IN THE SUPREME COURT OF THE STATE OF FLORIDA

JUDIAS BUENOANO A/K/A
JUDY ANN GOODYEAR,

APPELLANT,

V. CASE NO. 68,091

STATE OF FLORIDA,

APPELLEE.

APPEAL FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT

REPLY BRIEF OF APPELLANT

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LIST OF CITATIONS

ISSUE I

I. THE TRIAL COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE WITH REGARD TO ARSENIC POISONING OF BOBBY JOE MORRIS AND ATTEMPTED POISONING OF JOHN GENTRY.

Appellee cites Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985) in support of its contention that similar fact evidence regarding arsenic poisoning in Bobby Joe Morris and the attempted paraformaldehyde poisoning of John Gentry were admissible. As Appellee says, that case holds that arsenic poisoning is a sufficiently unusual modus operandi to warrant the introduction of collateral crime evidence. But, the Court specified arsenic and did not say just any kind of poisoning was sufficiently unusual.

There the Court held arsenic poisoning was a sufficiently unusual modus operandi to warrant the introduction of collateral crimes evidence, Appellant was indicted and tried for first degree murder by arsenic poisoning. The State introduced evidence of another attempted murder by arsenic poisoning. The Court said similar fact evidence is not admissible where the collateral crime is merely similar to the crime for which the Defendant is on trial, citing Crammer v. State, 391 So.2d 803 (Fla. 2nd DCA 1980). To be admissible the Court said:

> ". . .there must be something so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to independently establish that he committed the crime charged." Green v. State, 427 So.2d

1036 (Fla. 3rd DCA) pet. for rev. denied, 438 So.2d 834 (Fla. 1983)."

The case of Nelson v. State, 450 So.2d 1224 (Fla. 4th DCA 1984) deals with similar symptons in two women and both were consistent with the same poison, and Nelson had purchased aconitine poison. The symptons were consistent with that poison.

There is no evidence this Appellant purchased either arsenic or paraformaldehyde poison, but the symptons of Bobby Joe Morris and John Gentry were not the same and the results of the two poisons were quite different also. Arsenic could kill, but the dose of paraformaldehyde Gentry was receiving would not cause death.

> ". . .the test for admissibility is not that there be greater similarity than dissimilarity between the crimes. Rather, as we stated in Green v. State, 427 So.2d 1036 (Fla. 3rd DCA), pet. for rev. denied, 438 So.2d 834 (Fla. 1983), 'the similar crimes test is a stringent one: there must be something so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged.'" Bricker v. State, 462 So.2d 556 (Fla. 3rd DCA 1985)

The evidence concerning the attempted poisoning of John Gentry does not meet that test. The modus operandi, independent of an identification of Appellant by Gentry, would not establish that she committed the crime.

In Green v. State, supra, evidence of other crimes was admitted in the trial of Appellant, an attorney. Appellant was tried for grand larceny arising out of financial

transactions involving two of her former clients.

Evidence was presented of a transaction between Appellant and a former client for which Appellant was not on trial. The Third District Court said the similarities were that both the crimes for which Appellant was on trial and the similar crime evidence introduced involved transactions between a lawyer and a client whereby the latter entrusts the former with funds.

The Court said there were these general similarities, but no features of the prior transactions which were so unique as to be a "fingerprint type" characteristic.

The District Court in Hodges v. State, 403 So.2d 1375 (Fla. 5th DCA 1981) gives a lengthy discussion of similar fact evidence. The Court said:

> "Evidence of particular bad acts to show the accused's character as evidence of his commission of an act is inadmissible because of: (1) the undue prejudice from the over-strong tendency of a jury to believe an accused guilty because he is a likely person to have done such an act, (2) the undue prejudice from the tendency to condemn because the accused may have escaped unpunished from other offenses, and (3) the unfair surprise and injustice in charging one with one offense and collaterally attacking him with other wrongs for which he may be unprepared to defend. Over the last three centuries this policy of exclusion of bad character evidence has received judicial sanction more emphatic with time and experience."

One of the major problems with the collateral crimes evidence in this case is overlooked by Appellee. There was no evidence Appellant administered arsenic to

Bobby Morris. The only reason it appears she did is because all the cases are thrown in together and you are then inclined to believe "she must have done it".

As previously argued, this is definitely not proper use of the Williams Rule evidence. This is pyramiding assumption on assumption.

In Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1964), the similar fact evidence introduced was much like that introduced in this case concerning Bobby Morris. As in Norris, the only proven similarity between the deaths of Goodyear and Norris was that arsenic was found in each body and that it was possible for Appellant to have administered it.

The Norris Court discussed at length the case of Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854, which closely paralleled the facts in the Norris case. The Wrather Court said:

> "Without going so far as to hold, with some of the Courts, that the proof of the independent crime must be 'beyond a reasonable doubt', we approve the rule that, to render evidence of an independent crime admissible, the proof of its commission and of the connection of the accused on trial therewith, must be not 'vague and uncertain', but clear and convincing. Obviously, an absolute essential is that (1) a former crime has been committed, and (2) committed by the identical person on trial. Only thus can identification, or other proof of guilt, of the accused in the pending case be aided by evidence of the independent crime."

One only has to review the evidence presented concerning the death of Bobby Morris, without a prejudiced mind, and notwithstanding the fact that Mr. Goodyear also died of arsenic poisoning, to realize that there was no evidence of a crime at all, much less evidence Appellant committed that crime.

In addition to the admission of the extraneous crimes evidence being improperly admitted in this case, there is the very great probability that, in addition to it ensuring a conviction, it influenced the jury to vote for the death penalty.

If the ultimate penalty were not to be considered in this case, it could be the Court feels there is sufficient evidence without the similar fact evidence. But in view of the severity of the punishment, any doubt Appellant may have had a fair trial should be resolved in her favor.

ISSUE II

II. THE COURT ERRED IN FAILING TO DIRECT A VERDICT OF ACQUITTAL BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT JAMES E. GOODYEAR DIED OF ARSENIC POISONING AND, INDEPENDENT OF CONFESSION AND SIMILAR FACT EVIDENCE, DID NOT PROVE THE CORPUS DELICTI.

A set of facts can always be viewed two ways. Of course Appellee argues the corpus delicti was proved independent of the confession and similar fact evidence.

The State says she had a motive, insurance and an

uunhappy marriage, refused to hospitalize Goodyear, concealed the actual cause of death, and made a prior statement about a potential cause of death which was consistent with the actual cause of death.

In the mind of a young girl, Debbie Sims, it may have appeared Appellant refused to take her husband to the hospital. But a review of the infirmary records shows he had been going to a doctor and apparently, if they did not see the need to hospitalize Mr. Goodyear, Appellant may have been inclined to wait a couple of days to see if he got better. She did take him to the hospital so you could hardly say she refused to do so.

Again, Connie Lang testified she felt Appellant and James Goodyear had "grown apart" (R-462-463) and that was about the extent of her explanation of Appellant's unhappy marriage. There was no mention of any fights or trouble between the two.

Almost any military wife would collect insurance upon the death of her husband. There was nothing unusual about the insurance and it was not a large amount.

The joke about putting poison in their husband's food could hardly be called proof of the corpus delicti.

And how could one conceal a cause of death if you don't know what the cause of death was?

These facts do not make a prima facie case.

ISSUE III

III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BASED ON THE GRATUITIOUS COMMENT BY A WITNESS WHICH ACCUSED DEFENDANT OF ANOTHER CRIME IRRELEVANT TO ANY ISSUE FOR WHICH SHE WAS BEING TRIED.

There is a recognized exception to the requirement that errors be timely asserted. The exception is fundamental error.

> "For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process. State v. Smith, 240 So.2d 807 (Fla. 1970)."

Because the statement made by Mary Owens concerns another crime, it would not be admissible. The same harm is effected when evidence of this type is put before the jury even through a gratuitous statement of a witness.

This evidence of another crime coupled with the similar fact evidence admitted in this case denied Appellant a fair trial. The result could not be considered harmless.

ISSUE IV

IV. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY DURING THE SENTENCING PHASE OF TWO FORMER PROSECUTORS CONCERNING DETAILS OF TWO OTHER CRIMES AS DEFENDANT DID NOT HAVE A FAIR OPPORTUNITY TO REBUT THEIR HEARSAY TESTIMONY.

Appellant agrees that the Courts in this State

allow testimony giving details of a separate crime rather than just the bare fact of conviction. But those details should be accurate. In this case they were not.

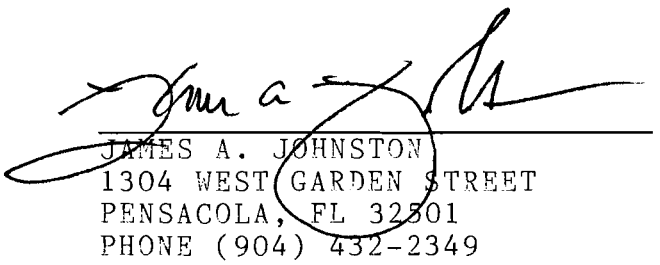
Surely there is some boundary within which this type testimony must remain.

The purpose, Appellee says, for considering aggravating and mitigating circumstances is to engage in a character analysis of the Defendant. Presentation of an inaccurate analysis cannot contribute to uniform treatment and help eliminate total arbitrariness and capriciousness in the imposition of the death penalty.

CONCLUSION

Appellant could not have received a fair trial with the similar crimes evidence and evidence of another crime from a witness. Further, Appellant should be entitled to a new sentencing because of the unfair and prejudiced testimony of two prosecutors concerning two other crimes.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Appellant's Reply Brief has been furnished to Margene A. Roper, Assistant Attorney General, Fourth Floor, 125 North Ridgewood Avenue, Daytona Beach, FL 32014, by regular U. S. Mail on this 19th day of December, 1986.

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