IN THE SUPREME COURT OF FLORIDA

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JAMES ROGER HUFF,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,695

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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	)	
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	)	
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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The following symbols will be used:

"R" - Refers to the Record on Appeal consisting of the transcript and pleadings from the most recent trial in 1984.

"T" - Refers to the Record on Appeal consisting of the transcript and pleadings from the first trial in 1980.

ARGUMENT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

Appellant is extremely surprised by the refusal of the appellee to concede that the preservation of the crime scene was a crucial issue at trial. Appellant invites this Court to read the record and reach its own conclusion in this regard. Appellant is confident that the issue at trial was an important one at trial and remains so on appeal.

Appellee does concede that an inquiry into the actual police procedures used in processing the crime scene would be relevant. (See Appellee's Brief, page 6) Appellee contends that the testimony of the proffered witness constituted a collateral critique of police procedures in general. Appellant submits that the testimony dealt with a critique of the actual procedures used and not of general police practice. Appellee further contends, "A trial should not be turned into a collateral, irrelevant debate with one expert witness criticizing the opinions or methods of another." Id. In this contention, Appellee relies upon Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1983) and Ecker v. National Roofing of Miami, 201 So.2d 586 (Fla. 3d DCA 1967). Appellant submits that a close reading of these cases reveals that they are not applicable to the instant set of facts. These cases instead hold that it is improper to impeach an expert

witness by eliciting from another expert witness what he thinks of that expert's ability and reputation. This is completely different from allowing an expert to testify about the investigative procedures employed in a police investigation.

Appellee is correct in the assertion that a trial judge should exclude expert testimony where the expert has insufficient knowledge of the facts of the case. This however is required only where the factual predicate submitted in the hypothetical question omits a fact which is so obviously necessary to the formation of an opinion in such an instance that the trial judge may take note of this omission on the basis of common knowledge. Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971). The sufficiency of the facts submitted to the expert must normally be decided by the witness himself, at least in the first instance. Id. Appellant submits that no such obvious fact was omitted in the questions propounded to the expert in the instant case.

Appellee also cites Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983) and Martin v. Story, 97 So.2d 343 (Fla. 2d DCA 1957) for the proposition that experts with insufficient personal knowledge of the facts should not be permitted to testify. Martin v. Story, supra, dealt with an expert witness who admitted that he had no personal knowledge of the use of the so called dangerous instrumentality and that his knowledge was based on a study of his records which were admittedly incomplete. There is no such admission by the witness in the case at bar. Spradley, supra, involved a clearly insufficient predicate concerning a factual issue. The court held that the forensic pathologist was

not qualified to opine that the victim's death was not caused by "accident". This opinion was based solely on his examination of the gunshot wound with no knowledge of whether or not the gun discharged accidentally. Appellant submits that the facts in Spradley are very much distinguishable from the instant facts.

Appellee's final assertion on this point is the conclusion that the witness' opinions had no evidentiary value since he admitted that he did not know if any evidence had been lost, contaminated or disturbed. Appellee's contention completely misses the thrust of the defense at trial. It was Appellant's contention that the improper and incomplete manner in which the crime scene was processed resulted in the destruction or nonpreservation of exculpatory evidence. It does not matter that the expert witness had no direct knowledge of any such lost evidence. As such, the excluded proffered testimony had potentially great evidentiary value for the jury. Its exclusion resulted in a denial of a fair trial.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR ENGAGED IN IMPROPER COMMENT RESULTING IN THE DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Washington v. State, 86 Fla. 533, 98 So. 605 (1924) held that is was not reversible error for the prosecutor to refer to the defendant as a "murderer" when the indictment charged murder and the evidence supported the charge. This Court should note that the comment in Washington was made during closing argument to the jury. At that point, all of the evidence had been introduced and the prosecutor's remark was arguably a justified conclusion drawn from the evidence. At the time of the objectionable comment in the instant case, only four witnesses had been called and their testimony did not strongly support the charge. The comment was made during the first day of a three week trial. Appellee argues that any impact of the comment would have dissipated at this point. Appellant contends that the timing of the epitaph successfully tainted the jury prior to the introduction of the majority of the evidence and such taint never dissipated. The harm resulted from the jury hearing the prosecutor's conclusion of guilt prior to hearing evidence of that guilt. The offensive nature of the remark looms larger as a result.

Appellee's assertion that this error was not preserved is unfounded. Appellant points out that defense counsel

interrupted the prosecutor in the middle of his sentence to point out the improper nature of the remark. (R 734-735) While he did not use the word "objection", it was clear that it was just that, an objection. Wortman v. State, 10 FLW 1283 (Fla. 5th DCA May 23, 1985). Appellant concedes that the motion for mistrial was made following two more questions of the witness. Appellant points out that an objection need not always be made at the moment that questioning enters the impermissible areas of inquiry in order to preserve the error for review. Jackson v. State, 451 So.2d 458 (Fla. 1984). The defense counsel's interruption and assertion that the remark was improper coupled with the motion for mistrial which came shortly thereafter was sufficient to apprise the judge of the error and to preserve the issue for intelligent review on appeal. Id.

In the instant case, the evidence against the appellant was not overwhelming. Appellant submits that where there is nothing in the record from which an appellate court can determine whether the offensive argument contributed to the conviction, reversal is required. Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1960).

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT WHERE THE STATEMENT WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

Appellee submits that the trial court's denial of the motion to suppress was invited by the defense at trial based upon the memorandum of law filed prior to the hearing. (R 3555-3557) Appellant strongly disputes this contention of Appellee. The memorandum of law begins with a recitation of the general rule regarding the doctrine of the "law of the case". The remainder of the memorandum attempts to point out the error in applying the doctrine in the instant case. The main thrust of the memorandum of law was to convince the trial judge to at least hold a hearing on the motion to suppress rather than erroneously deny the motion based upon the law of the case doctrine. It is thus clear that the error below was not invited by defense counsel.

Appellee further contends that the appellant was affirmatively acknowledging that he understood his constitutional rights rather than affirmatively invoking his right to silence. The trial judge agreed with the state's interpretation that the appellant was answering affirmatively that he understood his rights. When defense counsel pointed out specific testimony of Overly that the appellant did not want to talk to him about anything, the trial judge simply stated that his previous ruling would stand. (R 877-881) Overly concluded from his conversation

with the appellant that the appellant did not wish to talk to him about anything. (R 867-870; T 1834-1835) The trial court's conclusion to the contrary constituted an abuse of discretion which is not supported by the record on appeal.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ALLOWING LAY WITNESSES TO GIVE OPINION TESTIMONY CONCERNING AN ULTIMATE ISSUE WHICH THE WITNESSES WERE NOT QUALIFIED TO GIVE THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

A. The testimony of Francis Foster as to how the circumstances of the killings that the appellant relayed to Foster did not "look right".

Appellee contends that since Francis Foster had already testified without objection that he told his son that, "This thing don't look right...", any further testimony clarifying Foster's meaning of this statement was harmless error. In Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980), it did not seem to matter that four (4) police officers testified on rebuttal that they knew the general reputation of the defendant for truth and veracity, and that it was bad. Each was then asked if he would believe the defendant under oath and each answered in the negative. These latter questions were objected to by the defendant. The harmless error doctrine was not applied in Bowles and Appellant can see no distinction between that case and the instant set of facts. Appellant likewise does not accept Appellee's contention that it was incumbent upon the appellant to object again and to move to strike the testimony. This "rule" was not applied in Bowles, supra, nor should it be applied to the instant case.

B. The testimony of Mabry Williams that he believed that the appellant was guilty of the murders.

Appellant must first strongly contest Appellee's suggestion in a footnote that Mabry Williams must have

misunderstood the question, "Isn't true that the entire investigation was conducted in such a way as to justify the arrest of Mr. Jim Huff?", to which Williams replied in an affirmative manner. (R 1301) There is absolutely nothing in the record to suggest that Williams misunderstood the question or that his answer was inexplicable.

Appellant also contends that this testimony was not proper rebuttal for the defense theory that evidence was not properly preserved at the scene. The opinion of one of the chief homicide investigators as to Appellant's guilt or innocence is completely different from a suggestion that no evidence of an individual's innocence was found. Appellant did not open the door in his examination of Mabry Williams. Any motion for mistrial or request limiting instruction would have been a futile act in light of the trial court's overruling of Appellant's timely and specific objection.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S IMPROPER COMMENT REGARDING THE CREDIBILITY OF A WITNESS THUS RESULTING IN A DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

Appellee sees no difference between the prosecutor's and the defense attorney's methods of cross-examination. Appellant contends that there is a substantial and significant difference between the two methods. The prosecutor engaged in a method which forced the witness to call other witnesses liars if their testimony differed from the witness at hand. Appellant submits that this type of questioning is beyond the competence of any witness, since that witness cannot know the reason for another witness' answer. The contradiction may be a result of faded memory, lack of perception, a possible misunderstanding of the question, or deliberate fabrication. Appellant submits that no witness can determine which of these reasons result in an answer that is contradictory to their own testimony.

Appellant disagrees with Appellee's assertion that defense counsel engaged in the same method of cross-examination. Defense counsel did not ask witnesses if other witnesses had lied in their testimony, but rather asked if that testimony was incorrect. See Appellee's brief, page 18. Appellant submits that a vast difference exists between these two methods of questioning, especially when viewed by a jury of laymen who are not accustomed to watching different styles of cross-examination.

While it is true that Murray v. State, 425 So.2d 157 (Fla. 4th DCA 1983) was reversed by this Court [State v. Murray, 443 So.2d 955 (Fla. 1984)], the key point of inquiry is whether or not the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230 (Fla. 1979). This Court must determine whether or not the error was indeed harmless. State v. Murray, 443 So.2d 955, 956 (Fla. 1984).

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW THE COURT BELOW ERRED IN NOT GRANTING THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE ONLY EVIDENCE OF THE APPELLANT'S GUILT WAS CIRCUMSTANTIAL AND THE CIRCUMSTANTIAL PROOF ADDUCED AT TRIAL DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

While premeditation may be established by circumstantial evidence, inferences originally drawn from the evidence must not only be consistent with guilt but inconsistent with any reasonable hypothesis of innocence. Oats v. State, 446 So.2d 90 (Fla. 1984). The prosecution in Oats introduced similar fact evidence to rebut the defendant's contention in his confession that the murder was an accident. The evidence was used to show intent, common scheme, and absence of accident. In Heiney v. State, 447 So.2d 1010 (Fla. 1984) the evidence of premeditation included the fact that seven (7) blows with a claw hammer were administered to the victim's head. The beating continued until the victim's brain was pulped, his ear lacerated, his skull severely fractured, and his eye completely exploded. Appellant submits that the evidence as to premeditation in the instant case is insufficient as a matter of law. This argument is especially applicable to the death of Appellant's father.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING PREJUDICIAL AND IRRELEVANT CROSS-EXAMINATION OF THE APPELLANT THUS DEPRIVING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Appellant contends that this point has been adequately preserved for review despite Appellee's assertions to the contrary. Defense counsel stated that the line of questioning was outside the scope of direct examination and was the subject of attorney-client privilege. (R 2684) He then objected at the bench and moved for mistrial based upon the exchange. (R 2684) During argument at the bench, lead defense counsel stated that these questions had been objected to from the beginning and reiterated the fact that the defense wished to have a standing objection to all questions outside the scope of direct examination. (R 2685) The trial court stated that the objections should be contemporaneous and defense counsel reiterated the fact that there was currently an objection before the court. (R 2685) It should be noted that the objection and motion for mistrial were based on the exchange between the prosecutor and the appellant that had already occurred. When the parties agreed to assert the attorney-client privilege in the presence of the jury, the prior motion for mistrial certainly cannot be deemed to have been waived. In fact, the trial court denied the motion for mistrial after the agreement had all ready been reached. (R 2686) Despite the subsequent invocation of the privilege in front of the jury, the prosecutor pursued the improper

questioning and defense counsel was forced to enter the same objection. (R 2686-2687) Certainly this point has been adequately preserved for appellate review.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING THE TIMELY DEFENSE OBJECTION AND ALLOWING THE STATE TO IMPROPERLY INTRODUCE EVIDENCE RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO CONFRONTATION OF WITNESSES AND TO DUE PROCESS OF LAW.

Despite Appellee's contention, Appellant admitted in the initial brief that Overly's memory was refreshed somewhat. See Appellant's initial brief, page 55. Appellant's contention was based upon the fact that Overly's memory was not actually refreshed in its entirety, thus he had no independent recollection at the time of trial regarding the specific rights of which he advised the appellant upon his arrest. This resulted in the prosecutor actually reading certain questions and answers from the transcript of Overly's prior statement where Overly's memory was not actually refreshed. This established the predicate upon which the court ruled Appellant's statement admissible and upon which the jury determined the voluntariness of the statement.

Appellant still maintains that the proper procedure was not followed either under the past recollection recorded or present memory refreshed exception to the hearsay rule. Finally, while there is some confusion regarding the transcript which the prosecutor used at trial, Appellant still submits that the transcript was apparently of a hearing on the motion to suppress prior to the first trial and not a deposition. This is a minor and unimportant point anyway.

POINT XIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF A KEY STATE WITNESS REGARDING HIS BIAS AND MOTIVE IN VIOLATION OF APPELLANT'S RIGHT OF CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

Appellant maintains that Sheriff Johnson was a key witness at his trial. Sheriff Johnson testified that the appellant made a "confession" to him shortly after Appellant's arrest at the crime scene. As such, Sheriff Johnson's testimony cannot be termed unimportant.

Appellant also disputes Appellee's contention that the only basis of the objection below related to credibility. The issue of bias and motive on the part of Sheriff Johnson was set forth in the written memorandum of law filed by the defense at the trial court's request as an aid in ruling on this issue. (R 1062-1064, 3652-3653) Appellee cannot legitimately contest the fact that these grounds were raised in a timely fashion. The written memorandum filed prior to the trial court's ruling on this issue certainly encompasses bias and motive as the grounds for the proffered testimony. (R 1062-1063, 1071-1072, 3651-3654) It is true that a trial court may limit cross-examination regarding motive for testifying where the facts relied upon are too remote to show such motive. The defense theory in the instant case was based upon the contention that Sheriff Johnson's testimony was motivated by his desire to successfully solve these two capital murder cases and in focussing on that as a campaign issue

rather than the controversial issue regarding the allegations of sexual misconduct. (R 2238-2239) The Huff murders occurred some four months after the administrative investigations were completed in close proximity to an election in which Sheriff Johnson was defeated. (R 1065-1068) As such, the facts relied upon in the proffered cross-examination were not too remote to show such motive.

POINT XVI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WITHOUT THE PRESENCE OF THE APPELLANT THEREBY DENYING HIM HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellee seems to dismiss much of Appellant's argument on this issue as being not preserved through any objection at trial. Appellant submits that his absence in any portion of the proceedings below may constitute fundamental error. In the recent opinion of Brown v. State, 10 FLW 263 (Fla. May 2, 1985), this Court reversed a conviction of first degree felony murder and sentence of death and remanded for a new trial where Brown was not personally present at a deposition to perpetuate the testimony of one of the state's witnesses. It is interesting to note that the identical situation is present in the instant case. On April 25, 1984, the state filed an application for an order to perpetuate the testimony of Paul Moore due to physical illness. The certificate of service reveals that the application was furnished to Appellant's defense counsel and to the court reporter. There is no indication that the appellant personally received the application. (R 3424) The trial court issued an order to perpetuate the testimony pursuant to Florida Rule of Criminal Procedure 3.190(j). (R 3427) The minutes of the hearing of April 24, 1984, note that the defendant waived his right to be present during the taking of the deposition of Paul Moore. (R 3429-3430) No transcript of this motion hearing is

contained in the record on appeal. At the beginning of the deposition for the perpetuation of the testimony, Appellant's counsel states that the appellant waived his presence in open court the day before. (R 3505)

Appellant submits that a defendant's right to be present at all phases of his trial could be analogized to the procedural right to have instructions on necessarily included lesser offenses given to the jury. Appellant submits that for an effective waiver there must be an express waiver of the right and the record must reflect that it was knowingly and intelligently made. See Harris v. State, 438 So.2d 787 (Fla. 1983). Additionally, Appellant points out that the state in the instant case did not comply with Rule of Criminal Procedure 3.190(j) which appears to be mandatory in nature such that the appellant should have been brought to the deposition by the officer having custody. cf. Brown v. State, supra.

CONCLUSION

Based upon the cases, authorities and policies, cited herein and in Appellant's initial brief, Appellant respectfully requests the following relief:

As to Points I, II, III, IV, V, VI, VII, IX, X, XIII, XIV, XVI and XVII, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for a new trial.

As to Point VIII, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for discharge or, in the alternative, remand with instructions to enter a judgment and sentence for a lesser included offense.

As to Points XI and XII, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for a new trial or, in the alternative, for an evidentiary hearing.

As to Point XV, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for discharge or, in the alternative, remand for an evidentiary hearing on the intent of the prosecutor at the first trial.

As to Points XVIII and XIX, Appellant respectfully requests that this Honorable Court vacate the sentences and remand for imposition of two life sentences.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and Mr. James Roger Huff, Inmate No. A075985, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 4th day of June, 1985.

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
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