IN THE SUPREME COURT OF FLORIDA

BRUCE DOUGLAS PACE,

Appellant,

v.

CASE NO. 75,056

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

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TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Appellant Bruce Douglas Pace relies on his initial brief to reply to the State's answer brief except for the following additions concerning Issues I, II, and IV.

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE EXCULPATORY HEARSAY STATEMENTS PACE MADE TO HIS STEPFATHER.

The State asserts that Pace's exculpatory statements were demonstrably false and, therefore, admissible as an admission against penal interest. State's Brief at 9-11. However, the State misinterprets the requirements necessary to change an exculpatory, hearsay statement into an inculpatory admission. Believability of the statement is not the issue. See, Moore v. State, 530 So.2d 61 (Fla. 1st DCA 1988). The test is not whether the prosecutor, the judge, the jury or anyone else

believes the statement. Before the statement is admissible, the State must refute and prove the statement to be false. Moore, at 65-66. No such prove was presented.

In its answer brief, the State asserts four reasons why Pace's statement was false, but none of them has merit. State's Brief at 10. These alleged reasons did not refute the content of the statement and did not constitute proof of falsity. First, Pace did not report his statement until he spoke to his father. A failure to report earlier does not, in any way, refute the statement. Second, Pace told May Green the stains on his pants were from squirrel blood. The State suggests this was a lie because testing of a pair of pants revealed human blood stains. One problem with this analysis is that May Green never identified the pants with the human blood as the pants Pace wore. (R 709) See, Initial Brief at 34. Another problem is that the statement Pace made to his father did not mention anything about stains on his pants. (R 852-863) Consequently, whether Pace lied or not when he told May Green the stains she saw were from squirrel blood has no bearing on the admissibility of the hearsay statement. The squirrel blood comment did not refute or contradict any part of the statement in question. Third, the State suggested in a footnote that physical evidence "corroborated Pace's presence at the crime scene." State's Brief at 10. However, the State failed to identify which "scene" -- the location of the body, the location of the taxi, or the driveway of the Pace's parents' house. Pace's statement admitted being in the taxi and at his parents house.

Corroboration of these facts certainly would not refute his statement. There was no physical evidence linking Pace to the body. See, Initial Brief, Issue V. Fourth, in a footnote, the State asserts that physical evidence shows Pace's shotgun was used. State's Brief at 10. This is not correct if the State suggests proof that the gun was used to commit the crime. Physical evidence showed the shotgun fired some Federal brand shells and that the victim was killed with Federal brand shells. However, there was nothing to link the shells fired in Pace's gun to the victim. The only evidence of the use of the shotgun was that it fired shells found in the yard of Pace's house. See Initial Brief at 33.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN LIMITING CROSS-EXAMINATION OF STATE WITNESSES ABOUT THE EXISTENCE OF A THIRD SHOTGUN SHELL AT THE SAME HOUSE WHERE THE TWO SHELLS WHICH THE STATE INTRODUCED IN EVIDENCE AND ALLEGED AS THE SHELLS FROM THE TWO FATAL SHOTS.

The State contends Pace's proposed cross-examination was beyond the scope of direct and, consequently, properly restricted. On pages 11-12 of the answer brief, the State alleges the direct examination was limited to the transaction where the two red shells were found in the yard and delivered to law enforcement. This overlooks the fact that Harvey Rich, on direct examination, testified that it was not unusual to find shotgun shells in his yard because his sons frequently shot in the yard target practicing. (R 857-858) Furthermore, Rich testified that he did not notice the two red shells near the driveway at the same time. (R 857-858) He noticed the first and paid little attention to it. (R 857-858) Later during the same weekend, he found the second about eight to ten feet from the first after walking in the yard after church. (R 858) Lilly Rich testified on direct that she picked up the two shells near the driveway on Monday after her husband pointed them out to her. (R 877-878) The scope of the direct examination included any discovery of shotgun shells in the yard. The testimony was not limited to the narrow transaction of the discovery of the two shells, and Pace was entitled to elicit testimony to complete

the picture for the jury regarding the shotgun shells present in the yard.

On page 12 of the answer brief, the State attempts to distinguish Zequera v. State, 549 So.2d 189 (Fla. 1989) on the ground that the .22 caliber bullets in question were in evidence where the third red shotgun shell, here, was not. First, the fact that the .22 caliber bullets were actually in evidence was not of significance in Zequera. The issue was the defendant's right to elicit on cross the existence of these bullets in the codefendant's possession. Since the prosecutor inferred that the bullets were in Zequera's possession, Zequera was entitled to clarify the false inference. The same situation exist here. Because two shots killed the victim, the State was drawing the inference that the two shells near the driveway were the product of those two shots. Pace was entitled to clarify the circumstances by demonstrating that a third shell of the same manufacture was also found in the yard.

Finally, the State contends that any error in restricting cross-examination was harmless because the defense did not present defense evidence about the third shell. State's Brief at 13-14. This position is without merit. Being placed in the position of having to choose between presenting the evidence or having first and last argument in summation is, itself, harm. See, Coco v. State, 62 So.2d 892 (Fla. 1953). Furthermore, the two cases the State cites as supporting this harmless error theory do not so hold. In Jones v. State, 440 So.2d 570 (Fla. 1983), the court held the attempted cross-examination was

beyond the scope of direct, not that harmless error occurred. Dicta in the opinion merely noted that other methods were available to elicit the testimony. In Henry v. State, 15 FLW 2098 (Fla. 4th DCA 1990), the court held the restriction of cross-examination was harmless because defense witnesses testified to substantially the same information as the State's witness would have on cross. This is far different than forcing a defendant to present a State witness as his own solely for the purpose of presenting evidence which should have been the proper subject of cross-examination.

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING TWO EXPENDED SHOTGUN SHELLS INTO EVIDENCE SINCE THESE ITEMS WERE IRRELEVANT AND NEVER LINKED TO THE CRIME.

On page 16 of the answer brief, the State claims as fact that "[t]he shells were at the scene of the murder." The shells were found in the Richs' yard near the driveway. (R 857) Nothing, other than the prosecution's speculation, established that as the scene of the murder. Harvey Rich testified that it was not unusual to find shotgun shells in his yard. (R 857) There was no other physical evidence suggesting the driveway was the scene of the homicide. (R 81-882)

CONCLUSION

For the reasons presented in the initial brief and in this reply brief, Bruce Pace asks this Court to reverse his conviction, or alternatively, to reduce his sentence to life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Mr. Mark C. Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Bruce Douglas Pace, #084643, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 23 day of October, 1990.

W. C. McLAIN