IN THE SUPREME COURT OF FLORIDA

WILLIE MITCHELL, JR.,
Appellant,

vs. Case No. 70,074

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "S". Other references will be as denoted in appellant's initial brief.

This reply brief is directed only to Issues I, III, IV, and VI; as to the remaining issues appellant will rely on his initial brief.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE SEVERAL PROSPECTIVE JURORS BASED ON THEIR OPPOSITION TO CAPITAL PUNISHMENT, WITHOUT DETERMINING WHETHER THE JURORS COULD PUT ASIDE THEIR PERSONAL VIEWS AND CONSCIENTIOUSLY APPLY THE LAW AS INSTRUCTED BY THE COURT.

The State's argument on this point is largely based on a claim of procedural default. Notwithstanding the fact that the trial judge expressly noted a defense objection each time he excused one of these jurors for cause, the state seems to think the objection doesn't count unless it comes from the defense lawyers's mouth. The state's argument elevates form over substance, and ignores the purpose of the contemporaneous objection rule, which is not merely to thwart appellate consideration of constitutional issues. Rather "[t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been

committed, and provides him an opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So.2d 701, 703 (Fla.1978). Where, as here, the trial judge, in ruling on a challenge for cause, specifically recognizes the defense objection before defense counsel has verbalized it, the judge is saying, in effect, "I am aware of the grounds for your objection, and I overrule it." Even more significantly, he is communicating to defense counsel that he considers the issue to be preserved, and that argument on the point would be unnecessary, and perhaps even unwelcome. To adopt the state's position would stand the contemporaneous objection rule on its head -- it would mean that where the trial court (acting with the best intention of making sure that the record reflects that the issue is preserved) notes a defense objection, and this in turn dissuades the defense attorney from verbalizing the objection, the net result is that the trial court's ruling is insulated from review. That is not, and should not be, the law. Appellant submits that when the state challenges a juror for cause on Witt-Witherspoon grounds, an objection on behalf of the defendant is all that is needed to preserve the issue for review; if the trial judge chooses to register the objection himself, then this Court certainly need not be concerned that the trial court is getting "sandbagged". Cf. Maggard v. State, 399 So.2d 973,975 (Fla.1981)(S.7-8).

Perhaps with the intention of bolstering its "contemporaneous objection" argument, the state attempts to shift the emphasis of appellant's argument to "the procedure used to remove

jurors" (S.8)[1], and away from the critical question of whether the exclusion itself of any or all of these jurors was constitutionally permissible under the standard of Adams, Witt, and Gray.[2] With regard to the latter issue, the state appears to concede in its brief (S.8) that the burden, in the trial court, of demonstrating that a prospective juror is unqualified to serve is on the party seeking exclusion. See Wainwright v. Witt, 469 U.S. at 423. Appellant will rely on his initial brief (p.33-44) to show that the state in the present case, did not meet its burden.

ISSUE III.

UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE, THE IDENTIFICATION OF APPELLANT BY THE TECHNIQUE OF BITE MARK COMPARISON UNDERMINED THE RELIABILITY OF THE GUILT-OR-INNOCENCE DETERMINATION; THUS, THE ADMISSION OF THIS EVIDENCE VIOLATED THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL TRIALS, AND WAS FUNDAMENTAL ERROR.

1/ Appellant did argue, almost parenthetically, that the voir dire in this case was insuffifient to satisfy Fla.R.Cr.P. 3.330(b). See appellant's initial brief, p.42-44 and n.9. However, appellant's primary argument was that the state failed to meet the constitutional minimum predicate for the exclussion of death-scrupled jurors, under the test laid out in Adams, Witt, and Gray. See initial brief, p.33-42,44.

2/ Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985); Gray v. Mississippi, __U.S.__(case no. 85-5454, decided May 18, 1987)(41 Cr.L. 3197).

In his initial brief, relying on the "fundamental error" analysis of State v. Peek[3] and Wright v. State[4], appellant argued that under some circumstances, the introduction of inherently unreliable or misleading expert testimony may amount to fundamental error, requiring reversal even in the absence of an objection below (See appellant's initial brief, p.49). Appellant further argued that, in the instant case, the testimony of the state's forensic odontologist, Dr. Briggle, purporting to positively identify appellant as the person who inflicted the bite mark on the victim's left arm, fell into the category of fundamental error because of its unreliability[5], and because of its potentially devastating effect on the jury (See initial brief, p.49,72-80; State v. Peek, supra, App.A.1-3,8).

The state, not surprisingly and not unreasonably, has basically sought to characterize appellant's argument as one which goes only to the weight and credibility of the evidence (S.17); and thus not subject to appellate review (see e.g. Tibbs v. State, 397 So.2d 1120(Fla.1981)), especially in the absence of an objection (S.17-21). While appellant concedes that the line between an issue of credibility and an issue of reliability is a thin one, he believes that this case, like Wright and especially like Peek, involves the latter. As additional support for his position, appellant calls

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[3] State v. Peek is an unpublished opinion of the Circuit Court of the Tenth Judicial Circuit of Florida, issued November 3, 1983, and is set forth in Appendix A of appellant's initial brief.

[4] 348 So.2d 26 (Fla.1st DCA 1977).

[5] With regard to the reasons why Dr. Briggle's conclusion was unreliable, appellant will rely on his initial brief, p.51-75.

this Court's attention to the Second District Court of Appeal's recent decision in Jackson v. State, __So.2d (Fla.2d DCA 1987) (case No. 85-1727, opinion filed August 7, 1987)(12 F.L.W.1925). While Jackson is a sufficiency, rather than an admissibility, case, its discussion of factors affecting the reliability and probative value of bite mark evidence, and its implicit recognition that the ability to make a reliable identification from a bite mark comparison is something which will vary from case to case[6/], is extremely relevant to appellant's argument in this appeal.

In Jackson, the Second DCA noted that there were "three items of crucial evidence" presented by the state; these were (1) the testimony of a forensic odontologist, Dr. Richard Souviron[7/], that a bite mark on the murder victim's wrist was consistent with the defendant's teeth impressions: (2) a statement made by the defendant to acquaintances, which indicated knowledge that the victim had been bitten; and (3) two strands of head hair found on the victim's pajamas which, according to an FBI expert, matched the defendant's hair. In order to determine whether the evidence excluded every reasonable hypothesis except that of guilt, the appellate court examined the probative effect of each of these items of evidence.[8/]

6/ See appellant's initial brief, p.52 (top paragraph).

7/ Coincidentally, Dr. Souviron is an associate of, and apparently something of a mentor to, the state's forensic odontologist in the present case, Dr. Briggle (see R311-313,317-320).

8/ As it is not relevant to the instant case, appellant will not discuss the court's analysis of the hair comparison testimony in Jackson.

The court observed that the conversation in which the defendant told his acquaintances that the victim had been bitten took place after the police had questioned him and taken impressions of his teeth. This, the court said, "would certainly be a strong indication to anyone that a bite mark was involved." (12 F.L.W. at 1926). With regard to the bite mark comparison testimony itself, the court said this:

> Dr. Souviron was qualified as an expert in forensic odontology and bite-mark analysis. He testified that the bite mark on the victim's wrist was made through clothing. In his own words, it was a tough bite: "It's tough because it's a bite through the cloth ... difficult bite to diagnose." Dr. Souviron matched the impressions of Jackson's teeth to pictures of the bite and found similarities such as a left tooth sticking out, space between front teeth, and unique characteristics of the curvature of the arch. However, Dr. Souviron stated that "this was not a positive bite ..." and said, "I certainly hope he [Detective Baker] didn't arrest John Jackson on this bite." Moreover, testimony for the defense of another forensic odontologist case considerable doubt on the reliability of Dr. Souviron's conclusions.

Jackson v. State, supra (12 F.L.W. at 1925).

The Jackson court held that "[v]iewing all the evidence in a light most favorable to the state, as we must do on appellate review, we find that the state failed to present substantial, competent evidence sufficient to enable the jury to exclude every reasonable hypothesis of defendant's innocence" (12 F.L.W. at 1926).

In the present case, the bite mark provided even less of a basis for a reliable identification than did the bite mark in Jackson; yet Dr. Briggle, a relative novice in the still developing field of bite mark comparison, went much further than Dr. Souviron

was willing to go in the latter case. In Jackson, Souviron testified that the bite mark was consistent with the defendant's teeth, but cautioned that "this was not a positive bite", and said "I certainly hope he [Detective Baker] didn't arrest John Jackson on this bite" [emphasis supplied]. In the present case, Dr. Briggle purported to state to a reasonable medical certainty that the bite mark was in fact made by appellant's teeth (R300-301). Obviously, this conclusion must be viewed as highly suspect - and highly unreliable - unless the bite mark in the present case was of considerably better quality than was the bite mark in Jackson. Yet, as can clearly be seen from the evidence[9/], the quality of the bite mark in the present case was, if anything, considerably worse.

In Jackson, Dr. Souviron testified that he was dealing with a "tough bite", because a bite through clothing is difficult to diagnose. Yet Dr. Briggle, with far less experience than either Souviron or Levine, acknowledged no such difficulty, even though the bite was made through the victim's shirt. According to Dr. Briggle, clothing can have an effect on the bite mark, but he didn't know that he would call it a distortive effect (R314). Dr. Levine, on the other hand, testified that bite marks made through clothing are very often diffuse, or muddy, "so we really don't pick up individual characteristics depending on the clothing" (R390). Levine described large portions of the bite mark in the present case as "very diffuse" (R403); "everything runs together" (R387); "just too

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9/ See p.56-72 of appellant's initial brief, setting forth the testimony of the forensic odontologists Levine and Briggle.

wide an area that is all the same" (R404). Yet to Dr. Briggle, this was a "good bite, is what we would call it in the field, because it shows particular indentations and characteristics of individual teeth" (R282-283). However, as becomes painfully apparent by comparing Briggle's testimony with Levine's, what Briggle is relying on are the class characteristics of the teeth marks - i.e., "this marking appears to have been made by a canine tooth", "that marking appears to have been made by an incisor", etc. - and not on any unique or individual characteristics from which it could be said that "this marking appears to have been made by Willie Mitchell's incisor."

Again, compare Jackson, in which Dr. Souviron compared impressions of the defendant's teeth with photographs of the bite and found certain similarities "such as a left tooth sticking out, space between front teeth, and unique characteristics of the curvature of the arch." Yet Souviron cautioned that this was not a positive match; in his opinion not even sufficient to arrest the defendant, much less convict him. In the present case - a case in which the state sought and obtained the death penalty - Dr. Briggle's purported identification of appellant was based almost entirely on the similarities in spacing between the photos of the bite and the impressions of appellant's teeth; particularly, the spaces, on either side of the lower arch, between the eyetooth and the lateral incisor. Yet there is nothing in Dr. Briggle's testimony, or anywhere else in the record, to indicate whether there is anything unusual about such spacing. Contrast People v. Prante, 498 N.E. 2d 889,897 (Ill.App.

1986).[10]

As this Court recognized in Bundy v. State, 455 So.2d 330, 348-349 (Fla.1984), the basis for bite mark identification testimony is that "the characteristics of individual human dentition are highly unique." As the experts testified in Bundy (at 337), "because of the wide variation in the characteristics of human teeth, individuals are highly unique so that the technique of bite mark comparison can provide identification of a high degree of reliability." In the present case, whether viewed in conjunction with the testimony of Dr. Levine, or even standing alone, it is clear that the purported identification of appellant by Dr. Briggle was not based on unique or individual characteristics, because no such characteristics were discernible from the mark. This was plainly even less of a "positive bite" than the bite mark in Jackson, and it strains credulity past the breaking point to imagine that Dr. Briggle (with much less experience in the field than either Levine or Souviron) could arrive at a positive i.d. from it. His identification was, quite simply, unreliable; and it was fundamental error to place it before the jury in this capital trial. See State v. Peek, supra.[11]

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[10] See appellant's initial brief, p.74, n.32.

[11] The state also argues that, because there was other evidence aside from the bite mark identification, its admission cannot be deemed fundamental error (S.18). That is incorrect. See State v. Peek, supra, in which the unreliability of the hair analyst's testimony led to a finding of fundamental error, notwithstanding the fact that there was other evidence presented by the state, including a fingerprint. As the court observed in Peek, "The jury might, or might not, have convicted the defendant without [the hair analyst's] testimony, but clearly its admission would have a great impact upon the decision of any reasonable person." [Appendix A.8]. Cf. State v. DiGuilio, 491 So.2d 1129 (Fla.1986). The same is true in the instant case. [See appellant's initial brief, p.75-79].

ISSUE IV.

THE PROSECUTOR'S CONCLUDING REMARKS IN HIS GUILT-OR-INNOCENCE PHASE ARGUMENT TO THE JURY INJECTED IRRELEVANT AND HIGHLY PREJUDICIAL CONSIDERATIONS INTO THE JURY'S DECISION, AND IRREPARABLY DAMAGED APPELLANT'S RIGHT TO A FAIR TRIAL.

What is most striking about the state's argument on this point is that, while it analyzes the wording of the prosecutor's remarks[12/], it completely ignores their emotional impact. The state rather casually says, "The prosecutor merely mentioned that the victim would have been offended by the allegations that he was killed while engaged in a homosexual act" (S.23).

Here, at the end of his closing argument to the jury, is what the prosecutor actually said:

> Ladies and gentlemen, during the course of this trial, three people -- three people -- have sat at that defense table. I have sat over there. I've not sat there alone. I have sat there with Walter Shonyo. Every time there is mention about homosexual activity, every time there is a mention about anal intercourse, and every time there is a mention about oral intercourse, every time there is a mention about semen in the anus, Mr. Shonyo winced and Mr. Shonyo angered and Mr. Shonyo gripped the edge of the table.

12/ The state's analysis, however, thoroughly misses the mark (as will be discussed further at p.12-13 of this reply brief), because it confuses the question of whether the victim, Mr. Shonyo, was a homosexual, with the much more critical question of whether Mr. Shonyo was the victim of a homosexual assault (see S.23-26).

> He is not here to tell you what happened in that truck that night, but the evidence has told you what happened, and now you can tell him you know what happened, and you can tell him that by coming back in this courtroom, looking him straight in the eye and saying, "You're guilty, Mr. Mitchell. You're guilty as charged in the two-count Indictment of the armed robbery and the first-degree murder of Walter Shonyo."
>
> Tell him you know what happened in that truck. Thank you, ladies and gentlemen.

(R.570-571)

Obviously, this graphic, inflammatory, and patently improper argument goes far beyond a "mere mention" that the victim would have been offended (which is not to imply that whether the victim would be offended is in any way relevant to a fair determination of guilt or innocence). It is the emotional effect on the jury of the prosecutor's words - words well-chosen to have that effect - compounded by their placement at the very end of his rebuttal closing argument just before asking the jury to return a guilty verdict, which makes this fundamentally unfair argument device incapable of being "cured" by a sustained objection or an instruction.[13/] The prosecutor's

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13/ Cf. Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962); United States v. Garza, 608 F.2d 659, 666 (5th Cir. 1979)("If you throw a skunk into the jury box, you can't instruct the jury not to smell it.")

remarks were fundamentally tainted [see Tuff v. State, ___ So.2d ___ (Fla. 4th DCA 1987) (case no. 4-86-1436, opinion filed July 29, 1987)(on motion for rehearing)(12 FLW 1845)], and their prejudical effect on the jury could not have been eradicated by rebuke or retraction; therefore they amounted to fundamental error according to Florida law. See e.g. Pait v. State, 112 So.2d 380, 385-386 (Fla. 1959); Ailer v. State, 114 So.2d 348, 351 (Fla.2d DCA 1959); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984); Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984); Rosso v. State, ___ So.2d ___ (Fla.3d DCA 1987)(12 F.L.W.1023); Tuff v. State, ___ So.2d ___ (Fla.4th DCA 1987)(12 F.L.W. 1335). Moreover, the remarks, by their very nature, so infected the trial with unfairness, and so compromised the reliability of the determination of guilt or innocence, as to make the resulting conviction a denial of due process. Compare Donnelly v. DeChristoforo, 416 US 637 (1984) with Caldwell v. Mississippi, 472 US ___, 105 S.Ct. 2633 (1985).

The state's contention that the prosecutor's remarks were a "fair comment on the evidence" not only ignores the extreme (and intentional) inflammatory nature of the remarks, but also demonstrates a thorough misunderstanding of the evidence itself. The state says "Though no opening statements were transcribed, it is clear that the defense sought to establish Shonyo had been killed by someone in a homosexual rage and that since Mitchell was not a homosexual the murder could not have

been committed by him. No evidence was presented at trial to support the argument that Shonyo was homosexual. The prosecutor's comment was therefore a valid comment on the evidence, and was properly made in anticipation of the defense's reiteration of their unsupported theory" (S.24)(emphasis supplied by appellant). The problem with the state's reasoning is that, while it is true that the defense presented no evidence that Shonyo was a homosexual (and, for that matter, never claimed that he was a homosexual), the defense presented considerable evidence (including the expert testimony of Dr. Baden) that Shonyo was the victim of a homosexual assault (see R.412-440). Baden made it explicitly clear that he could not say whether Shonyo was a willing or an unwilling participant in the homosexual activity (see R.431); only that, in his opinion to a reasonable degree of medical certainty, this was a homosexual rage killing (see R.424,433,436, 439-440). The prosecutor's improper and inflammatory remarks were not a "valid comment on the evidence"; instead they amounted to a blatant appeal to the jury to reject appellant's defense (and the expert testimony supporting it), not based on the evidence, but because it would be a stigma upon the victim's memory and an embarrassment to his family.

ISSUE VI.

THE TRIAL COURT ERRED IN FINDING, AND IN INSTRUCTING THE JURY ON, THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Appellant will rely on his initial brief in support of this Point on Appeal, as well as the other penalty phase issues. However, it is necessary to point out that the representation in the state's brief that "[t]he defendant, by his own admission, was out looking to rob someone" (S.30) is unsupported by any citation to the record, and is false. Appellant's admission was that he was out looking to pawn a watch to get some money for rock cocaine, when he came upon an abandoned truck and decided to loot it (R.462-463, 473-474).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth at p.107 of his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LAUREN HAFNER SEWELL, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, and to Willie Mitchell, Jr. #030018, Florida State Prison, P.O. Box 747, Starke, Florida 32091 by mail on this 28 day of September, 1987.

Steven L Bolotin

STEVEN L. BOLOTIN