IN THE

Supreme Court of the State of Florida

Case No. 66,204

ANTHONY RAY PEEK,
Appellant,

versus

STATE OF FLORIDA,
Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
STATE OF FLORIDA

EDWARD S. STAFMAN, Esq.
Attorney at Law
P.O. Box 11112
Tallahassee, FL 32302
(904) 224-6558

Attorney for Appellant

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

ANTHONY RAY PEEK,

Appellant,

vs. Case No. 66,204

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S REPLY BRIEF

EDWARD S. STAFMAN, Esq.
Attorney at Law
P.O. Box 11112
Tallahassee, FL 32302
(904) 224-6558

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I. THE TRIAL JUDGE'S REFERENCE TO APPELLANT'S FAMILY AS "NIGGERS" DENIED APPELLANT A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Because the trial judge referred to Appellant's family as "niggers," Appellant sought not only his disqualification, but simultaneously sought a new trial based upon that racial comment (R-1238-1243). Appellant does not herein complain about the judge's recusal, but contends that he was entitled to a new trial because the judge's remarks give both the appearance of injustice and resulted in actual injustice. Judge Norris denied the motion for new trial (R-1251) and it is this ruling that was error.

The State pretends that the reference to Appellant's family as "niggers" did not occur, but the fact is that two sworn witnesses independently heard it (R-1399), one of whom is an officer of the Court and only reluctantly admitted that he heard it. No witness has ever said that it was not said.[1] Under the State's approach, a trial judge could sentence a person solely because of his race, admit it off the record to witnesses, and there would be no remedy for the defendant other than the judge's recusal from future proceedings. Appellant asserts that where two reliable witnesses submit affidavits and testify under oath that the trial judge called Appellant's family "niggers," this Court may not, as the State would have this Court do, simply pretend that it did not occur.

---

[1] While the State is correct that the judge need not comment on the allegations of a motion seeking his recusal, the State could have called him as a witness in a motion for a new trial.

The State's fallback position that, even if the comment was made, the trial was essentially fair and thus there was no prejudice, is abhorrent. Essentially, the State would have this Court condone a trial court's overt racism as evidenced by his racial remark, unless the defendant can point to resulting prejudice to him. This is not the law nor should it be. Rather, the undeniable appearance of injustice has always required reversal, with or without actual prejudice. Offut v. U.S., 348 U.S. 11, 14 (1954); In re Murchison, 349 U.S. 133, 136 (1959); Potts v. State, 430 So. 2d 900, 903 (Fla. 1982); State v. Lewis, 80 So. 2d 685 (Fla. 1955); Driessen v. State, 431 So. 2d 692 (Fla. 3rd DCA 1983); Scott v. Anderson, 405 So. 2d 228, 234 (Fla. 1st DCA 1981); State v. Steele, 348 So. 2d 398, 401 (Fla. 3rd DCA 1977); Anderson v. State, 287 So. 2d 322, 324-25 (Fla. 1st DCA 1973).

As one court explained, "the use of the word 'nigger' . . . is discrimination per se." Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984). The use of the term "nigger" has no place in the civil treatment of a citizen. City of Minneapolis v. Richardson, 239 N.W. 2d 197, 203 (Minn. 1976).

Moreover, the instant record contains more than a hint that actual prejudice existed. The judge's cavalier attitude regarding the admission of the inadmissible Williams Rule testimony is but one example.[2] One does not know if the same indifference would be shown to a white defendant. The exercise of judicial discretion in the numerous evidentiary rulings made in the course of the trial is another instance where racial prejudice could

---

[2] In deciding to allow this evidence, the judge decided to "let it all hang out" since he would not "be on the criminal bench anyway if and when this thing is reversed" (R-249, 1399).

affect the result. Significantly, the record contains few evidentiary disputes in which the defense prevailed.

It would be an impossibility to point to any one of the above rulings and say with certainty that it would have been different but for the judge's racial attitude as evidenced by his remark. But, it would be wrong and we submit, unconstitutional, to place that burden on Appellant. Rather, the racial remark must, in and of itself, require reversal.

In the final analysis, an affirmance of this conviction would cause public outrage at the Florida judiciary and would take our State and our jurisprudence one hundred years backwards. Death penalty opponents all over the country would be able to point to this case as a perfect example to support their contention that Florida's courts are not racially neutral. This Court has an obligation to protect the integrity of the process and Appellant respectfully suggests that nothing less than a complete reversal would accomplish that goal.

II. THE PROSECUTOR'S USE OF FOUR PEREMPTORY CHALLENGES TO EXCLUDE ALL BUT ONE BLACK FROM THE JURY, WITHOUT EXPLANATION, DENIED APPELLANT A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY AND A JURY COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

Despite the fact that the instant case is controlled by State v. Neil, 457 So. 2d 481 (Fla. 1984), the State argues that that case should not apply because it does not authorize retroactive relief. State's Brief at 13. Surely the State is aware of the unanimous holdings of the cases from this Court and the District Courts of Appeals which conclude that Neil applies to those cases which, like the instant one, were pending at the time

Neil was decided.[3] Andrews v. State, 459 So. 2d 1018 (Fla. 1984); Franks v. State, 10 F.L.W. 798 (Fla. 4th DCA 1985); Jones v. State, 10 F.L.W. 528 (Fla. 3rd DCA 1985); see City of Miami v. Cornett, 10 F.L.W. 283 (Fla. 3rd DCA 1985); Hoberman v. State, 400 So. 2d 758 (Fla. 1981). In each of these cases, which, like the instant one, was pending when Neil was decided, the courts have reversed and remanded for a new trial on the basis of Neil. Moreover, the issue was timely raised below and Appellant should be entitled to the same benefits of the law as was Neil.

The State also contends that Appellant failed to object to the prosecutor's systematic exclusion of blacks from the jury. While counsel did not use the word "object," he plainly was complaining and seeking relief from the court. The obvious question raised by the State's argument is why did counsel "note for the record," and want "the record to reflect" the systematic exclusion of blacks from the jury if he was not complaining of the prosecutor's actions. The judge made his feeling on the issue known at the outset. As defense counsel stood to complain, the judge inquired: "You're going to make a speech" (R-386). The sarcastic question is an obvious indication that the judge believed there was nothing improper about the prosecutor's use of his peremptories. Unlike Francois v. State, 407 So. 2d 885 (Fla. 1981), defense counsel's failure to use the word "object" was not a "tactic." Rather, counsel noted his complaints for the record because the trial judge had made his feelings on the issue plain.

Lastly, the State's contention that Appellant failed to demonstrate that the challenged persons were challenged solely

---

[3] It is interesting that the State failed to cite these cases.

because of their race is unavailing. The defendant need only show that "the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." Neil at 486. In turn, this showing should trigger a trial court inquiry of the prosecutor's motives. Id.

The prosecutor's use of his peremptory challenges in this case may be analogized to a drawing from a bag containing 26 white balls and 5 black balls. With eyes closed, someone is asked to randomly draw nine balls (one for each peremptory challenge exercised). The person draws 5 of the 26 white balls and 4 of the 5 black balls. Simple laws of probability will tell us the probability of such a combination occurring by chance. The data is as follows:

	Total	Whites	Blacks
Persons Summoned to Jury Box	31	25-26*	5-6*
Persons Removed by Court	1	1	0
Persons Challenged by State	9	4-5*	4-5*
Persons Challenged by Defense	9	9	0
Actual Composition of Jury	12	11	1

From this data, a simple chi square analysis[4] yields the following results (the results are shown for both sets of data since there is one challenged juror whose race we do not know):

---

* The uncertainty here is due to the fact that the record does not reflect the race of the first two jurors challenged. See note 7 of Appellant's main brief.

4 The Court is requested to take judicial notice of the chi square results which were computed using the standard chi square formula. Chi square analyses, of course, are well-accepted by the courts when statistical questions are raised.

	White	Black	Chi Square	Probability of Chance Occurrence
Universe	26	5		
Drawing	5	4	6.96782	.00834
Universe	25	6		
Drawing	4	5	10.0583	.00197

Thus, even in the light most favorable to the State, the probability that the prosecutor's exercise of his peremptories was not based upon race is less than 1% (0.834%). This amounts to virtual conclusive proof that race played a role in the prosecutor's challenges. At the very least, the court should have required him to explain his actions.

At the very least, this is a situation where it cannot be said with certainty whether the trial court would have found discrimination. If so, this would require reversal:

> We cannot tell . . . whether or not the trial court would have found that Neil had shown a sufficient likelihood of discrimination in order for the court to inquire as to the state's motives. . . The bottom line . . . is that we simply cannot tell.

Id. at 487.

Thus, despite the State's argument, the State's exercise of its peremptory challenges to exclude blacks requires reversal.

III. THE TRIAL JUDGE ERRED AND APPELLANT WAS DENIED A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BY THE FAILURE TO GRANT HIS MOTION TO DISMISS, HIS MOTION FOR DIRECTED VERDICT, AND HIS MOTION FOR NEW TRIAL, WHERE THE CIRCUMSTANTIAL EVIDENCE FAILED TO ESTABLISH HIS GUILT BEYOND A REASONABLE DOUBT AND WAS NOT INCONSISTENT WITH APPELLANT'S REASONABLE HYPOTHESIS OF INNOCENCE

The State's contention that the evidence was stronger here than in the first trial is laughable.

The most significant piece of evidence against Appellant and the only one placing him at the scene at the first trial was the

hair evidence and the probability statistics pertaining to that hair evidence. As Judge Dewell explained in his order granting a new trial, that evidence showed that it was "99.98 percent certain" that Appellant was at the house. That evidence turned out to be a lie. Just as the State used that perjured testimony to deceive the first jury and this Court, it now seeks to mislead the Court again by pretending that without that evidence, its case is nevertheless stronger because it now has the meaningless and inadmissible Williams Rule testimony.

Appellant acknowledges that if admissible, the Williams Rule testimony may be used in deciding the issue of the sufficiency of the evidence. However, the question for this Court is whether the State's proof was inconsistent with every reasonable hypothesis of innocence. Jaramillo v. State, 417 So. 2d 257 (Fla. 1982); McArthur v. State, 351 So. 2d 972 (Fla. 1977). In this case, the Williams Rule testimony may be another "circumstance," albeit one of dubious weight and value, but it says nothing about Appellant's reasonable hypothesis of innocence. Indeed, it says absolutely nothing about whether Appellant committed this crime.

Some of the State's brief on this issue is extremely misleading. For example, the State writes:

> Try as appellant may, he cannot escape the fact that two juries, two trial judges and four justices of this court have already found **this** evidence not only convincing, but justifying the sentence of death.

Brief at 17 (emphasis supplied). This is a distortion. The first jury, trial judge, and the four justices of this court did not examine the truth, but relied upon a now-proven lie which all

but positively indicated Appellant's presence at the victim's home. That lie has been shown to be a lie and it is for this reason that Appellant was given a new trial. Moreover, Appellant submits that the second jury and trial judge found him guilty again, not based upon sufficient and competent evidence, but, inter alia, upon the inflammatory prejudices arising from the improper use of Williams Rule testimony, improper and illegal jury composition, and the exclusion of relevant evidence.

The State makes much about the fact that Appellant told the police that he had not been to the park where the car was found. It makes perfect sense that a person on probation would not admit to the police his involvement in an auto burglary. The statements of the police that Appellant said he had not been to the park do not, as the State argues, show that the fingerprints were placed upon the car at any time or in any place. It only shows that Appellant, not surprisingly, lied to the police when asked about it.[5] The State writes:

> Understandably, appellant would want this court to reject his statements to [the police] . . . and accept his trial version of the events.

Brief at 19. This is not true. Appellant admits he told the police that he was not at the park and does not ask this Court to reject that statement. Rather, Appellant seeks that this Court recognize it for what it is and for what it is not: it shows he lied to the police; it does not show when, how, or where the fingerprint was placed upon the car.

To escape the rule of law that the police testimony about

---

[5] Appellant's lie to the police was not nearly as preposterous as the State's use of perjured testimony at the original trial.

Appellant's statement to them may not be considered as substantive evidence, Smith v. State, 379 So. 2d 996, 997 (Fla. 5th DCA 1980), the State cites to Moore v. State, 452 So. 2d 559 (Fla. 1984), and writes:

> inconsistent statements **made under oath** can be used as substantive evidence. Since appellant himself, under oath, testified that he had told the three officers he had never been to [Lake] Martha Park, his testimony could be considered as substantive evidence.

Brief at 20 (emphasis supplied). This argument is convoluted.

First, one of Appellant's arguments in this issue is that the trial court erred by failing to grant him a judgment of acquittal at the close of the State's case. In reviewing that ruling, the Court may not consider Appellant's testimony since it was not introduced as part of the State's case.

Second, while Appellant's testimony was under oath, his prior statment to the police was not made under oath or at a proceeding. As this Court explained in Moore, supra, in order to be admissible as substantive evidence, the **prior statement** (not the subsequent testimony about the prior statement) must be made under oath and at a trial, hearing, or other proceeding. Appellant's prior statement was not made under oath and a police interrogation is not a proceeding within the meaning of the statute. Robinson v. State, 455 So. 2d 481 (Fla. 5th DCA 1984). For both of these reasons, Appellant's prior inconsistent statement may not be considered as substantive evidence of his guilt.

The State's brief steers clear of the fundamental issue: the fact that its proof is not inconsistent with Appellant's reasonable hypothesis of innocence. It is entirely reasonable that the events could have happened just as Appellant says. His alibi

defense is compelling and once the chaff is discarded, the case consists of a lone explained fingerprint on a car found a mile away from the victim's home the day following her murder. The State's assertion that Appellant's guilt has been proven with "mathematical certainty," Brief at 18, only demonstrates the State's need for a remedial math course. The evidence is plainly insufficient to sustain Appellant's conviction. Jackson v. Virginia, 443 U.S. 307 (1979); Jaramillo v. State, 417 So. 2d 257 (Fla. 1982); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

IV. THE TRIAL JUDGE'S ADMISSION OF EVIDENCE OF ANOTHER CRIME WHICH HAD NO SIMILARITY WITH THE CRIME CHARGED AND WHICH SEVERELY PREJUDICED THE JURY AGAINST APPELLANT, ADMITTED BASED UPON THE TRIAL JUDGE'S FEELING THAT "IT SHOULD ALL HANG OUT" AND THAT HE WOULD NOT BE ON THE CRIMINAL BENCH IN THE EVENT OF REMAND, VIOLATED FLORIDA'S EVIDENCE CODE AND DENIED APPELLANT A FAIR TRIAL AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The State's argument in support of the admissibility of the detailed account of the Jamison rape is perhaps the most serious perversion of law and logic in its brief.

The State first argues that evidence of the Jamison rape was admissible because Appellant's arrest for that offense led police to him. State's Brief at 23. There is little record support for this assertion. However, even assuming arguendo that Appellant's arrest for the Jamison rape lead police to him, this would make relevant and admissible only the fact that he was a suspect because he was under arrest for a rape. It would not make admissible the detailed testimony of the crying rape victim concerning the various sex acts performed upon her, how he removed her clothing, and the like. These facts have no bearing on how Appellant became a suspect.

The State's second argument is difficult to follow. It recognizes that State v. Drake, 400 So. 2d 1217 (Fla. 1981) controls, but argues that the facts of the Jamison rape may be introduced to corroborate an identification or to show something other than identity. State's Brief at 25. However, unlike the cases relied upon by the State, the Jamison rape was not introduced to corroborate another identification, State v. Maisto, 427 So. 2d 1120 (Fla. 3rd DCA 1983),nor was it used to show motive, Heiney v. State, 47 So. 2d 210 (Fla. 1984), nor was it used to rebut an assertion of a non-violent character. Squires v. State, 450 So. 2d 208 (Fla. 1984). Rather, as in Drake, "purely and simply, the similar facts evidence in this case tends to prove only two things -- propensity and bad character." Id. at 1219.[6]

The State goes on at length in its brief about its notion of what the law should be. Indeed, it would adopt a rule that would deem admissible any evidence of another offense and dismiss even radical differences with its explanation that the defendant did not have the opportunity to do the same thing to both victims, without regard to the existence of record support for same. Thus, the State's assertion that the only reason that Appellant did not murder Jamison was because of lack of opportunity, State's brief at 30, is ridiculous and not supported. Under this theory, every rapist is a murderer denied the opportunity.

After the lengthy harangue about irrelevant points, the State, in one paragraph, identifies the supposed similarities between the two offenses. As has been shown, none of these so-

---

[6] Appellant submits that this testimony was introduced also to inflame the jury with perhaps the most inflammatory of all crimes in the South: the rape of a white woman by a black man.

called similarities, either individually or in combination, are unusual so as to make them legally relevant. Drake, supra. Appellant submits that he can randomly select two crimes committed by different individuals and always find the types of similarities identified here. To adopt the State's position would be to announce a new rule of law which would authorize the testimony of victims of every other crime a defendant has committed.

Turning to the supposed similarities identified sheepishly in the last paragraph of the State's argument, one sees they are false similarities. True, both victims were women, but does this show identity? Both were sexually assualted, but this says nothing about who murdered Carlson, especially when there are no unique circumstances to the sexual assualts. Indeed, Carlson was severely beaten before her death and Jamison was not: this would seem to indicate two very different attackers.

True, in both cases, entry was made through a screen door. If this is pertinent, criminal defendants must begin to introduce differences such as the different colors of victims' houses, whether there is carpet or wood floors, and whether the victim had a fireplace or a wood stove. This, like all of the supposed similarities, is just another ruse. Indeed, one entry was forced; the other was not. The State explains that the Jamison door was opened and so there was no opportunity to force the door, but it is equally and perhaps more likely that while Appellant was willing to enter an open door, he was unwilling to break and enter a home. There is simply no record support for the State's suppositions. In fact, many homes have screen doors. This fact says nothing about the identity of the assailant.

The State says that in both cases, the assailant sought

money throughout the house. This is true with respect to the Jamison case, but there is no evidence of this in the Carlson case. Nor is it true that in both cases the contents of the victims' purses were strewn throughout the house. In the Jamison case, Appellant emptied the purse's contents on the bed (R-704); in the Carlson case, the victim's purse was found on the floor with a change purse alongside it (R-498-99). Again, there is nothing particularly unique about these facts. In fact, in one case, car keys were stolen, in the other, money was the motive.

Lastly, the supposed similarity of the fingerprint is difficult to discuss with a straight face. As has been explained, Appellant's palmprint was placed on Jamison's car as he hurdled it while running at gunpoint. This is hardly a similarity.

Balanced against the above are the numerous dissimilarities between the offenses, not the least of which are the radical difference in the age of the victims, the use of a weapon in one and not the other, the significant differences in time of day and location of the crimes, the uniqueness of the Carlson strangling, the beating of one victim and not the other, and the testimony of an expert forensic psychologist that it is very unlikely that these two crimes were committed by the same person.

This case is a perversion of the Williams Rule.[7] The evidence was admitted because the judge decided to "let it all hang out" since he would not be on the bench when this Court reverses. Appellant is serving a life sentence for the Jamison rape and has now been given a death sentence for it. Reversal is required.

---

[7] Even if the Court were to find that the Jamison rape showed identity, the admission of this evidence became a feature of the trial and was thus improper. See cases at page 48 of main brief.

V. THE TRIAL JUDGE'S EXCLUSION OF EVIDENCE THAT THE SUPPOSEDLY SIMILAR CRIME WAS TOTALLY DISSIMILAR WITH THE CRIME CHARGED WAS ERROR AND DENIED APPELLANT A FAIR TRIAL, AND THE RIGHT TO PRESENT EVIDENCE IN HIS OWN DEFENSE

The State argues that Dr. Norman's testimony was properly excluded because it was "laughable." State's Brief at 32. Appellant is unsure from where the State's counsel obtained his degree in forensic psychology so as to qualify him to challenge, let alone berate, Dr. Norman's testimony. Surely, the personal opinion of counsel that he does not believe the testimony is not grounds to exclude it.

Just as the Assistant State Attorney below missed the point and argued that an expert opinion on guilt or innocence is inadmissible, so does the State in its brief. We painstakingly explained that Dr. Norman's opinion was offered not to show guilt/innocence, but to rebut the Williams Rule testimony by showing that in the opinion of a forensic psychologist, the two crimes were unlikely to have been committed by the same person.

Dr. Norman's testimony was far more probative than much of the State's evidence. For example, the State's blood evidence showed that Appellant, as well as better than one third of the population, could have committed this crime. This evidence has almost no probative value. The Williams Rule evidence similarly had no probative value but suggested guilt by predisposition. At the least, Appellant was entitled to counter that suggestion with scientific evidence that the crimes were wholly different and were most probably committed by different types of individuals. The erroneous exclusion of this evidence requires reversal.

IX. THE PROSECUTOR'S QUESTIONING OF APPELLANT ABOUT THE EXERCISE OF HIS RIGHT TO REMAIN SILENT IN A PREVIOUS CASE VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS

In apparent recognition of the error in the prosecutor's grilling of Appellant regarding the exercise of his right to remain silent, the State responds only that Appellant failed to object. Admittedly, there is no objection in the record. However, while there was no objection below, once the prosecutor's comment was made, it was too late, and "neither rebuke nor retraction would have cured the error." Under those circumstances, this Court has long held that the error is fundamental and reversible, the lack of an objection notwithstanding. Willinsky v. State, 360 So. 2d 760 (Fla. 1978); Wilson v. State, 294 So. 2d 327 (Fla. 1974); Grant v. State, 194 So. 2d 612 (Fla. 1967); Ogelsby v. State, 23 So. 2d 558 (1945); Simmons v. State, 190 So. 756 (Fla. 1939). This error, too, requires reversal.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set out in our main brief, the judgment and sentence entered herein must be reversed.

Respectfully submitted,

EDWARD S. STAFMAN, Esq.
P.O. Box 11112
Tallahassee, FL 32302
(904) 224-6558
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by United States Mail upon Charles Corces, Assistant Attorney General, on this 15th day of May, 1985.

Edward S. Stafman