IN THE SUPREME COURT OF FLORIDA

CARY M. LAMBRIX,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 65,203

APPEAL FROM THE CIRCUIT COURT
IN AND FOR GLADES COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Cary M. Lambrix relies upon his initial brief and the authorities cited therein to reply to the State's answer brief except for the following additional arguments on Issues I, III, and IV.

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN UTILIZING A JURY SELECTION PROCESS WHICH DENIED THE DEFENDANT A TRIAL BY JURY REPRESENTATIVE OF OF A CROSS SECTION OF THE COMMUNITY AND WHICH CREATED A JURY THAT WAS CONVICTION PRONE.

In its Answer Brief the State of Florida responds to Appellant by simply stating that "Appellant's arguments as to this issue have been rejected before and should be rejected again." The State then cites 15 cases, four from the United States Supreme Court, five from federal circuit courts, and six from the Florida Supreme Court.

Perhaps the case currently creating the most interest in legal circles involving jury selection is Wainwright v. Witt ____ U.S. _____ [36 CrL 3116; 53 LW 4108; Case Number 83-1427; January 21, 1985]. Even though cited by the State, this case has very little bearing on the issue presented. In the majority opinion by Justice Rehniquist there is no mention whatsoever of the "conviction proneness issue" and the "cross section issue" is only referred to in footnote 5. The thrust of the case is

primarily only interpreting the famous Footnote 21 of Witherspoon.

This case is further distinguishable from the Appellant's case in that "defense counsel did not object or attempt rehabilitation" as the Appellant counsel clearly did (R1493, 1577, 1633, and 1746). Justice Stevens in his opinion concerning the judgment relies solely upon defense counsel's lack of objection for his decision.

Only in the dissenting opinion by Justice Brennan (joined by Justice Marshall) are the Appellant's arguments examined:

> Exclusion of those opposed to capital punishment...keeps an identifiable class of people off the jury in capital cases and is likely systematically to bias juries. Such juries are more likely to be hanging juries, tribunals more disposed in any given case to impose a sentence of death...These juries will be unlikely to represent a fair cross section of the community, and their verdicts will thus be unlikely to reflect the community's judgment whether a particular defendant has been shown beyond a reasonable doubt to be guilty and deserving of death...A jury unlikely to reflect such community views is not a jury that comports with the Sixth Amendment.

Approximately three weeks after Appellant submitted his initial brief, the Florida Supreme Court opinion of Witt v. State, ___ So. 2d ___ (Fla. 1985) [10 FLW 148, Case No. 66,626; March 4, 1985] was published. In that opinion the Court considered and rejected Grigsby v. Mabry, No. 83-2113 (8th Cir. January 30, 1985) for the purpose of a 3.850 motion indicating that "an alleged change of law eminating from an intermediate

court does not constitute a change which must be given consideration in a 3.850 proceedings." This Witt case then rejects the Grigsby doctrine for 3.850 purpose only and does not generally reject the concept.

The State relies upon five other Florida Supreme Court cases: Caruther v. State, ___ So. 2d ___ (Fla. 1985) [10 FLW 114; Case No. 64, 114, February 7, 1985]; Copeland v. State, 457 So. 2d 1012 (Fla. 1984); Downs v. State, 386 So. 2d 788 (Fla. 1980); Gafford v. State, 386 So. 2d 333 (Fla. 1980); Riley v. State, 366 So. 2d 19 (Fla. 1978). The State contends that these cases constitute a rejection of the Appellant's arguments. Appellant disagrees. A close reading of these cases will disclose that while they may involve at least the basic components of the "cross section of the community issues", none of them specifically address the other Grigsby proposition, i.e. the conviction-proneness of such a jury. Of the cited cases the only one which approaches the issue of conviction proneness is Downs with its concern for "an impartial trial." While "impartiality" is a related concept, it does not fully encompass the issue raised and resolved by Grigsby and asserted by the Appellant in his initial brief.

In addition to the absence of a definite decision on conviction proneness, there is no indication in the cited decisions that the Florida Supreme Court has analythically considered the research, studies and evidence which was presented in and formed the bases for the Grigsby decision.

Appellant contends that such evidence provides a clear basis to establish that the process used for the selection of the Appellant's juror created a jury that was conviction prone, in violation of the sixth and fourteenth amendments of the Federal constitution and rights guaranteed by the Florida Constitution.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, FRANCIS SMITH, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The State of Florida raises three arguments against the Appellant proposition: (1) the existence of a statement; (2) the need for a proper predicate and foundation for impeachment; and (3) that any error in restricting the examination of the witness harmless. Appellant replies to each of these arguments as follows:

THE EXISTENCE OF A STATEMENT

At page 12 of its brief the State of Florida "...submits that there was no sworn statement with which defense counsel could have impeached Francis Smith." The State reached that conclusion based upon the fact that "there is no sworn statement of Francis Smith's in the record on appeal..." and "no such statement was introduced at trial." This blatant conclusion by the State that a statement did not exist is unreasonable in light of the representations to the Court made by defense counsel Robert Jacobs:

> MR. JACOBS: Your Honor, I would refer to a statement by Miss Smith under oath on February 11, 1983 supplied by the state attorney. (R-2319)
>
> ***
> MR. JACOBS: ...She gave a sworn statement under oath to the Hillsborough County Sheriff's Department... (R-2320)
>
> ***
>
> MR. JACOBS: Your Honor, for the record she indicated in that statement that she was not with Cary Lambrix from the first to the fifth of February. She did not see him until the ninth of February when he picked her up. That goes to her credibility, Judge. (R-2322)

Judge Stanley acknowledged the existence of the statement, when he indicated:

> THE COURT:... all that statement was about aiding and abetting. I mean now I have read the file." (R-2322)

THE NEED FOR PROPER PREDICATE AND FOUNDATION FOR IMPEACHMENT

It is a long standing rule that a witness may be impeached by evidence of prior declarations or statements inconsistent with or contradicting of the witness' testimony at the trial.

The fact that the witness has previously stated facts differently shows either a failure of memory or a want of integrity, either of which impairs the value of the testimony.

The State of Florida contends that no proper predicate or foundation was laid by defense counsel for impeachment of

Francis Smith by the use of her prior inconsistent statements.

The prosecutor at trial never objected to the lack of predicate. The record shows the prosecutor made four objections during the defense attempt to impeach Francis Smith based upon her previous statement. The first objection:

> MR. McGRUTHER: Objection, Your Honor. May we approach the bench?
>
> THE COURT: Surely. (R- 2319)
>
> MR. McGRUTHER: Judge, first of all, I would like to make counsel very much aware of something. I don't know if the Court is aware or not but at the time that Miss Smith was arrested, she was arrested for aiding a fugitive, Mr. Lambrix, who had escaped from a correctional institution at that point. He is getting dangerously close to some material and I'm advising the Court, I think it is going to have to be his burden. I would object to him trying to impeach based on the testimony... (R-2320)

The prosecutor's first objection, thus appears to be based upon his concerns for "some material" relating to the Appellant's criminal record possibly being disclosed to the jury. The Court ruled:

> THE COURT: (To defense counsel) You may question. But what I'm saying is you know what doors there are. (R-2321)

The prosecutor's second objection (R2321) and third objection (R2322) were based upon the necessity of admission of the written statement itself and not related to a predicate of time, place, or person.

After the proffered cross-examination and defense counsel's

question to the Judge "I can ask the question...?" (R-2325), the Court ruled against the prosecutor's second and third objection by stating that defense counsel could inquire:

> THE COURT: The question you asked and the one question. You stop there... (R-2325)

Before defense counsel could ask his "one question", the prosecutor raised his fourth objection:

> MR. McGRUTHER: Judge, at this point I would object to him even asking. She says she doesn't recall making such a statement. I feel all the jury can do is draw an inference. If he wanted to put the statement into evidence I would be more than happy to do so and let the jury see the stuff about him being in state prison. But for him to ask the question and her to give an answer: No, I don't recall giving a statement, it establishes nothing.

Although the exact nature of the prosecutor's objection is somewhat unclear it appears to be a renewal of the second and third objections that the statement itself should be admitted and does not raise a predicate problem as to time, place, or person.

The Court ruled:

> THE COURT: Whichever way I go on it, it is going to be appealed. I'll just deny the statement and we will proceed here. (Emphasis added)

The Court's ruling to"...just deny the statement..." foreclosed any other use or exposition of it as related to cross-examination by the defense attorney.

The prosecutors first objection related to the defense attorney becoming "dangerously close" to exposing the

Appellant's criminal record. The second, third and fourth objections appear to directly related to the necessity of admitting the statement itself into evidence. The prosecutor did not object to the cross-examination based upon the failure to lay a proper predicate, nor did the Court rule on that ground.

The State's contention that the "only way" to impeach would be through a proper predicate and the calling of a third party to testify to inconsistency, overlooks the most basic, fundamental, and effective means of impeachment---the constitutional right of cross-examination.

The myopia of the State's position is further reflected in the four cases cited, none of which are on point.

Both Bennett v. State, 63 So. 842 (Fla. 1914) and Clinton v. State, 42 So. 312 (Fla. 1907) are clearly distinguishable from the present case in that they involve a conversation between the witness and a third party---not a written statement and not the cross-examination of the key prosecution witness. Appellant's proposition rests upon the restriction of cross-examination of the key witness, which was not an issue in the Bennett and Clinton cases.

Hutchinson v. State, 397 So. 2d 1001 (Fla. 1st DCA, 1981) is not on point. It does not involve the issue of cross-examination of the key prosecution witness. To the contrary it involves the attempted impeachment of a defense witness by a third party. From a defense standpoint the issue of impeaching

a key prosectution witness is obviously much more critical.

Whitley v. State, 265 So. 2d 99 (Fla. 3rd DCA 1972) is vastly different from the Appellant's case. Describing the circumstances, Judge Howell in the opinion stated at page 101:

> ...The statement was not a written one...but only the defense investigator's written recording or memorandum of what he understood the witness to have told him. Perhaps even more importantly...the transcript of the record before this Court shows that both the defendant and the jury had the full benefit of the essential contents of such recording or memorandum, because the investigator was permitted to testify (to its contents).

Since the prosecutor never objected to the cross-examination of Francis Smith for a lack of proper predicate and the Judge never ruled on such an issue, Appellant contends that this is not a real issue in this case. The "straw man" issue of laying a proper predicate is made even less plausible by the four inapplicable cases cited by the State. Appellate contends the true issue is the right to cross-examination---the right to cross-examine a key witness on inconsistent statements. Appellant asserts this right was effectively denied.

HARMLESS ERROR

Finally, the State contended that "if the Court erred...that error was clearly harmless." The position is directly contrary to cases cited in Appellant's initial brief. Cited caselaw clearly indicates that the opportunity for full and complete cross-examination of critical witnesses is fundamental.

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN RESTRICTING THE CROSS-EXAMINATION OF A KEY WITNESS, SPECIAL AGENT CONNIE SMITH.

Appellant agrees with the State of Florida that Section 90.612 (2), Fla. Stat. (1983) regulates the cross-examination of witnesses. That section provides that:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in its discretion, permit inquiry into additional matters.

The issue then becomes: What was "the subject matter of the direct examination" of Special Agent Connie Smith of the Florida Department of Law Enforcement?

Agent Smith was the State's first witness (R1841). Her testimony was lengthy. (R1841-1901). According to her own testimony she was involved in virtually every stage of the investigation:

> (1. The Initiation Of The Investigation)
> A: It was Valentine's Day of last year, on February 14. I was at work. I was assigned to the Tampa office...my supervisor came in and asked me to go to the State Attorney's Office. There was a person there named Francis Smith. (R1843)
>
> (2. The Interrogation of The Key Witness)
> A: She proceeded to report to me that she had assisted a person named Cary Lambrix bury two bodies in LaBelle. (R1844)
>
> (3. Coordination Of The Investigation.)
> A: I made arrangements to have Francis

Smith brought to Fort Myers the following day to be interviewed by Bob Daniels and other investigators...

Q: Were you also present in Fort Myers that day?

A: I was. (R1844)

(4. Crime Scene Coordination)
A: I made arrangements to visit the location that Francis had described for the following day. (R1845)

(5. Participation In Excavation of Graves)

Q:...Agent Smith, I believe that you testified...that you were at the grave site location with various other law enforcement personnel...? (R1851)

A: That's right.

***

A: I assisted in a support capacity...I witnessed four law enforcement officers unearth, recover the bodies of Alicia Bryant and Lawrence Lamberson. (R1852)

***

A: I assisted in securing the area as a crime section and roped it off. (R1854)

***

A: I watched them being...uncovered and then placed in body bags. (R1855)

(6. General Crime Scene Investigation)

Q: Did you go anywhere else at the general site that day?

A: Yes, I did. I went to the trailer, itself, the trailer proper. (R1858)

(7. Interviewing Other Witnesses And Collection of Physical Evidence)

Q: ...I ask you to look at State Exhibit

Number 12...

***

A: A shovel.

Q: Have you seen that shovel somewhere?

A: I have.

Q: Where at?

A: In LaBelle on February 25, 1983.

***

A: I was with a female named Debra Hazel and a male named Preston Branch. The purpose of being in LaBelle was to...recover that. (shovel) (R1865)

(8. Identification of Crime Scene Photographs--R1873-1878)

(9. Preparation of An Investigative Report--Proffer Testimony)

Q: Mrs. Smith, did you fill out a Florida Department of Law Enforcement investigative report in regard to this case?

A: Yes. (R1889)

(10. Recovered Evidence From Deceased's Automobile---Proffered Testimony)

Q: Did you relate in that report that you found a notebook or were given a notebook...

A: Yes.

Q: And that was evidence taken from the car...

A:...Yes.

Q: And you received that notebook?

***

A: Yes. (R1889)

***

Q: Did you also obtain copies of photographs found in...Clarence Lamberson's wallet?

A: Yes.

Q: This notebook and wallet came from the car which my client is alledged to have taken from Mr. Lamberson...?

A: That's correct. (R1890)

Special Agent Connie Smith was significantly involved in this case. She was a primary investigator. She initiated the investigation (R1843); interrogated the State's Key witness (R1844); coordinated the general investigation (R1845); participated in excavation of the graves (R1851); conducted a general crime scene investigation (R1858); and interviewed other witnesses and collected physical evidence (R1865). All of the foregoing were the "subject matter of the direct examination" of this witness. Direct examination specifically related to the investigation conducted by Agent Smith.

Under these circumstances, Appellant contends that he has a right to cross-examine the witness concerning her entire investigation of the case, (not simply the part of the investigation chosen by the State), and that Coxwell v. State, 361 So. 2d 148 (Fla. 1978) at page 151 applies:

> When the direct examination opens a general subject, the cross examination may go into any phase, and may not be restricted to mere parts...or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details

> of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts....

The Court restricted the Appellant's cross-examination and deprived him of a full and complete exposition of the investigation. Such restriction constitutes reversible error under the numerous authorities cited in the initial brief.

CONCLUSION

Upon the reasons and authorities presented in this reply brief and in his initial brief, Cary M. Lambrix asks this Court to reverse his judgment and sentence and remand the case for the relief requested in his initial brief.

Respectfully submitted,

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BY: J. L. Ray LeGrande
J. L. "Ray" LeGrande

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 9th day of May, 1985.

J. L. Ray LeGrande
J. L. "Ray" LeGrande