IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD BROWN :

Appellant, :

vs. : Case No. 70,230

STATE OF FLORIDA, :

Appellee, :

:

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

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

This reply brief is directed to Issues I, III, IV, and VII. As to the remaining issues, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE FBI FIREARMS IDENTIFICATION ANALYST TO GIVE HIS EXPERT OPINION THAT STATE'S EXHIBITS 14 AND 15 (THE BULLET FRAGMENTS FOUND BEHIND THE CHINA CABINET, AND THE BULLET JACKET FOUND ON THE SHELF IN THE CHINA CABINET) APPEARED TO BE CONSISTENT WITH THE OTHER BULLET FRAGMENTS HE HAD EXAMINED.

"The 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. ... To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Castor v.

State, 365 So2d 701, 703 (Fla. 1978; see Jackson v. State, 451 So2d 458, 461 (Fla. 1984). The defense objection in the instant case to the "expert" testimony of Mr. Schrecker concerning the bullet fragments which he had never examined was strenuous , specific, and timely (R475-78); and both objectives of the contemporaneous objection rule were clearly satisfied. See Jackson v. State, supra at 461. The state, in its brief on appeal, makes little or no effort to defend on the merits the admission of Schrecker's testimony regarding the unexamined exhibits. Instead, the state attacks the sufficiency of the objection, and the gist of its argument seems to be that defense counsel objected a couple of questions too soon. This is a somewhat peculiar position for the state to be taking, since the contemporaneous objection rule contemplates that the objection should come in time for the error to be avoided or corrected, if possible. Castor; Jackson. If the defense attorney, anticipating where the prosecutor is going with a line of questioning, registers his objections in time to show why the testimony is inadmissible (as, in this case, for lack of a proper scientific predicate, and because of the speculative nature of the testimony), then the trial court can avoid the error by ruling accordingly. In the event that the trial court (as he did in this case) overrules the objection and allows the challenged testimony, then the issue is presewed for intelligent review on appeal. Castor; Jackson. That is exactly what was done here.

Interestingly, the state cites § 90.705 of the Florida Evidence Code and City of Hialeah v. Weatherford, 466 So2d 1127 (Fla. 3d DCA 1985). Far from supporting the

state's procedural default argument,

however, these authorities demonstrate that defense counsel did exactly what was required and appropriate to challenge Schrecker's testimony concerning the unexamined bullet materials. § 90.705 (2) provides:

> Prior to the witness giving his opinion a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

In City of Hialeah v. Weatherford, supra, an expert witness, Dr. Straub, testified regarding the causal connection between the paramedics' negligence and the decedent's death. The only objection at trial by counsel for the city was an unelaborated objection to the "form" of the question. 466 So2d at 1128, n*. On appeal, however, the city argued that the testimony of Dr. Straub was insufficient to establish the causal link because no factual basis for his opinion was introduced at trial. The Third DCA, citing § 90.705, rejected this contention, noting that the city had "failed to challenge the factual basis for Dr. Straub's opinion, either in voir dire or in cross-examination", and his opinion was therefore admissible and competent evidence.

The record in the present case provides a stark contrast to Weatherford. To briefly recapitulate the situation: the state had called Schrecker, an FBI firearms identification analyst, to compare the various bullet materials which were recovered at the scene of the shooting incident, and from the deceased and the injured persons. Schrecker (who, in establishing his credentials, had defined his field of expertise as the comparison of bullets and casings with one another or with a weapon by examining and comparing their microscopic markings) testified that each of the exhibits which he examined and which contained marks of value were all consistent with one another, and, in his opinion, had been fired from the same gun. On re-direct, the defense brought out that Exhibits 14 and 15 (the bullet fragments found behind the china cabinet, and the bullet jacket found on the shelf in the china cabinet) had not been submitted to Schrecker for examination. Since the shot that went into the china hutch was the shot which the defense maintained was fired by Raymond Stacey, it was obviously of critical importance whether the rifling marks on that bullet were the same as, or different from, the others. Therefore, the state's failure to submit the bullet jacket and lead fragment from the china hutch to Schrecker for examination essentially negated what it was trying to accomplish with his testimony in the first place - i.e., to support its theory that all of the shots were fired from one weapon.

It is in this context that Schrecker's testimony on re-direct, and the defense's objection thereto, must be viewed. Appellant

submits that defense counsel, through his objection and through his examination of the witness,[1/] clearly established that Schrecker did not have a sufficient scientific basis to give opinion testimony concerning the unexamined exhibits.

REDIRECT EXAMINATION

BY MR. McCLAIN[prosecutor]:

Q. Mr. Schrecker, Exhibits 14 and 15 that you had not examined that you testified were the bullet jacket and fragment from the north wall in the china cabinet, could you look at those now and make any type determination as to what they are or where they came from?

1/ And through Schrecker's own testimony, volunteered on direct in establishing his qualifications as a firearms identification expert, that his field:

> involves the examination of ammunition components such as fired bullets, fired casings, <u>and these items can contain marks which can be compared</u>. <u>So, it's possible to compare bullets with one another or the bullets with a weapon.</u>
>
> It's possible to compare fired casings with one another, or compare them with a weapon, and it's possible to say on certain occasions that, for example, these bullets were fired in the same gun or that these cartridge cases were identified as having been fired by this particular weapon.
>
> So, strictly speaking, that it what firearms identification is.

(R458)

See also <u>Roberts v. State</u>, 164 So2d 817, 820 (Fla. 1964) (firearms identification expert may give comparison testimony "where it is shown that by training and experience he is qualified to give an expert opinion on the basis of ballistics tests which he himself conducted"): <u>Pizzo v. State</u>, 289 So2d 26, 27 (Fla. 2d DCA 1974) ("examination of the bullet would have been meaningful only to an expert, and in any event, such examination could not be accomplished with the naked eye"). See appellant's initial brief, p. 64-66.

MR. VECCHIO [defense counsel]: Your Honor, I would object.

MR. McLAIN: Just by ---

MR. VECCHIO: The testimony as to the other fragments was done based on his examination in the laboratory, the FBI microscope and what have you, and I think it's -- I don't think he is able at this point to give any sort of examination of these items as he has on the other items because they were examined in his laboratory.

THE COURT: Because of what?

MR. VECCHIO: They were examined in his lab, in the FBI lab, and he had the opportunity to examine them under the microscope and give them whatever tests that he does up there.

THE COURT: He is just being asked to look at them and make any type of determination of where they are and where they came from if he can. If he can, he can so state; and if he can, then you can cross-examine him as to what the basis of his answer is going to be.

Q. Mr. Schrecker --

BY THE COURT:

Q. Can you make any determination? Yes or no.

A. Yes, I can.

THE COURT: Do you want to cross-examine him on the basis of what his answer is going to be?

MR. VECCHIO: That's correct.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. VECCHIO:

Q. Mr. Schrecker, on the other fragments and casings and bullets that you have testified to, you examined them in your office in the FBI headquarters; is that correct?

A. That's right, yes.

Q. What tests were all of these particular items undergone?

A. The examinations really consisted of microscopic examinations. They were measured under a microscope which is capable of measuring the groove impressions on the bullet.

I examined them under a comparison microscope where I could mount one object on one stage, another object on the other stage, and directly compare them one with another. So, that is the instrumentation that I used basically, well, our reference ammunitions supplies, which aided me in determining what these were.

Q. In other word, you mean charts concerning other weapons and other projectiles?

A. Well, we had a list of weapons. We have lists of weapons, what the rifling characteristics are of those weapons, and we also have ammunition specimens back there that we use for comparison purposes.

Q. All right. But you have none of that here today with you?

A. I do not, no.

MR. VECCHIO: I object. Obviously in Washington he puts the particular projectiles under a great deal of investigation and comparison under a microscope, and I think at this time to have him compare something that he doesn't even have a microscope here, I think, would be completely speculative.

THE COURT: I think it goes to the weight, not the admissibility. I will overrule the objection.

(R475-478)

After the objection was overruled, the state proceeded to elicit Schrecker's opinion that, based on his admittedly very gross "naked eye" observation, Exhibits 14 and 15 appeared to be similar to the bullet fragments which he had examined in the laboratory (R479). Interestingly, Schrecker was able to see that Exhibit 15 (the "silver colored, possibly aluminum bullet jacket") did contain rifling impressions, "indicating, of course, it's a fired jacket fragment" (R479).

Clearly, defense counsel's objection was more than sufficiently specific to apprise the trial court of the error and to preserve the issue for intelligent review on appeal. Castor v. State, supra; Jackson v. State, supra; Steinhorst v. State, 412 So2d 332, 338 (Fla. 1982); see also Spivey v. State, _ So2d _ (Fla. 1988) (case No. 67,010, opinion filed July 14, 1988) (13 FLW 445, 447). Equally clearly, the objection was timely, and provided the trial court with ample opportunity to have avoided the error, had he ruled correctly that Schrecker lacked a sufficient factual or scientific basis to offer an opinion regarding the unexamined exhibits. See Fla.Stat.§90.705(2); City of Hialeah v. Weatherford, supra. See also Jackson v. State, supra, 451 So2d at 461 (objection was made during the impermissible line of questioning, "which is sufficiently timely to have allowed the court, had it sustained the objection, to instruct the jury to desregard the tesitmony or to consider a motion for mistrial); Roban v. State, 384 So2d 683, 685 (Fla.4th DCA 1980) (motion for mistrial was within the time frame for a contemporaneous objection); Castor v. State, supra.

ISSUE III

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF (1) VIOLATION OF FLA.R.CR.P. 3.410 (FAILURE TO RESPOND IN OPEN COURT TO A JURY REQUEST TO REVIEW TESTIMONY); (2) ABSENCE OF THE TRIAL JUDGE FROM A CRITICAL STAGE OF THE TRIAL; (3) APPELLANT'S OWN ABSENCE FROM A CRITICAL STAGE OF THE TRIAL; (4) ENTRY OF THE PROSECUTOR AND DEFENSE COUNSEL INTO THE JURY ROOM DURING DELIBERATIONS; AND (5) THE PROSECUTOR'S STATEMENT TO THE JURORS THAT HE DID NOT WANT ANY OTHER QUESTIONS.

The bulk of the state's argument on this point is that defense counsel waived the errors by failing to object. However, an Ivory violation [2/] is per se reversible error. Fla.R.CR.P. 3.410 is mandatory and the trial court's failure to respond in open court [to a jury question or request] is alone sufficient to find error", regardless of whether counsel has had actual notice of the question from the jury. Curtis v. State, 480 So2d 1277, 1278 n.2 (Fla. 1985); see also Bradley v. State, 513 So2d 112, 114 (Fla. 1987). As for the issues of the trial court's absence, and appellant's own absence, these implicate fundamental rights which cannot be waived unless the waiver has been made knowingly and intelligently by the defendant. Carter v. State, 512 So2d 284, 285-86 (Fla. 3d DCA 1987); see Peri v. State, 426 So2d 1021, 1023-26 (Fla. 3d DCA 1985) (and cases cited therein at p 1026); McCollum v. State, 74 So2d 74 (Fla. 1954); Johnson v. Zerbst, 304 US 458 (1938); cf. Amazon v. State, 487 So2d 8, 10-11 (Fla. 1986). See appellant's initial brief, p. 87-95.

2/ Ivory v. State, 351 So2d 26 (Fla. 1977)

Since the presence of the judge cannot be waived even by the express stipulation of counsel [Carter v. State, supra, at 286], it certainly cannot be waived by counsel's failure to object, or by his "active participation ... in what occurred" (see SB 20). Appellant did not knowingly and intelligently waive his right to the judge's presence, or to his own presence, or to have the jury's request responded to in open court. Reversal is therefore required. Ivory; Curtis; Bradley; Peri; Carter; McCollum; Amazon; Johnson v. Zerbst.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE

The state says "this Court has applied [the "cold, calculated, and premeditated"] factor to other than contract murders and execution styled (sic) killings where there is evidence of heightened premeditaion in the commission of the murder. See for instance, the cases cited in Preston v. State, 444 So2d 939 (Fla. 1984)" [SB 21, emphasis in state's brief].

However, a comparison of the circumstances of the instant case with those of the cases cited in Preston compellingly demonstrates the absence of heightened premeditation here. As stated in Preston (at 946):

> [The cold, calculated, and premeditated] aggravating circumstance has been found when the facts show a particularly lengthy,

methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); Middleton v. State, 426 So2d 548 (Fla. 1982) (defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State, 422 So. 2d 833 (Fla. 1982), cert.denied, (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

ISSUE VII

THE TRIAL COURT ERRED IN DELEGATING TO THE PROSECUTOR THE RESPONSIBILITY OF PREPARING THE ORDER SENTENCING APPELLANT TO DEATH, IN VIOLATION OF FLA.STAT. § 921.141, AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state's argument on this point seems to be that the trial judge must have agreed with the sentencing order prepared by the prosecutor, or else he wouldn't have signed it (SB 28). That is not good enough. Patterson v. State, 513 So2d 1237, 1261-63 (Fla. 1987). It is the trial judge, not an interested party such as the assistant state attorney, who has the statutory and constitutional responsibility to identify, explain, and weigh the applicable aggravating and mitigating circumstances. Patterson. It is the judge's view of the evidence, not the prosecutor's, which must be thought out and articulated in writing, to provide the opportunity for meaningful review by this Court. State v. Dixon, 283 So2d 1, 8 (Fla. 1973), discussing Fla.Stat. § 921.141 (3).

Moreover, it is not even altogether clear that the trial court did agree with the view of the circumstances set forth by the prosecutor in his sentencing order, since that view is significantly different from the one expressed by the trial court in orally pronouncing sentence (i.e., that the shootings resulted from drug-induced paranoia) (R 793-94). The court then said "Ask the prosecutor to get me a written order next week, two to one. Get a written order on the death case ... Two aggravating and one mitigating" (R 795). At a hearing eleven days later, the judge asked whether the written order was in yet. Assistant State Attorney McClain said "I believe so. I understand Mr. Caruso did it" (R 801). The judge replied " We don't have it so get it, a written order on aggravation. It's got to be a written order of death setting out the aggravating circumstances" (R 801-02). The written sentencing order prepared by the prosecutor was filed ten days later. Thus the question arises, did the trial court necessarily agree with the view of the circumstances expounded by the prosecutor (especially in view of the judge's emphasis on drug use and paranoia, which is nowhere reflected in the prosecutor's narrative), or did he perhaps just agree with the result? In any event, the trial court abdicated his statutory and constitutional responsibility to identify and explain in writing the circumstsances justifying a sentence of death, and instead delegated this critical function to an interested party. Appellant's sentence of death, imposed in this manner, cannot stand.

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. 126 of the initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 22 day of August, 1988.

STEVEN L. BOLOTIN