact that the prosecutor had no factual basis for suggesting that Roman had told Beaudoin what had happened on the night of the murder. Obviously, the defendant was attempting to bar the prosecutor from intimating the existence of a nonexistent confession.

The prosecutor attempted to justify the improper question by tying it to the Beaudoin telephone utterance. The harmfulness of the question becomes apparent when it is analyzed in conjunction with Issue II.

ISSUE IV

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A DEPUTY SHERIFF A LEADING QUESTION THAT EXPRESSLY INFERRED THAT THE DEFENDANT HAD A PRIOR CRIMINAL RECORD.

When the prosecutor improperly questioned the deputy sheriff about Roman's prior criminal records at the Sumter County Sheriff's Department, the defendant immediately requested permission to approach the bench. Thereupon, the witness immediately uttered the three words "Yes, I did", before the defendant had an opportunity to state the grounds for his objection. The defendant immediately objected and moved for a mistrial. The court denied the mistrial motion but sustained the objection.

The state first contends that the objection was untimely because the witness answered before the grounds for the objection had been stated. The state's argument is inconsistent with common experience. Oftentimes a witness will answer a question before the grounds of an objection can be stated. A legal right should not be waived because of a quick answering witness. In addition, it was actually the prosecutor's question, more so than the witness's answer, that prejudiced Roman's right to a fair trial. The witness's answer was almost certain to flow from the improper question.

The state next contends that the error was waived because the defendant failed to move for a curative instruction. The record clearly indicates that the defendant did ask for the curative instruction, but bowed to the trial court's experienced advice that the instruction would "imprint it on their minds

more." (R. 879).

The state also incredulously contends that the jury could have reasonably concluded that the prosecutor was referring to criminal records made in the course of this murder investigation, and not prior criminal records. This argument borders on the absurd and warrants no further discussion.

The state also argues that the reference to Roman's records in the Sumter County Sheriff's Department does not establish that those records were "criminal" records. Although the defendant concedes that it is possible that the Sumter County Sheriff's Office may possess records on Roman that are unrelated to criminal history, it is a safe bet to conclude that the jury perceived the question as relating to criminal records, exactly as the prosecution intended.

The state next contends that the error, like the errors committed in Issues II and III, is harmless. This Court adopted a presumption of harmfulness test when unrelated criminal activity is improperly admitted, Straight v. State, 397 So.2d 903 (Fla. 1981), a test even more stringent than the Palmes test. The state has not met its burden of overcoming the presumption of harmfulness. The jury could have reasonably concluded that Roman had a prior criminal record involving murder based on Calvert's testimony that he had heard Beaudoin state that Roman had killed another or another baby.

ISSUE V

THE COURT COMMITTED FUNDAMENTAL ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE.

The defendant admits that he never requested the trial court to give the jury instruction that he now requests on appeal. The trial court's failure to instruct as to the proper burden of proof, notwithstanding the defendant's failure to specifically object, constitutes fundamental error. U.S. v. Jackson, 587 F.2d 852 (6th Cir. 1978); State v. Grilz, 666 P.2d 1059 (Ariz. 1983).[1]

In Covey v. State, 504 S.W.2d 387 (Tenn. Ct.Ap. 1973), the trial judge instructed the jury, "Once that insanity is proved to your satisfaction, then it becomes the duty of the state to prove insanity of the defendant, that is, his competence under the law." The Covey insanity instruction, unlike the Florida instruction, at least shifts the burden of proof to the state. Nevertheless, the appellate court correctly reversed the defendant's conviction because the instruction did not clearly specify that the state had the burden to establish the sanity of the accused beyond a reasonable doubt. The standard jury instruction simply does not comport with Florida law because it

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[1]The Arizona Supreme Court stated that "as long as the jury is clearly instructed that the state has the burden of proving the accused sane beyond a reasonable doubt, mention of the presumption of sanity is not fundamental error." The Court's statement directly implies that fundamental error would be committed if the jury was not clearly instructed that the state had the burden of proving the accused sane beyond a reasonable doubt.

does not squarely place the burden of proof on the state to prove sanity beyond a reasonable doubt.

The state argues that Roman did not adduce sufficient evidence to cause a reasonable doubt about his sanity. The state misreads the facts. Mildred Beaudoin testified that Roman was very drunk that night, and had been drinking wine for four days. (R. 1135). Wanda Pritchard testified that Roman was definitely drunk and that he walked out of the trailer and fell down several times. (R. 1330). Raymond Beaudoin also testified that Roman had been drinking since 6:00 that night, and that he was an alcoholic. (R. 564). Police officer Howton stated that Roman looked "spaced out" as though he had been roaming around and drinking all night. (R. 1347-1352). Smith saw Roman with a bottle of wine. (R. 530). Calvert saw Roman drinking at approximately 4:00 p.m. on March 13. (R. 638). Roman claimed that he was drunk.

Dr. Lakarczyk testified that had Roman been drunk, he would not have had the ability to reason accurately, that he would not have known right from wrong, and he would have been insane. (R. 1260-1261; 1311). Dr. Carrera, the state's witness, could not say whether or not Roman would have been sane unless he knew the degree of Roman's drunkenness on the night of the murder. Clearly, the state's own expert had a reasonable doubt as to Roman's sanity based on the degree of his drunkenness. The evidence more than adequately raised a reasonable doubt as to whether Roman was drunk, and if so, to what degree.

ISSUE VI

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S REQUESTED MITIGATING CIRCUMSTANCE INSTRUCTION DURING THE PENALTY PHASE AND FURTHER ERRED BY SENTENCING THE DEFENDANT TO DEATH.

In defending the denial of Roman's requested mitigating instruction by the trial judge, the state first argues that Roman waived his right to appeal the denial of the requested instruction because it was requested for the wrong reason. The Appellant takes exception to that argument and asserts that review of the denial of the requested mitigating instruction is properly before the court. Trial counsel specifically and correctly requested the 921.141(6)(b) instruction at the close of all of the guilt and penalty evidence. The entire trial proceeding had been literally inundated with expert testimony about Roman's sanity, his alcoholisim, his psychological history, his psychiatric hospitalizations and his organic brain disorders. Indeed, Ernest Roman's psychological status was the key issue of the trial.

It was with this background that Roman's trial counsel requested instructions on 921.141(6)(b) <u>and</u> (f). These are the two mitigating circumstances relating to psychological disorders which have been routinely recognized by this Court. <u>Ferguson v. State</u>, 417 So.2d 631 (Fla. 1982); <u>Ferguson v. State</u>, 417 So.2d 639 (Fla. 1982); <u>Mines v. State</u>, 390 So.2d 332 (Fla. 1980); <u>Kampff v. State</u>, 371 So.2d 1007 (Fla. 1979). The suggestion that Roman is attempting to raise new grounds or evidence on appeal simply ignores the vast amount of testimony in the record

regarding Roman's "extreme mental or emotinal disturbance."

The remainder of the state's argument seems to hinge upon its belief that Roman was not suffering from any "extreme mental or emotional disturbance" at the time of this crime. The point on appeal, however, is whether Judge Booth properly took specific consideration of that issue away from the penalty phase jury. Without regard to whether the judge and jury absolutely would have found the existence of the 921.141(6)(b) mitigating circumstance, Roman was at least entitled to an instruction on that circumstance since evidence was presented on it. To deny that requested instruction emasculates the purpose of the penalty phase jury.

The importance of this error must not be taken too lightly. As given by the trial judge, the penalty phase instructions were weighted toward death. The jury was given three aggravating circumstances they could find against only one possible specific mitigating circumstance. Had the jury had another mitigating circumstance to consider in their weighing process, they might well have recommended mandatory life for Roman.

Finally, Roman again points out the apparent confusion by the lower court and the state over the proper standard to be applied in weighing 921.141(6)(b) and (f) mitigating circumstances. The last two pages of the state's brief read like a prosecutor's explanation of the M'Naghten Rule during closing argument. For sentencing purposes, it simply does not matter that Roman's insanity defense was rejected by the jury during the guilt phase. The sentencing standard is not the same. Ferguson v. State, supra.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this 25 day of January, 1984, to MARGENE R. ROPER, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014.

Christopher J. Smith
WILLIAMS & SMITH
221 North Joanna Avenue
Tavares, Florida 32778
(904) 343-6655
Attorney for Appellant.