IN THE SUPREME COURT OF FLORIDA

GEORGE M. HODGES,

Appellant,

vs. : Case No. 74,671

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
FLORIDA BAR NO. 0143265

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RELIMINARY STATEME

This brief is filed on behalf of the Appellant, George M. Hodges, in reply to the Brief of the Appellee, the State of Florida. Appellant will rely upon the argument presented in his initial brief regarding Issues V through IX.

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

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S **CONSTITUTIONAL RIGHT** TO **CONFRONT AND CROSS-EXAMINE HIS ACCUSER BY ERRONEOUSLY ADMITTING HEARSAY EVIDENCE OF BETTY** RICKS' **STATEMENTS TO** THE **POLICE** AND **HER SISTER.**

Appellee's reliance upon Koon v. State, 513 So.2d 1253 (Fla.), cert.denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1987), Brief of Appellee at p. 5-6, to support her argument that Ms. Ricks' statements to the police were not hearsay because they were not affered to prove the truth of the matter asserted is misplaced. The Koon decision did not address the admissibility of a deceased homicide victim's statements to the police to establish the defendant's motive for the homicide. Instead, Koon concerned a federal magistrate's statement to the defendant to establish his motive for killing a witness in a federal counterfeiting case. This Court simply applied the rule that "[a]n out-of-court statement is admissible to show knowledge on the part of the listener that the state-

ment was made if such knowledge is relevant to the case." 513 So.2d at 1255.

In this case the listeners were two police officers to whom Ms. Ricks said she was adamant about prosecuting Appellant for indecent exposure. (R287,305) The officers' knowledge of the statements was not relevant to Appellant's alleged motive to kill Ms. Ricks. Instead, the prosecutor used the factual content of the statements, i.e., the truth of the matter asserted, to argue that Appellant was motivated to kill Ms. Ricks because she was adamant about prosecuting him. (R714,963,967)

The evidentiary rule applicable to this case is that the homicide victim's statements cannot be used to prove the defendant's state of mind. Correll v. State, 523 So.2d 562, 565 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988); Kelley v. State, 543 So.2d 286, 288 (Fla. 1st DCA 1989); Hunt v. State, 429 So.2d 811, 813 (Fla. 2d DCA 1983). These decisions are based upon the state of mind exception to the hearsay rule which allows the out-of-court statements to be used only if the declarant's state of mind is at issue. Correll v. State; § 90.803(3)(a), Fla. Stat. (1989). Ms. Ricks' state of mind was not at issue, and her statements were not probative of Appellant's alleged motive. Kelley v. State.

Appellee's reliance upon Peede v. State, 474 So.2d 808 (Fla.), cert.denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1987), and Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982), Brief of Appellee at p.8-9, is also misplaced. In Peede, this Court found no

error in admitting a kidnapped homicide victim's statements that she was afraid of the defendant and wanted her daughter to call the police if she failed to return by midnight because they were relevant to prove the kidnapping charge. 474 So.2d at 816. In the present case there was no underlying felony to which Ms. Ricks' state of mind might have been relevant.

In Jenkins, the First District held that the defense should have been allowed to present evidence that the homicide victim told a witness he was going to straighten up the defendant because the victim's state of mind was relevant to the defendant's claim of self defense. 422 So.2d at 1008. Since Appellant was not claiming self defense, Ms. Ricks' state of mind was not relevant in this case.

Appellee's reliance upon Lucas v. State, 568 So.2d 18 (Fla. 1990), Brief of Appellee at p.6-7, to support her argument that Ms. Ricks' out-af-court statements were admissible during the penalty phase of the trial is equally mistaken. In Lucas, this Court ruled that the defense opened the door to hearsay evidence of the defendant's threats to the victim by cross-examining a penalty phase witness for the State about the victim's threats to Lucas, 568 So.2d at 21. In this case, the defense did nat open the door to hearsay evidence that Appellant harassed Ms. Ricks to drop the indecent exposure charge. (R682-690) In fact, the court ruled that the hearsay evidence was admissible before any penalty phase testimony was presented, (R662-678) so the erroneous ruling came before

the defense had been given the opportunity to open any doors on cross-examination of penalty phase witnesses.

Appellee argues that any error in admitting hearsay evidence in this case was harmless because of the supposed sufficiency or overwhelming nature of the evidence. Brief of Appellee at p.9. Neither the legal sufficiency nor even the overwhelming nature of the evidence is a proper considcratian in determining whether error is harmless. State v. Lee, 531 So.2d 133, 136-137 (Fla. 1988); state v. DiGuilio, 491 So.2d 1129, 1136, 1139 (Fla. 1986). Instead, the State has the burden of demonstrating beyond a reasonable doubt that the error did not affect the result. State v. Lee; State v. DiGuilio. In this case, the State has not met this burden. Moreover, it is apparent that the errors did affect the result of the case. The hearsay admitted during the guilt phase provided the State with its argument concerning Appellant's motive (R576,578, 627) and the hearsay admitted during penalty phase was used both be the State and the court to establish aggravating circumstances. (R714,906-907,963,967) Under these circumstances, the judgment and sentence must be reversed, and the cause remanded for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ALLOWING THE PROSECUTOR TO ELICIT A POLICE OFFICER'S TESTIMONY THAT NEITHER HE NOR THE PROSECUTOR BELIEVED A KEY STATE WITNESS'S PRIOR INCONSISTENT STATEMENT WHICH EXCULPATED APPELLANT.

Appellee complains that Appellant has argued new grounds on appeal not preserved by objection in the trial court. Brief of Appellee at p.10. Appellant disagrees. Detective Boydston's testimony concerning his opinion and Assistant State Attorney Benito's opinion that Jessie Watson's original statements exculpating Appellant were untrue was inadmissible because it was not relsvant, the objection stated in the trial court. (R535) Appellant's argument about the improper bolstering of the credibility of Watson's inculpatory trial testimony, Initial Brief of Appellant at p. 42-44, is an explanation of why the erroneous admission of the irrelevant evidence was prejudicial to the defense. Surely appellate counsel is permitted to argue the effect of the error and is not limited to merely pointing out the objection.

Contrary to the Appellee's assertion, Brief of Appellee at p.10-11, this Caurt did not grant the State carte blanche to present any and all evidence other than hearsay to explain police action in State v. Baird, 572 So.2d 904 (Fla. 1990). The Baird opinion quite simply has nothing to do with the admissibility of a

police afficer's opinion regarding the credibility of witness statements.

While Appellant certainly agrees with the general rule of law concerning the scope of cross-examination stated in Zequera v. State, 549 So.2d 189, 192 (Fla. 1989), and the other cases cited by the Appellee, Brief of Appellee at p.11, again those cases have nothing to do with the relevance of the officer's belief in the credibility of witness statements.

There was no more important issue for the jury to resolve in this case than Jessie Watson's credibility. If the jury had not believed Watson's testimony, the State's evidence was far from overwhelming. The erroneous admission of evidence which improperly affects the jury's perception of the credibility of the principal State's witness is not harmless and requires reversal. Quiles v. State, 523 So.2d 1261, 1263-1264 (Fla. 2d DCA 1988).

ISSUE III

THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS TO BE MENTALLY COMPETENT TO STAND TRIAL AND TO BE PRESENT WHEN IT PROCEEDED WITH THE PENALTY PHASE TRIAL FOLLOWING APPELLANT'S SUICIDE ATTEMPT WITHOUT FIRST CONDUCTING A COMPETENCY HEARING.

Appellee relies upon Trawick v. State, 473 So.2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986), and Card v. State, 497 So.2d 1169 (Fla. 1986), cert.denied, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987), Brief of Appellee at p.18-19, to argue that Appellant's suicide attempt did

not provide reasonable grounds to believe that he might be incompetent. Yet neither case involved an actual suicide attempt, much less a nearly successful suicide attempt made during the course of trial.

A suicide attempt during trial provides a strong indication that the defendant may not be presently competent to stand trial. See Drope v. Missouri, 420 U.S. 162, 181, 95 S.Ct. 896, 43 L.Ed.2d 103, 119 (1975). See also Crawford v. State, 538 So.2d 976 (Fla. 5th DCA 1989) (suicide attempt prior to sentencing required competency hearing).

In this case, Appellant wrote a suicide note explaining his actions. (R886-887) This note, in combination with the actual suicide attempt, plainly showed the irrationality of Appellant's thought and behavior on the day of the penalty phase trial. Appellant did not attempt suicide because he felt guilty; he tried to kill himself because he believed he was innocent and Jessie Watson was lying. (R886-887) It was certainly not rational for a man who believed himself innocent to refuse to assist his defense attorney and then attempt to take his own life to "beat" the prosecutor. (R887)

Surely these circumstances raised at least a bona fide doubt regarding Appellant's competency to stand trial an the day of the penalty phase proceedings. See Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815, 822 (1966); Pridgen v. State, 531 So.2d 951, 954-955 (Fla. 1988). Due process of law required Appellant to have the present ability to consult with counsel with

a reasonable degree of rational understanding on the day of the penalty phase trial. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Pridgen v. State, 531 So.2d at 954; U.S. Const. amend. XIV; Art. I, § 9, Fla.Const. Since Appellant's suicide attempt raised at least a reasonable daubt about his competency on the day of the penalty phase trial, the sentence must be reversed.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR PENALTY PHASE TRIAL AND SENTENCING HEARING BY ALLOWING EVIDENCE, AN EMOTIONAL DISPLAY, AND PROSECUTORIAL REMARKS ABOUT THE IMPACT OF THE OFFENSES UPON THE VICTIM AND HER FAMILY.

Victim impact evidence is irrelevant to the capital sentencing decision, and its admission violates the Eighth and Fourteenth Amendments to the United States Constitution. Baath v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Appellee admits that defense counsel objected to the hearsay evidence of Ms. Ricks' statements to the police and her sister on the grounds that it was irrelevant and violated the Eighth and Fourteenth Amendments. (R665-667,674-677) Brief of Appellee at p.22. Since defense counsel clearly stated the correct legal grounds for objecting to victim impact evidence, Appellee's argument that the objection was insufficient to preserve this error for appeal is obviously meritless.

Next, Appellee camplains that defense counsel failed to object to Debra Ricks' emotional display when she began crying on the witness stand. Brief of Appellee at p.23-24. Again Appellee is clearly wrong. While requesting the court to admonish the witness or the jury, defense counsel plainly objected that "anything relating to the victim, the impact it would have on the family, it's totally inadmissible in a capital penalty trial." (R688) Bo 1 prohibits evidence of the emotional impact of the crime on the family. Nothing Ms. Ricks could have said would have more clearly shown the emotional impact of the crime on the family.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Avc., Tampa, FL 33607, (813) 873-4730, on this 2d day of May, 1991.

Respectfully submitted,

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