IN THE SUPREME COURT OF FLORIDA

BRYAN F. JENNINGS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,835

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT II

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 FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

The two motions for post-conviction relief should have been admitted into evidence. Appellee maintains that Clarence Muszynski admitted to the falsity of the statements contained in the motions. Therefore, Appellee contends that the motions do not qualify as extrinsic evidence of a prior inconsistent statement by a witness under Section 90.614(2), Florida Statutes.

Although Muszynski admitted that he lied in the motions for post-conviction relief, the written motions were still extrinsic evidence of a prior inconsistent statement by Muszynski and should have been admitted under the pertinent statute. This occurred when defense counsel asked:

> Q. These documents were signed by you under oath, were they not?
>
> A. I don't know about oath, all I did was sign them.
>
> Q. You signed them in front of a Notary, did you not, sir?
>
> A. Yes, sir.
>
> * * *
>
> Q. Mr. Muszynski, there is a paragraph that appears before your signature on both of these documents, is there not?
>
> A. Uh-huh.
>
> * * *

THE COURT: Without objection, read them, Mr. Howard.

Q. Before me, the undersigned authority, this date, personally appeared Clarence J. Muszynski who first being duly sworn, says that he is the defendant in the above-styled cause, that he has read the foregoing motion for post conviction relief, has personal knowledge of each of the facts and matters contained therein, as set forth and alleged, and that each and all of these facts and matters are true and correct. Then your signature appears.

A. Yes, sir.

Q. A similar statement appears on the other motion, does it not, sir?

A. Yes, sir.

Q. . . . At the time you filed these motions in 1981 and 1982, you swore that the facts were true and correct.

* * *

Q. You signed the documents under oath swearing that they were true and correct, did you not, sir?

A. I wasn't under oath.

Q. Did you hear me just read that?

A. Yes, but I didn't - -

Q. What did you think that was?

A. Well, no one said under oath to me, I didn't have it read to me. I mean, it was on the paper, but no one read it to me, said, raise your hand, you are under oath, and all that. (R662-664)

Even if this Court accepts Appellee's argument, it still remains that the motions do constitute extrinsic evidence of a prior inconsistent statement by Clarence Muszynski. He

testified at trial that he was not under oath when he made these false allegations contained in his motions for post-conviction relief. The written documents constituted extrinsic, tangible evidence that contradicted trial testimony that he was not under oath. Therefore, the motions were evidence that should have been allowed under Section 90.614(2), Florida Statutes. Additionally, Appellant does not abandon his arguments made in the initial brief concerning this point.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN OVERRULING TWO TIMELY AND SPECIFIC OBJECTIONS AND ALLOWING PREJUDICIAL AND IRRELEVANT TESTIMONY CONCERNING THE VICTIM.

Appellant fails to grasp Appellee's classification of this evidence as relevant. Appellant would have not objected to testimony that the father had gone to the school searching for his daughter. That was all the jury needed to hear. The jury did not need to hear the father testify that his little-six-year old daughter had learned to read faster than any one in her class. As a result, she was selected narrator of the school play and was so excited about it that she read the entire story to her father the night before her murder.. She was unable to fill that role due to her untimely death. The jury heard more than relevant evidence, they heard extraneous appeals to their emotions. Certainly, even the Appellee would agree that any slight probative value would be outweighed by the extreme prejudice. Section 90.403, Florida Statutes.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING INTO EVIDENCE A LETTER PURPORTEDLY WRITTEN BY THE APPELLANT.

Appellant disagrees with Appellee's assessment of the record on appeal. Appellant argued at trial that the destroyed letters were under the control of the State, who had notice that they would be needed at trial. (R752) Appellee states that the trial court rejected this argument by Appellant, "in effect recognizing that the letters had been in control of Sylvain and not the State (R752)." (Appellee's brief pp. 23-24.) The trial court responded to Appellant's argument, "I'm going to overrule you on that point. Let's go to the next point." (R752) Appellant does not read this ruling as being a rejection of Appellant's statement of the fact that the State had control of the original.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S ACTION IN OVERRULING A TIMELY AND SPECIFIC OBJECTION AND PERMITTING THE PROSECUTOR TO ENGAGE IN IMPROPER ARGUMENTS AT THE PENALTY PHASE THEREBY PREJUDICING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant submits that a motion for mistrial following the trial court's action in overruling Appellant's timely and specific objection would have been a futile act and was therefore unnecessary. Appellant lodged a contemporaneous objection which was sufficiently specific to apprise the judge of the error and to preserve the issue for intelligent review. Jackson v. State, 451 So.2d 458 (Fla. 1984). Appellant's contemporaneous objection was overruled and, at that point, Appellant had done all that he was required to do to bring the error to the attention of the trial court. Simpson v. State, 418 So.2d 984 (Fla. 1982). "No purpose would be served by requiring a futile motion for mistrial after the trial court has already overruled the defendant's contemporaneous objection." Id. at 986.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN IT BECAME CLEAR THAT THE JURY WAS CONSIDERING IMPROPER MATTERS DURING DELIBERATIONS AT THE PENALTY PHASE.

During their deliberations at the penalty phase, the jury asked, "Are we permitted to know the basis of the first retrial and this retrial, if so, what are they?" (R1704) Appellee states that the jury was seeking information regarding the prior trials which was not within their knowledge. Appellee concludes that, since the jury did not know the answer to the question, they could not improperly consider that information. (Appellee's brief p. 35.)

Appellant agrees that the jury probably did not know the basis for the previous reversals by this Court. However, it is clear that the jury did know that Jennings had been tried for this offense on two previous occasions. This is clear from the examination of the three jurors who received extrajudicial communications about the case, as well as the written question by the jury. These considerations are what Appellant finds objectionable. The jury was considering the fact that this was Bryan Jennings' third trial. This consideration arose in spite of the trial court's admonitions to at least three of the jurors.

Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986) is a recent case which is helpful in the consideration of this

issue. Cappadona was convicted of first-degree-murder in 1981. That conviction was overturned on appeal resulting in a second trial. Shortly before that trial began, a newspaper article detailed some of the evidence adduced at the first trial and revealed that Cappadona had been convicted and sentenced. On voire dire, three jurors admitted reading the article but testified that this would not prevent them from rendering a fair and impartial verdict. A motion for mistrial was denied and the trial court admonished the jury on several occasions to disregard media reports. As in the instant case, a written question to the trial judge from the jury room supported the suspicion that all of the jurors, not just the three directly exposed to media influence, were tainted with the knowledge of Cappadona's prior conviction. The District Court of Appeal, Fourth District, concluded that the subjective influences that arose from the jury's knowledge of Cappadona's prior conviction imposed a burden on his defense which was "an intolerable dilution of the presumption of innocence to which he was constitutionally entitled." Id. at 1208. The District Court also quoted United States v. Williams, 568 F.2d 464 (5th Cir. 1978) wherein the court reasoned that, "Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." Id. at 470,471.

The information was just as damning at the penalty phase in the instant case. The jury was obviously considering these irrelevant and prejudicial matters in spite of the court's admonitions. The jury's disregard of the trial court's

instructions in the first instance is evidence that they probably disregarded the reinstruction. Improper considerations by the jury during their deliberations denied Appellant his right to a fair trial. The motion for mistrial should have been granted.

POINT XII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO TIMELY DISCHARGE AN ALTERNATE JUROR AND IN ALLOWING THAT JUROR TO RETIRE WITH THE REST OF THE JURY AT THE PENALTY PHASE.

Appellant submits that fundamental error does not require a contemporaneous objection. Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974). Furthermore, it is not abundantly clear that the alternate in the instant case was not present during at least part of the jury's deliberations. If this Court is of the opinion that no reversible error would occur if deliberations had not commenced by the time the alternate was retrieved from the jury room, an evidentiary hearing may be required to determine the duration and sequence of events. Appellant submits that the record on appeal reflects the non-excusal and presence of an alternate in the jury room after the jury retired to consider its verdict. If the length of time is a consideration for this Court, an evidentiary hearing would be helpful.

CONCLUSION

Based upon the cases, authorities, and policies, contained herein and in the initial brief, Appellant respectfully requests that this Honorable Court grant the following relief:

1. As to Points II,III and VII, vacate the judgments and sentences and remand for new trial;

2. As to Points X, XI and XII, reduce Appellant's death sentence to a life sentence or, in the alternative, vacate Appellant's death sentence and remand for a new penalty phase;

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the Honorable Jim Smith, Attorney General, 125 Ridgewood Ave., Daytona Beach, FL 32014 and to Bryan Jennings, #073045, Florida State Prison, P.O. Box 747, Starke, FL 32091, on this 5th day of January 1987.

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS