IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS, JR., :

Appellant, :

vs. Case No. 72,638

STATE OF FLORIDA, :

Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

PAUL C. HELM
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant, DANIEL BURNS, JR., in reply to the Brief of the Appellee, the State of Florida. Appellant will rely upon the argument set forth in his Initial Brief with regard to Issues 111, V, VII, VIII, and IX.

References to the record on appeal ate designated by "R" and the page number.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY ALLOWING IRRELEVANT EVIDENCE OF AND COMMENTS UPON TROOPER YOUNG'S CHARACTER AND BY FAILING TO PREVENT EMOTIONAL DISPLAYS BY YOUNG'S WIFE.

Appellee's explanation of the State's use of Sgt. Cheshire's testimony -- that he was used to identify the victim and to avoid calling bereaved relatives, see Brief of Appellee, at pages 10-11 -- has two major flaws. First, it ignores the fact that Trooper Young had already been identified by another officer who was at the scene of the offense. (R629-632) Second, it ignores the trial court's legal error in ruling that evidence of Trooper Young's personal characteristics was admissible. (R656-657) Sgt. Cheshire's testimony about Young's outstanding character, (R659-660, 665) especially his opinion that Young was the best trooper he had ever supervised or been associated with, (R665) was exactly the sort of evidence prohibited by the Eighth and Four-

teenth Amendments because it is irrelevant and prejudicial. See Booth v. Maryland, 482 U.S. 496, 502-506, 107 S.Ct. 2529, 96 L.Ed.2d 440, 448-450 (1987).

Such character evidence plainly had no bearing upon the identification of the victim. It also had no bearing upon Appellant's culpability for shooting Young. All police officers, and for that matter, all people are entitled to go about their lives and their work without being shot and killed. The good or bad character of the victim has nothing to do with the guilt or innocence of the defendant, nor with the appropriate punishment for a particular crime. The sole purpose in presenting evidence of the victim's good character to a jury in a capital murder trial can only be to arouse and inflame the passions of the jurors. Prosecutorial over-zealousness in focusing the jurors' attention on the personal character traits of the victim rather than the defendant's culpability is constitutionally forbidden. See South Carolina v. Gathers, 490 U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

The court's error in permitting the State to present improper evidence of Young's character was made even more prejudicial to Appellant by the maudlin spectacle of Young's wife crying in the audience while this testimony was being presented. (R658, 670) Appellee answers that the trial court found no reason to instruct on overt behavior. (R658-659, 671) Brief of Appellee, at page 11. Given the court's failure to recognize the impropriety of Sgt. Cheshire's testimony, it is hardly surprising that the court

found no reason to take any action in response to Mrs. Young's emotional display. Evidently the court felt that only a highly disruptive outburst would require corrective action. But the widow's subdued sobbing was more likely to arouse the jurors' sympathy than an excited outburst.

Appellee further argues that no Booth error occurred when the prosecutors urged the jury to consider Young's good character as a police officer during closing arguments for both the guilt and penalty phases of the trial. (R1606, 1932) Brief of Appellee, at pages 12-13. In South Carolina v. Gathers, a prosecutor's argument that the victim was religious and a registered voter was found to require reversal. Surely the prosecutors' arguments that the victim "represents the best of what the law should be" (R1606) and that "this young police officer, while trying to protect us ... never forgot the extreme dedication--" (R1932) were far more prejudicial to Appellant's right to a fair trial than the remarks condemned in Gathers.

Finally, Appellee argues that defense counsel deliberately called the court's attention to the victim impact statements contained in the letter written by Trooper Young's brother. Brief of Appellee, at page 13. Appellant disagrees. Defense counsel was not asking the court to consider the letter, she was inquiring to determine whether the court had seen and read the letter. (R2297-2298, 2611-2612) The court acknowledged that it had reviewed the letter. (R2298) Since the letter concerned the brother's opinions and characterizations of the crime and Appellant, as well as the

good character of Trooper Young, the court's consideration of such a victim impact statement plainly violated Booth v. Maryland and requires reversal. See Patterson v. State, 513 So.2d 1257 (Fla. 1987).

The cumulative impact of the repeated Booth violations in this case destroyed the fairness of Appellant's trial and sentencing. See Nowitzke v. State, No. 71,729 (Fla. Nov. 6, 1990) (repeated instances of prosecutorial misconduct by State Attorney Shaub violated right to fair and impartial trial). This Court must reverse and remand for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY OVERRULING DEFENSE COUNSEL'S MOTIONS FOR MISTRIAL BECAUSE REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

In Nowitzke v. State, No. 71,729 (Fla. Nov. 6, 1990), this Court held that repeated instances of prosecutorial misconduct by State Attorney Frank Shaub violated the defendant's right to a fair and impartial trial and required reversal and remand for a new trial. As set forth in the Initial Brief of Appellant, at pages 38-45, this case also contained numerous instances of prosecutorial misconduct by both State Attorney Frank Shaub and his assistant, Mr. Economou. Mr. Shaub began the trial with a statement of his personal belief in Appellant's guilt during voir dire (R47) and concluded the penalty phase of trial with numerous improper remarks during closing argument. (R1922-1924, 1928-1929, 1932-1933) In the interim, Mr. Economou contributed several improper remarks

during the guilt phase closing argument. (R1592-1593, 1605-1606, 1608-1612)

In this case, as in Nowiteke, the cumulative impact of numerous instances of prosecutorial misconduct deprived Appellant of his constitutional right to a fair and impartial trial. The judgment and sentence must be reversed for a new trial.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL BY ADMITTING COLOR SLIDES TAKEN DURING THE AUTOPSY BECAUSE THEIR GRUESOME AND INFLAMMATORY NATURE OUTWEIGHED THEIR PROBATIVE VALUE.

In Czubak v. State, No. 72,363 (Fla. Nov. 8, 1990) [15 F.L.W. S586], this Court held that the trial court erred by admitting eight gruesome photographs of the victim's body taken at the crime scene at least a week after her death and after portions of her body had been eaten by her dogs. This Court found that the photographs had little or no relevance because they did not establish identity, reveal any wounds, or assist the medical examiner in explaining the cause of death. Also, the photos bore little relevance to the circumstances surrounding the murder because the position of the body had been disturbed by the dogs. This Court concluded,

> [W]here the value of the photographs was at best extremely limited and where the gruesome nature of the photographs was due to circumstances above and beyond the killing, the relevance of the photographs is outweighed by their shocking and inflammatory nature.

15 F.L.W. at 5588.

In this case, as in Czubak, the shocking and inflammatory nature of the color slides outweighed their limited probative value. This is particularly true of the slide which showed Trooper Young's exposed brain after the medical examiner cut away part of his skull. (R965, 969, 974-991) This photograph was not used to establish identity and had no relevance to the circumstances of the homicide. Moreover, it had only marginal relevance in assisting the medical examiner in explaining the cause of death. (R990-991) The cause of death was clearly established through other evidence without resort to such a gruesome display. (R985-986, 991-992, 1028-1040) Moreover, the cut-away skull and exposed brain were the work product of the medical examiner, not the Appellant. The State's use of the projected color slide of this revulsive photo served no real purpose except to inflame and repel the jurors.

ISSUE VI

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY GIVING A MISLEADING INSTRUCTION ON EXCUSABLE HOMICIDE WHICH NEGATED HIS THEORY OF DEFENSE.

Appellee has misconstrued the legal basis for Appellant's argument that the trial court committed fundamental error by giving a misleading instruction on excusable homicide. In Spaziano V. State, 522 So.2d 525 (Pla. 2d DCA 1988), the district court found that trial counsel was ineffective for failing to object to a misleading jury instruction on excusable hamicide. The district

court gave two reasons why the trial court was required to give a complete and accurate excusable homicide instruction:

> Based upon the evidence at trial and the defense's theory of excusable homicide, it was incumbent upon the trial court to give a full and accurate instruction on excusable homicide. Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983). Furthermore, when a manslaughter instruction is given, it is necessary that the complete definition of justifiable and excusable homicide be included as part of the manslaughter instruction. Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986).

522 So.2d at 526.

In Tobev v. State, 533 So.2d 1198, 1199 (Fla. 2d DCA 1988), the district court receded from Spaziano only insofar as that decision "can be read to mean that it is fundamental error to give an incomplete instruction on manslaughter ...." What Appellee neglects to mention in its brief is that the very next paragraph of Tobev reaffirms that portion of Spaziano upon which Appellant relies:

> We adhere to that part of Spaziano, however, which holds that Spaziano's trial counsel was ineffective for failing to object to an erroneous instruction on the defense of justifiable and excusable homicide where evidence was presented to support that defense.

533 So.2d at 1199.

Moreover, the district court went on to distinguish Banda v. State, 536 So.2d 221 (Fla. 1988), and Squires v. State, 450

So.2d 208 (Fla. 1984), upon which Appellee mistakenly relies, from Spaziano:

> The circumstance in Spaziano, unlike that found in Banda, Squires and Abreau, was that an instruction on excusable and justifiable homicide was not only necessary as a part of the manslaughter instruction, see Hedges v. State, 172 So.2d 824 (Fla. 1965), it was essential to permit the jury to pass upon Spaeiano's only defense. A defendant is entitled to a jury instruction on any defense for which evidence is presented. Wenzel v. State, 459 So.2d 1086 (Fla. 2d DCA 1984). The failure to give an instruction on a defense encompassed within the evidence is fundamental error and reviewable notwithstanding the absence of a requested instruction or an objection. Carter, 469 So.2d at 196. The failure in Spaziano to request and give an accurate instruction on the defense of excusable and justifiable homicide was prejudicial because the jury may have been misled when considering Spaziano's only defense for which he presented evidence. Where an error occurs in an instruction on a defense, as happened in Spaziano, the jury is deprived of a fair opportunity to acquit the defendant on the basis of that defense. The jury's power to acquit is different from the jury's "pardon power" which permits it to find the defendant guilty of a lesser included offense. See Abreau.

533 So.2d at 1200. This passage from Tobey plainly supports Appellant's argument.

Appellee's assertion that Appellant offered no testimony that would support a theory of excusable homicide, Brief of Appellee, at page 37, is simply untrue. As argued in the Initial

Brief of Appellant, at page 60, defense counsel elicited testimony from both medical examiners that the fatal gunshot wound was consistent with an accidental shooting during a struggle for possession of the gun. (R1038-1040, 1338) When there is any evidence to support the theory of defense, the court must instruct the jury on the law applicable to the theory of defense. Gardner v. State, 480 So.2d 91, 92 (Fla. 1985); Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (1945).

Moreover, it is the jury's duty to weigh the evidence in support of the defense after being instructed on the applicable law. Gardner v. State, 480 So.2d at 93. Neither the trial judge now the appellate court should determine the factual merits of the defense. Laythe v. State, 330 So.2d 113, 114 (Fla. 3d DCA 1976); Koontz v. State, 204 So.2d 224, 227 (Fla. 2d DCA 1967).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 12th day of December, 1990.

Respectfully submitted,

Paul C. Helm

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

PAUL C. HELM
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

PCH/an