IN THE SUPREME COURT OF FLORIDA

WALTER GRANT KYSER,

Appellant,

v.

CASE NO. 69,736

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Walter Kyser relies on his initial brief to reply to the arguments advanced in the State's answer brief except for the following additions on Issues I, II AND IV.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING KYSER'S INCRIMINATING STATEMENTS IN EVIDENCE BECAUSE THEY WERE OBTAINED DURING CUSTODIAL INTERROGATION AFTER KYSER HAD ASSERTED HIS RIGHT TO REMAIN SILENT AND REQUESTED COUNSEL.

The State first asserts that Kyser's request for counsel was equivocal, and as a result, the detectives were free to continue their interrogation about the crime. (State's brief, pages 4-6) This position is factually and legally without merit. Walter Kyser's request for counsel was unequivocal.(R 1168) Although he used the words "I think I want to talk to a lawyer", his meaning was clear. Detective Miller understood the request and stopped questioning Kyser about the offense.(R 1168-1169) Furthermore, the clarity of the request was never in issue in the trial court. The State never asserted during the motion to suppress hearing any lack of clarity in Kyser's words.(R 1097-1222) Even if Kyser's request for counsel was equivocal, the detectives were not free to interrogate; questioning is then limited to clarifying the request. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984);

Long v. State, No. 67,103 (Fla. November 12, 1987); Valle v. State, 474 So.2d 796 (Fla. 1985).

The State's reliance on Waterhouse v. State, 429 So.2d 301 (Fla. 1983) is misplaced. That case does not hold that interrogation may continue after an equivocal request for counsel. In fact, the opinion expressly recognizes that questioning is then restricted to clarifying the request. Ibid. at 305. Instead, Waterhouse involves a defendant making an equivocal request for counsel followed by his reinitiating further questioning on the subject of the crime. Waterhouse expressly invited the detectives to return to his cell to continue the interview. Kyser did not initiate any questioning in this case (R 1136-1137, 717, 1171-1172, 1221-1222), and Waterhouse is not applicable. Although the State suggests that Kyser did reinitiate questioning on the crime in order to give exculpatory statements (State's brief, page 7), the evidence does not support this position. Detective Boren testified that he began questioning Kyser about the homicide during his second interview.(R 1136-1137) Kyser was reluctant to talk.(R 1145) Boren interviewed Kyser for several hours before he was able to lead Kyser into the subject of the homicide.(R 1145) It was at that point in Boren's lengthy interrogation that Kyser was convinced to talk to his wife on the telephone and to give exculpatory statements.(R 1137-1153) This is certainly not an example of a defendant reinitiating contact with the police envisioned as an exception to the bright-line rule announced in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 278 (1981).

The violation of Edwards occurred when Boren first began the interview. All of Kyser's statements made after that point, including the ones to Detective McKeithen in the separate interview (R 717-727, 1171-1172), should have been suppressed.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING KYSER'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE WAS INSUFFICIENT TO SUBMIT THE CASE TO THE JURY ON FIRST DEGREE MURDER UNDER EITHER A PREMEDITATION OR FELONY MURDER THEORY.

The State suggests that the medical examiner's testimony, Kyser's flight and the circumstances of the shooting are sufficient to establish Kyser's guilt of first degree premeditated murder.(State's brief at pages 9-10) This argument is without merit since each of these factors is consistent with Kyser's statement about how the homicide occurred.

Dr. Sybers testimony and the nature of the wounds do not refute Kyser version of the shooting. As noted in Kyser's initial brief (pages 28-30), the location of the wound and the absence of bruising or abrasions on Moore's neck and head area is consistent with an accidental shooting during an attempt to strike Moore. Citing Griffin v. State, 474 So.2d 777 (Fla. 1985), the State also argues that the type of bullet used is evidence of premeditation. In Griffin, bullets of high penetration ability were used. Here wadcutter ammunition was allegedly involved. (R 681-685, 698) Wadcutter bullets do not have high penetration ability since they are made of soft lead and designed for target practice.(R 684) These cartridges usually carry a lighter gunpowder charge and the flat nose of the bullet is designed to make clearer holes in paper targets.(R 683-684) They are not designed to be particularly

lethal. Furthermore, the State's own witnesses, established that Kyser was given the ammunition; he did not deliberately buy bullets because of special qualities about them.(R 497, 521)

Kyser's flight after the homicide and his alleged admission about being afraid of returning to prison do not evidence guilt of first degree murder. Of course, flight can imply guilt, but it does not imply degree of guilt. Hall v. State, 403 So.2d 1319 (Fla. 1981), discussed in Kyser's initial brief on pages 31 through 32, involved a similar scenario. Deputy Coburn confronted Hall and his codefendant. The confrontation resulted in Coburn's shooting death and the defendants fled and participated in a gun battle with pursuing officers. Nevertheless, this Court concluded that the evidence did not establish premeditation. Kyser's flight is of no greater evidentiary value. The State's contention to the contrary is invalid.(State's brief at pages 9-10)

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AND IMPANELED A NEW JURY FOR PENALTY PHASE WHEN THE FOREMAN OF THE JURY WAS EXCUSED FROM SERVICE BECAUSE OF HIS DAUGHTER'S ATTEMPTED SUICIDE.

After Kyser filed his initial brief, this Court decided Jennings v. State, 512 So.2d 169 (Fla. 1987) which contains a similar issue to one presented here. Jennings is distinguishable, however, and does not control this case.

In Jennings, a juror announced, after the jury had been sworn, that she had feelings about the death penalty which would impair her ability to sit during penalty phase. The State did not object to her sitting on the guilt phase but raised an objection to her participation in penalty phase. Defense counsel did not object to the juror's continued service during either the guilt or penalty phases of the trial. He also refused to stipulate to the juror's being replaced for penalty phase. The juror served during guilt phase, but the trial court replaced her with an alternate for the penalty phase of the case. This Court held that substituting the alternate juror for the primary juror before the commencement of penalty phase was not reversible error. The primary juror would have been excused for cause had her revelation occurred during voir dire. And, the fact that the alternate juror had not deliberated with the remainder of the panel during guilt phase did not prevent the juror from making a sound decision. 512 So.2d at 172-173.

This case is distinguishable from Jennings. First, the basis for excusing juror Schlief did not arise until after the guilty verdict.(R 923) Kyser did not have the opportunity to have an alternate seated before deliberations and thereby insure his right to have a penalty phase jury composed of jurors who had participated equally in the decision-making process. In Jennings, the defense was aware of the fact that the primary juror would not be able to sit in penalty phase before the jury deliberated guilt. By not objecting to the juror's continued service during guilt phase, Jennings gave up the right to have penalty jurors who had participated equally in the deliberations.

Second, unlike Jennings, substituting the alternate juror who had not participated in the guilt phase portion of the deliberations did prejudice Kyser's sentencing. A portion of the mitigating evidence presented was another version of how the homicide occurred.(R 946-955) Consequently, unlike a typical penalty phase where new evidence about who committed the homicide is not presented, the jury in this case was again faced with evaluating evidence related to degree of guilt. Guilt phase deliberations on the strength of the evidence would again be relevant to decision on penalty. Without having the benefit of the those deliberations, the alternate juror would be on an unequal footing with the remainder of the jury. Although the penalty vote was eight to four, it cannot be said that the change in jurors would not have made a difference. Schlief was the foreman of the jury and may very well have had

persuasive influence over more than his single vote. It is impossible to determine how he would have voted or how he would have influenced others on the jury. However, his vote and one other would have made a difference. Instead of a fully participating juror, Kyser was forced into penalty phase with a juror who lacked both the experience and the influence derived from having deliberated guilt. His sentencing recommendation was tainted, and he is entitled to a penalty phase heard by jurors participating equally in the decision-making process.

CONCLUSION

For the reasons presented in this reply brief and in the initial brief, Walter Grant Kyser asks this Court to reverse his judgment and sentence and remand for a new trial. Alternatively, he asks that his conviction for first degree murder be reduced to second degree murder or that his death sentence be reduced to life imprisonment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing reply brief by hand delivery to Assistant Attorney General Gary Printy, The Capitol, Tallahassee, Florida, 32301, this 30 day of November 1987.

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