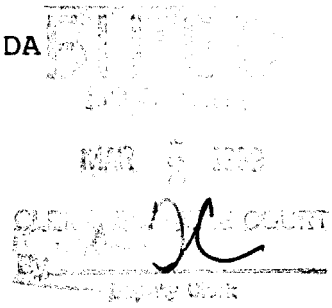
IN THE SUPREME COURT OF FLORIDA



DAVID DUANE PENTECOST, :

Appellant, :

v. : CASE NO. 71,851

STATE OF FLORIDA, :

Appellee. :

_____ :

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

David Pentecost relies on his initial brief to respond to the State's answer brief, except for the following additions:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING TWO CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO FAILED TO EXPRESS THE ABILITY TO GIVE FAIR CONSIDERATION TO THE DEFENSE OF VOLUNTARY INTOXICATION.

The State contends that the trial judge properly denied defense challenges for cause to Jurors Hammond and Filmore because their responses indicated an ability to follow the law concerning the intoxication defense. As a secondary position, the State asserts that any error in denying the challenges was harmless. Both of these positions lack merit.

A prospective juror must be removed for cause "if there is a basis for any reasonable doubt as to [that] juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial." Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959). Responses from Jurors Hammond and Filmore reveal such a reasonable doubt. (See Initial Brief at pages 25-27) Hammond expressed her views on intoxication as a defense as follows:

> Well, the level of intoxication I come to the opinion once you started drinking and two or three drinks, you're kind of already going out of your norm, but you have got to know when to stop, and if you don't, it seems to me like you are still responsible for what you're doing.

(R 201-202) Defense counsel then asked the pointed question:

> Because of that belief, are you of the opinion that no level of intoxication can in your mind, no matter what the jury instructions say, can give rise to a defense to a criminal charge?

Hammond responded:

> What I would do, I would listen carefully and weigh all of the evidence to that effect and then use that judgment.

(R 201-203) She never clarified what was meant by "that judgment" -- the law on intoxication or her previously stated views. Furthermore, the fact that Hammond later responded negatively when asked if she would hold a person who voluntarily consumed alcohol responsible for "everything that happens after" (R 202), does not demonstrate an ability to follow the law on the intoxication defense.

The responses from Juror Filmore fall squarely within the admonition found in Singer, at 22: the "statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence." Accord, Hill v. State, 477 So.2d 553, 555-556 (Fla. 1985). Although Filmore, after extensive questioning, finally said she could follow the judge's instructions, she never mitigated her firmly stated views that intoxication could not diminish responsibility. (R 204-205) Filmore stated her opinion on the intoxication defense as follows:

> PROSPECTIVE JUROR: I'm trying to think of what I said earlier. I said I thought, you know, even if you drank quite a bit, you would still be responsible for your actions. And in a case like this, I would have to listen to all of the facts and then base my decision on that. I just couldn't say just what I -- you know.
>
> MR. KIMMEL: You couldn't say what, that because he was intoxicated -- because a person was intoxicated, whoever it is, that it's not a defense or that because a person is intoxicated --
>
> PROSPECTIVE JUROR: I think if a person is intoxicated, that they should be, you know, held responsible.

(R 202-205) Filmore's assertion of her ability to follow the law simply does not remove that reasonable doubt about her ability to do so.

On pages 11 through 13 of the answer brief, the State asserts two harmless error theories. The first is that

Pentecost failed to show prejudice because he did not exercise peremptory challenges on Hammond or Filmore. This position ignores the well settled law that the harm in erroneously denying a cause challenge is the reduction of the number of peremptory challenges available. See, Moore v. State, 525 So.2d 870, 873 (Fla. 1988); Hill v. State. There is no requirement that the defense use a peremptory challenge on the juror erroneously seated in order to show prejudicial error. The fact that peremptories were exhausted on other prospective jurors, also deemed unacceptable, does not indicate that defense counsel was satisfied with Hammond and Filmore. It merely reflects the hard choices counsel was forced to make because of the reduction in the number of peremptory challenges. Second, the State claims the error harmless because the intoxication defense was a secondary one at trial. However, the defense was claimed. The court instructed the jury on the defense and counsel argued it in summation. (R 831-836, 901) Pentecost was entitled to jurors who could fairly consider it.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IN SENTENCING PENTECOST TO DEATH, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

On pages 14 through 18, the State merely reasserts its displeasure with this Court's continued application of the principles found in Tedder v. State, 322 So.2d 908 (Fla. 1975). This Court has reaffirmed the rule in Tedder on many occasions. E.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988); DuBoise v. State, 520 So.2d 260 (Fla. 1988).

The State takes issue with the statement made in the initial brief that the jury could have concluded that Kayle Smith rather than David Pentecost did the actual stabbing. (State's Brief, page 19) Calling the statement "ridiculous," the State claims the jury's verdict "proved they believed otherwise." (State's Brief, page 19) The jury's general verdict for first degree murder did not prove the jury believed David did the actual stabbing. (R 908-909, 1227) David could have been deemed guilty as a principal to either the premeditated murder Kayle actually committed or of felony murder. The jury was instructed on the law of principals and felony murder. (R 887-890, 901-902) Moreover, the prosecutor argued these theories in closing. (R 864-865) At one point, the prosecutor even said both Kayle and David were equally guilty. (R 827-828) While the evidence may have been sufficient to support the

first degree murder verdict, the evidence concerning who was the main actor and who actually stabbed the victim was far from certain. Such an uncertainty is a valid and reasonable basis for the jury's life recommendation. See, DuBoise v. State, 520 So.2d 260; Hawkins v. State, 436 So.2d 44 (Fla. 1983); Malloy v. State, 382 So.2d 1190 (Fla. 1979).

On pages 19 and 20 of the answer brief, the State claims a misstatement of the record was made on page 31 of the initial brief. The statement that "the jury knew that the State was not seeking a death sentence for [Kayle]" is a fair conclusion from the evidence. As noted in the Statement of Facts in the initial brief, Pentecost is aware that Kayle testified that he had no deal and his sentencing was pending. (Initial Brief, page 10) However, Kayle also testified that the State asserted nothing in aggravation at his sentencing hearing which had already been held before the judge. (R 482-484) The jury could have, quite correctly, concluded that the State was not actively seeking a death sentence and that Kayle was receiving favorable sentencing considerations. An "unspoken deal" is, nevertheless, a deal.

Finally, the State claims that the jury must have rejected David's alcohol use as mitigating because the intoxication defense failed at guilt phase. Alcohol consumption need not rise to the level of a defense in order to constitute valid mitigation. See, Ferguson v. State, 417 So.2d 631 (Fla. 1982). The jury could have reasonably relied on alcohol consumption to mitigate the crime.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN SOLICITING AND CONSIDERING STATEMENTS FROM RELATIVES OF THE VICTIM IN THE DEATH SENTENCING PROCESS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

First, the State correctly notes that the letters from Dorothy Littlepage and Teresa Ipock were written in mitigation of sentence. Counsel was unable to actually review these documents prior to filing the initial brief, because the trial judge refused to release the documents for inclusion in the record until this Court ordered him to do so six days after the filing of the brief. However, these letters are not the basis for the violation of Booth v. Maryland, 482 U.S.___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The PSI contained improper victim impact information. (Initial Brief at page 33) Moreover, the trial judge's specific solicitation of additional victim impact information at the sentencing hearing shows his willingness to consider the information. (R 1268) That the trial judge did not mention victim impact information in the sentencing order does not refute his actively gathering such information at sentencing. The Eighth and Fourteenth Amendments require a new sentencing hearing.

CONCLUSION

For the reasons presented in his initial brief and in this reply brief, David Pentecost asks this Court to grant him a new trial, or alternatively, to reduce his death sentence to life.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 2nd day of March, 1989.

W. C. MCLAIN