IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,484

CLEO DOUGLAS LeCROY,

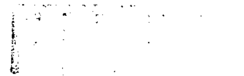
Appellant,

v.

STATE OF FLORIDA,

Appellee.

______________________/



DEC 10 1987

CLERK, SUPREME COURT

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APPELLANT'S REPLY BRIEF AND ANSWER BRIEF OF CROSS-APPELLEE

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Statement of the Case and Statement of the Facts are adequately set out in prior briefs.

POINTS INVOLVED

I. THE COURT ERRED IN REFUSING TO SUPPRESS SO MUCH OF THE APPELLANT'S STATEMENT AS FOLLOWED A WARNING WHICH NOT ONLY MISLEAD HIM BUT ALSO CALLED ATTENTION TO HIS FAILURE TO TESTIFY.

II. THE COURT ERRED IN EXCLUDING EVIDENCE THAT THE CODEFENDANT SAID HE WAS THE LAST ONE TO SEE THE VICTIMS ALIVE.

III. THE COURT ERRED IN PUTTING APPELLANT TO TRIAL ON ROBBERY CHARGES WHICH DID NOT ALLEGE AN INTENT TO PERMANENTLY DEPRIVE.

IV. FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED TO APPELLANT.

V. THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

VI. THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE FEELINGS OF THE VICTIMS' FAMILY AND IN HEARING FROM THEM HIMSELF.

VII. THE COURT ERRED IN SENTENCING APPELLANT FOR ROBBERY WHERE THE JURY EXPRESSLY FOUND HIM GUILTY OF FELONY MURDER DURING THAT ROBBERY.

VIII. THE COURT ERRED IN IMPOSING CONSECUTIVE MINIMUM MANDATORY SENTENCES IN CONNECTION WITH ROBBERIES WHICH WERE ALLEGEDLY PART OF THE SAME CRIMINAL TRANSACTION.

CROSS APPEAL

IX. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE AS TO FALSE STATEMENTS JON LeCROY MADE ABOUT HIS BROTHER IN APPELLANT'S PRESENCE.

SUMMARY OF ARGUMENT

Where a statement is made in the presence of the accused which he would naturally be expected to deny if it were false, an admission by silence may arise. That was not true here because the Jon LeCroy was described as talking about what his brother had done, not what Appellant had done. As many LeCroy brothers as there are, the statement was not such as to call for a response from Appellant. Further, the statements attributed to Jon were demonstrably false because the physical evidence contradicted them, and therefore properly excluded.

ARGUMENT POINT I

THE COURT ERRED IN REFUSING TO SUPPRESS SO MUCH OF THE APPELLANT'S STATEMENT AS FOLLOWED A WARNING WHICH NOT ONLY MISLEAD HIM BUT ALSO CALLED ATTENTION TO HIS FAILURE TO TESTIFY.

The State urges this Court not to reconsider its ruling, claiming there is no manifest injustice here. It reaches that conclusion only by pretending the refresher advice does not call attention to failure to testify. That is not a viable pretense when the advice so pointedly refers to his testimony "if and when this matter goes to Court".

Having been placed in the untenable position of giving up either his right to be free from adverse comment highlighting his failure to testify on his right to have the jury hear everything necessary to determine voluntariness of his statement, Appellant is now told his decision is binding and waives his right to complain. His complaint is against having to make the choice, and is properly preserved by timely objection.

Though not quite so pointed, the comment that Appellant would have to con a jury is certainly fairly susceptible of interpretation by the jury as calling attention to failure to testify before them. It was objected to as highly prejudicial (R2644) and no excision was even offered.

The State also takes issue with the indicia of involuntariness attending Appellant's statements. However, there was certainly enough for the jury to have excluded the statements as involuntary if they believed Appellant was inexperienced and befuddled, and had been mislead as to the purpose of the statement. Further, contrary to the State's contention, coercion does not have to come from the questioner. Thus, where a suspect becomes aware he is threatened with mob violence, the threat comes from outside. Nonetheless, in Ward v. Texas, (1942) 316 U.S. 547 at 555, 86 L.Ed 1663,62 S.Ct 1339, the Court noted that threatened mob violence is a factor held to render a statement involuntary. At least one of the threats Appellant described here was clearly directed at him, and the general mood must have seemed exactly like a threat of mob violence, especially to one so young and impressionable.

This case is not so overwhelming as the State suggests. If

Appellant said only the incriminating things attributed to him, the case against him would be stronger. However, he said many other things, some demonstrably false, concerning the bodies. There was also a strong suggestion that he may have been accepting the blame for his brother or others. Further, Roger Slora's credibility was so tainted by his desire to transfer prisons that the jury may well have discounted everything he said. Finally, there were things he did not know that the killer should have known, like the type of guns he allegedly used.

In these circumstances, the second statement was not harmless. Though he continued to describe John's death as accidental, he gave more detail about reflection before shooting Gail. He also told police what he did with the pistol and where to find the rifle, all of which helped tighten the case against him. It can not be said beyond a reasonable doubt that the second statement and the evidence it produced did not contribute to these convictions, and that is the test for harmless error, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Likewise, when the jury heard taped statements in which police twice told Appellant he'd have to testify before them, yet they did not hear from him, the harmful effect in a case like this is not so easily calculated. The jurors may well have thought Appellant should have explained the many incongruities in his statements after hearing him exhorted so often. The State can not demonstrate the absence of harm.

After what this Court said about full appellate review of death sentences in Preston v. State, 444 So.2d 939 at 942 (Fla. 1984), it can hardly refuse to reconsider this issue. It can and should reverse with directions to exclude the statement tainted by the refresher advice and excise from the earlier statement the comment about conning a jury.

ARGUMENT POINT II

THE COURT ERRED IN EXCLUDING EVIDENCE THAT THE CODEFENDANT SAID HE WAS THE LAST ONE TO SEE THE VICTIMS ALIVE.

The State says Jon LeCroy's admissions as to when he last saw the victims were properly excluded. It calls his statements ambiguous, unreliable and untrustworthy, and notes the requirement of Section 90.804 (2) (c) Fla.Stat. -- corroborating circumstances must show the trustworthiness of such statements.

Appellant finds ample corroborating circumstances in the facts which the jury did hear, to wit: Jon said he would lead searchers straight to the bodies, and did so, he was allegedly supposed to cut the bullets out of the bodies, he was the last to return to camp on the day of the shootings, his friend ended up with the victims' pistol and he demanded payment for the victims' rifle when it was offered for sale. Indeed, when the State claims the exclusion was harmless because the jury heard other evidence implicating Jon, it seems to be conceding the existence of corroborating circumstances.

It is not inappropriate to ask the State to explain how Jon's sometimes contradictory statements can be too unreliable and untrustworthy for admission, but Appellant's own very contradictory statements can be overwhelming proof of his guilt. Appellant submits that Jon's statements were admissible. Further, the exclusion was harmful, particularly since the jury never heard that Jon said he was the last person to see the victims alive.

The State also says Jon's statements which implicate both defendants are inadmissible, but could have been introduced if the defense had succeeded on this point. However, there is nothing in the rejected proffers to suggest that the statements the defense wanted in implicated both defendants. Nor is there any suggestion in Ards v. State, 458 So.2d 379 (Fla. 5DCA 1984) that admission of a declaration against penal interest authorized admission of other, inadmissible hearsay to give "the full picture", and Appellant is unaware of any such authority. In any event, this is speculation. What is clear is that Jon's declarations against penal interest were improperly excluded, for which a new trial is required.

ARGUMENT POINT III

THE COURT ERRED IN PUTTING APPELLANT TO TRIAL ON ROBBERY CHARGES WHICH DID NOT ALLEGE AN INTENT TO PERMANENTLY DEPRIVE.

Here again, Preston v. State, supra, requires review of this point to afford Appellant full appellate review, particularly since this Court did not review this issue when this case was before the Court earlier.

The State claims this Court had jurisdiction to review this issue earlier because the acceptance of jurisdiction authorizes review of all issues, citing Tillman v. State, 471 So.2d 32 at 34 (Fla. 1985). Were that so, it would not preclude review under Preston, supra. Further, The State has overlooked that acceptance of the State's petition for review may allow the State to raise all issues in the case, but it does not authorize the adverse party to seek affirmative relief in the absence of a cross-petition. No petition or cross-petition was filed by Appellant as to the ruling of the Fourth District. Because of the availability of full appellate review upon conviction, it undoubtedly would have been inappropriate to file such a petition on an interlocutory order upholding sufficiency of the charging document.

Appellant concludes that he has the right to review now, and to reversal of his robbery convictions. His charge is not just imperfect, as Appellee's cited cases concede -- it is subject to dismissal.

ARGUMENT POINTS IV AND V

FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED TO APPELLANT.

and

THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

Issue is fairly joined on most of the matters asserted here. Appellant will simply note the following:

As for the age factor, the State argues for a case by case approach in reliance on Trimble v. State, 478 A.2d 1143 (Md. 1984) and similar decisions. However, the law is replete with arbitrary age limitations bssed on the perceived lack of youthful maturity. The maturity to vote, to visit a dog or horse race or to possess alcohol are considered wanting. In many states, including Florida, such maturity is deemed lacking until age twenty-one.

The State notes the requirement of Section 39.02(5)(c)(1) to treat a juvenile charged with a capital offense as if he were an adult. However, that can be achieved by a life sentence. To refuse to inflict the extreme penalty on those under eighteen would be in keeping with the purpose of Chapter 39 -- to protect the child. To allow the death of a minor would not only be inhuman but it would also be freakish because it is so seldom applied to juveniles.

If this Court wishes to preserve the option for the rare youth whose maturity warrants it, it should not apply the penalty to Appellant. Even if this Court accepts the State's arguments and keeps all the aggravating circumstances, it has before it a very immature young man at the time of the offense. For one horrible criminal episode which generated all of his aggravating circumstances, death is too great a penalty. The State cites robbery-murders by young adults to show the penalty is proportional, but the cases of robbery-murders by juveniles have produced life sentences, as

in Brown v. State, 367 So.2d 616 (Fla. 1979) and Thompson v. State, 328 So.2d 1 (Fla. 1976). Those are the pertinent cases, and they require reversal of Appellant's death sentence.

ARGUMENT POINT VI

THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE FEELINGS OF THE VICTIMS' FAMILY AND IN HEARING FROM THEM HIMSELF.

The State claims the Judge did all that was required of him in the face of repeated improper comments by the prosecutor. The State is mistaken. The firt cautionary instruction was all that was asked of him, but he refused a second instruction and did not even sustain the final objection. Lawyers and judges may know what it means when an objection is sustained, but jurors are not so knowledgeable. Having just been told to disregard a comment, they may think they can consider anything they are not told to ignore.

The conduct of the prosecutor in the face of repeated admonitions and sustained objections can only be characterized as intentional misconduct. He was not simply commenting on the frailties of the victim as in Muehleman v. State, 503 So.2d 310 at 317 (Fla. 1987). The comments here were not relevant to any statutory aggravating circumstances, but were simply blatant appeals for sympathy for the victims.

Though a single comment may be harmless, as in Johnson v. State, 442 So.2d 185 at 188 (Fla. 1983), the comments here were repeated. Combined with the prior improper reference to the presence of the father of the victim in the courtroom, and the closeness of the vote, the absence of prejudice can not be assumed.

As for the victim impact statements, the jury may not have heard from them, but Booth v. Maryland, 482 U.S. ____, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987) still requires reversal. The Judge here said the relatives' statements counted (R3822), as they had to. In Patterson v. State, Case No. 68,608, opinion of this Court filed October 15, 1987, 12 FLW 528 at 531, this Court ordered a new sentencing hearing where just one relative testified in this manner before the Judge alone. A new sentencing is clearly required here where the same error occurred over and over again.

ARGUMENT POINT VIII

THE COURT ERRED IN IMPOSING CONSECUTIVE MINIMUM MANDATORY SENTENCES IN CONNECTION WITH ROBBERIES WHICH WERE ALLEGEDLY PART OF THE SAME CRIMINAL TRANSACTION.

The issue here is how closely the alleged offenses are linked in time and place. Citing cases where one crime occurred indoors and the other outdoors, the State claims these are separate and distinct offenses for minimum mandatory purposes. However, this is not a case where anyone went in or outdoors.

What happened here happened basically in one place, off the third finger road at Brown's farm. Four hundred feet is nothing in such an area. Though there are separate victims, we know from Palmer v. State, 438 So.2d 1 (Fla. 1983) that does not justify consecutive sentences. Nor does the fact that one location could not be seen from the other. In State v. Ames, 467 So.2d 994 (Fla. 1985), crimes occurring in separate rooms were still but one episode.

The significant point here is that the sentences which have been run consecutively are for crimes at the same place within a short time. As in Wilson v. State, 467 So.2d 996 (Fla. 1985), one murder is allegedly related to the other (here by the desire to avoid prosecution). This criminal episode does not justify consecutive sentences.

CROSS APPEAL

THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE AS TO FALSE STATEMENTS JON LeCROY MADE ABOUT HIS BROTHER IN APPELLANT'S PRESENCE.

The State wanted to use statements allegedly made by Jon LeCroy to Richard Freshour in Appellant's presence. Its theory is that Appellant would have protested if the statements were not true.

There is such an exception recognized in cases like Privett v. State, 417 So.2d 805 (Fla. 5DCA 1982) and Tresvant v. State, 396 So.2d 733 (Fla. 3DCA 1981), but it does not apply here for two reasons.

First of all, the statements described by Freshour are statements by Jon that his brother shot people (R2249, 2250). They do not refer to Appellant by name, and there are too many LeCroy brothers to infer identity.[1] Thus, the statements did not require a reply from Appellant.

Secondly, the underlying theory of the State is that the statements must be true or Appellant would have denied them. But, the Judge, the prosecutor and everyone in the courtroom knew the statements were false. No bullets had been cut out of these bodies. Thus, the underlying theory for admission is wrong. That is another reason Judge Harper gave for excluding the evidence. The trial Judge is afforded a broad discretion in ruling on admission of evidence, Welty v. State, 402 So.2d 1159 at 1163 (Fla. 1981, and he did not abuse that discretion in this instance. Regardless of the outcome of the plenary appeal, the cross-appeal should be denied.

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[1] Mrs. LeCroy said other brothers included Daniel and Charles (R3581) Charles testified at sentencing (R3610).

CONCLUSION

Based on the foregoing, and the reasons and authorities cited in his initial brief, Appellant is entitled to a new trial with his brother's admissions and without the statements which implicate his right not to testify. New sentencing hearings are also required, but the cross-appeal should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to JOY SHEARER, Esquire, Assistant Attorney General, Room 204, 111 Georgia Avenue, West Palm Beach, Fla. 33401 this 7th day of December, 1987.

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