IN THE SUPREME COURT OF FLORIDA

RUDOLPH HOLTON,

Appellant,

vs. Case No. 69,861

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

Polk County Courthouse
P.O. Box 9000--Drawer PD
Bartow, Florida 33830
(813) 534-4200

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant, Rudolph Holton, will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief. He does, however, challenge a misstatement of the facts by Appellee which appears at page *42* of Appellee's brief where it is asserted that "Newsome was jailed at the time he heard Holton confess". There was no confession by Holton to Newsome. The only alleged confession in evidence was that to which state witness Flemnie Birkins testified.

SUMMARY OF ARGUMENT

The State's reliance upon an inference that evidence known to the State but not presented to the jury supported Holton's conviction must be examined in light of whether the essential fairness of Holton's trial was compromised. Where, as here, the witness was essential to the State's case, there was a lack of corroboration for the witness' testimony and the witness was extensively impeached, the State's repeated assertion that the witness "knew facts that only the murderer would have known" destroyed the essential fairness of the trial.

A recent United States Supreme Court decision set forth a balancing test to be applied when determining whether a defendant's right to compulsory process outweighs preclusion of defense witness testimony as a sanction for discovery rules violation. Under the circumstances of the case at bar, defense witness Annie Ballenger should have been permitted to testify regarding scars on Appellant's person.

Appellee's reliance on this Court's decision in Tompkins v. State, 502 So.2d 415 (Fla. 1986) for the proposition that stangulation by itself is sufficient to prove premeditated murder is misplaced.

Finally, the prosecutor's insinuation on cross-examination that defense witness Bernard Johnny Black had molested the victim of this homicide was of sufficient import to require a new penalty trial. Similar misconduct has previously caused Florida courts to reverse convictions.

ARGUMENTS

ISSUE I

THE TRIAL COURT ERRED BY ACCEPTING THE PROSECUTOR'S EXPLANATION FOR USE OF PEREMPTORY STRIKES AGAINST ALL THE BLACK PROSPECTIVE JURORS ON THE PANEL.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE II

APPELLANT'S DEFENSE WAS IRREPARABLY PREJUDICED BY THE PROSECUTOR'S ASKING DETECTIVE CHILDERS ON CROSS-EXAMINATION FOR HIS OPINION AS TO WHETHER FLEMNIE BIRKINS "KNEW FACTS THAT ONLY THE MURDERER WOULD HAVE KNOWN."

Detective Childers' opinion, twice-solicited by the prosecutor, that Birkins "knew facts that only the murderer would have known" is a classic example of reliance by the State upon an inference that evidence not presented to the jury but known to the prosecutor supports the charges against the defendant. Such inferences obliterate an accused's right to be tried only on the basis of evidence presented to the jury.

Had defense counsel moved for mistrial on the basis of these statements, it is clear that the motion should have been granted by the trial judge. Because there was no motion for mistrial, we must instead focus upon whether the essential fairness of Holton's trial was compromised by the testimony.

To this end, Appellant's initial brief set forth the inconclusive nature of the State's other evidence at trial; the lack of corroboration for Flemnie Birkins' account of Holton's alleged confession and the extensive impeachment of Birkins on the witness stand. Clearly, had Birkins been an insignificant witness, Holton could not complain that the essential fairness of his trial was compromised. However, it is evident that Holton could not have been convicted of these charges without the testimony of Birkins.

In his brief, Appellee complains that Appellant's objections to the prosecutor's solicitation of Detective Childers' opinion on Birkins' credibility deprived the State of opportunity to present evidence to prove that Birkins did know facts about the crime which were unknown to the general public. Brief of Appellee p. *39-40.* Such is not the case; clearly defense counsel's line of questioning regarding access to televisions in the jail did open the door for the State to bring in evidence regarding the scope of the television news coverage of this crime. Defense counsel did not, however, open the door to general statements that the police held back certain facts and an opinion that Birkins knew some of them.

The magnitude of these comments that Birkins ''knew facts that only the murderer would have known" cannot be doubted. The State vouched for a severely impeached witness who was essential to their case. No curative instruction could have possibly erradicated the influence of representations that evidence knownto the State but not presented to the jury proved Holton's guilt.

Under the circumstances of this case, the essential fairness of Holton's trial was compromised and his conviction must be reversed.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO ELICIT AN IRRELEVANT AND PREJUDICIAL STATEMENT FROM DETECTIVE DURKIN THAT NO SIMILAR CRIMES HAD OCCURRED SINCE HOLTON WAS ARRESTED AND TO ARGUE TO THE JURY THAT THIS WAS EVIDENCE OF HOLTON'S GUILT.

ISSUE IV

THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT (GUILT OR INNOCENCE PHASE) WERE SO IMPROPER AND PREJUDICIAL THAT HOLTON WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE V

THE TRIAL COURT DENIED HOLTON HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED RELEVANT TESTIMONY OF A DEFENSE WITNESS SOLELY AS A SANCTION FOR NON-COMPLIANCE WITH DISCOVERY RULES.

In his brief, Appellee has contented that "the trial court would have even been correct to have sustained a State objection for relevancy on this omitted testimony." Brief of Appellee, p.55. Furthermore, Appellee has accused Appellant of asserting "a non sequitor arising either from a misreading of the record or an attempt to mislead this Court". Brief of Appellee, p.55.

It is enough to let the record speak for itself:

> THE COURT: Are the scars relevant to the State's case in this case?
>
> MS. MORGAN: The State seems to think so. They introduced photographs of them.
>
> THE COURT: You think the scars are relevant?
>
> MR. EPISCOPO: We say they are scratches and they are on his arms and chest and on his finger. But as I told you, Your Honor, she has indicated to me she said she doesn't know where he got them.
>
> THE COURT: Who, the witness?
>
> MR. EPISCOPO: Yes.
>
> THE COURT: Apparently, she is going to say something different now.

> MR. EPISCOPO: Well, I just talked to her this morning after I was told she was a witness. She looked at the pictures and she said she didn't know where he got them.
>
> MS. MORGAN: Your honor, she would be able to testify, though, that he had them for a number of years.
>
> THE COURT: I will let her testify as to the business about the sister in the neighborhood but not about the scars because that should have been discovered way before this and notice given to the State.

(R412-3)

Recently, in Taylor v. Illinois, Case No. *86-5963 [56* USLW 4118], the United States Supreme Court decided that the Compulsory Process Clause of the Sixth Amendment does not always forbid preclusion of testimony by a defense witness. where the discovery rules are violated. The Taylor opinion, however, noted the willful misconduct of the trial lawyer and the likelihood that the excluded testimony was perjured. The Court set up a balancing test where the defendant's right to offer witnesses in his favor must be weighed against preserving the integrity of the adversary process.

The Taylor Court wrote:

> A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would

> be entirely consistent with the purposes of the Confrontation Clause simply to exclude the witness' testimony.

56 USLW at 4122

Applying this standard to the facts at bar, it is clear that defense counsel's omission at bar was not willful. There was no tactical advantage to be gained by the non-disclosure of Annie Ballenger as a witness. The enlarged photographs entered into evidence by the State showed marks on Holton's body. Apparently, some were scratches and some were scars. Ballenger could have testified that some of the marks in the nhotographs of Holton's chest, arms and wrists had been present for many years to counter the State's assertion that they could have been inflicted by the victim's fingernails.

Under the circumstances of this case, Holton's Sixth Amendment right to present witnesses in his behalf should have outweighed whatever lack of diligence defense counsel displayed in failing to comply with the discovery rules. The trial court erred in excluding the testimony of Annie Ballenger in regard to the scars on Holton's body.

ISSUE VI

THE TRIAL COURT ERRED BY ADMITTING GRUESOME AND INFLAMMATORY PHOTOGRAPHS OF THE VICTIM'S BODY WHICH WERE UNREASONABLY ENLARGED TO HEIGHTEN THEIR PREJUDICIAL IMPACT.

ISSUE VII

THE TRIAL COURT ERRED BY FAILING TO GRANT A CONTINUANCE TO ALLOW AN IMPORTANT DEFENSE WITNESS, PAMELA WOODS, TO TESTIFY.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VIII

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF PREMEDITATED MURDER.

Appellee, in his argument on this issue, relies upon this Court's decision in Tompkins v. State, 502 So.2d 415 (Fla. 1986) for the proposition that strangulation is sufficient to support a verdict of premeditated murder. Tompkins simply does not stand for this proposition.

To begin with, the verdict in Tompkins was a general verdict of guilt to first-degree murder, unlike the specific verdict of premeditated murder at bar. There was ample evidence in Tompkins of an attempted sexual battery and the conviction is clearly sustainable on a felony murder theory. Moreover, Tompkins' confession suggested that there was some deliberation prior to his strangulation of the victim.

ISSUE IX

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILT TO FIRST DEGREE ARSON.

ISSUE X

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILT TO SEXUAL BATTERY WITH GREAT FORCE.

ISSUE XI

THE TRIAL COURT ERRONEOUSLY DENIED DEFENSE COUNSEL'S REQUEST FOR A JURY INSTRUCTION ON SECTION 800.02, FLORIDA STATUTES (1985) AS A LESSER-INCLUDED OFFENSE TO THE SEXUAL BATTERY CHARGE.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE XII

THE PROSECUTOR'S IMPROPER CROSS-EXAMINATION OF DEFENSE WITNESSES DURING PENALTY PHASE DENIED HOLTON A FAIR PENALTY TRIAL.

The prosecutor's cross-examination of Bernard Johnny Black was more than a technical violation of a disciplinary rule. Asking Black if he ever molested the victim, Katrina Graddy, could only be justified if a foundation was being laid for impeachment. The prosecutor could not, however, impeach Black's denial. The prejudicial insinuation may have tainted the jury's assessment of Black's testimony and, hence, the penalty recommendation.

Florida courts have previously granted new trials for similar prosecutorial misconduct on cross-examination. See, Thorpe v. State, 350 So.2d 552 (Fla. 1st DCA 1977)(insinuation that defendant was a drug dealer previously convicted of heroin possession); Marsh v. State, 202 So.2d 222 (Fla.3d DCA 1967)(laying illusory foundation for an imaginary impeachment). A new penalty trial should be ordered here as well.

ISSUE XIII

THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT (PENALTY PHASE) WERE SO IMPROPER THAT THE CAPITAL SENTENCING PROCEEDING DID NOT MEET THE EIGHTH AMENDMENT STANDARD OF RELIABILITY.

ISSUE XIV

THE TRIAL COURT ERRED BY IMPOSING A SENTENCE OF DEATH WITHOUT CONDUCTING *AN* INDEPENDENT WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AS REQUIRED BY SECTION *921.141,* FLORIDA STATUTES *(1985).* THE COURT ALSO ERRED BY SENTENCING HOLTON ON THE SEXUAL BATTERY AND ARSON CONVICTIONS WITHOUT BENEFIT OF A GUIDELINES SCORESHEET.

ISSUE XV

THE TRIAL COURT'S WRITTEN FINDINGS ERRONEOUSLY WEIGHED UNSUPPORTED AGGRAVATING CIRCUMSTANCES AND FAILED TO CONSIDER APPLICABLE MITIGATING EVIDENCE.

Appellant will rely upon his argument as presented in his initial brief.