FILED
SID J. WHITE
OCT 23 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LARRY EUGENE MANN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 75,952

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0234176

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

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

	PAGE NO.
PRELIMINARY STATEMENT	1
ARGUMENT	1
ISSUE I	
THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER ONE OF THE STATE'S WITNESSES TESTIFIED CONCERNING APPELLANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT.	1
ISSUE III	
THE INSTRUCTIONS THE TRIAL COURT GAVE APPELLANT'S JURY ON THE AGGRAVATING CIRCUMSTANCES FOUND IN SECTIONS 921.141(5)(b) AND 921.141(5)-(d) OF THE FLORIDA STATUTES WERE IMPROPER. THE INSTRUCTION ON PRIOR CONVICTION OF A VIOLENT FELONY DIRECTED A VERDICT AGAINST APPELLANT, AND THE INSTRUCTION ON COMMITTED DURING A KIDNAPPING DID NOT CONFORM TO THE ALLEGATIONS OR THE PROOF.	7
ISSUE IV	
THE COURT BELOW ERRED IN REFUSING TO RECUSE HIMSELF AT APPELLANT'S SENTENCING AFTER APPELLANT LEARNED THAT THE COURT HAD REVIEWED EX PARTE A NUMBER OF LETTERS FROM MEMBERS OF THE COMMUNITY URGING THAT APPELLANT BE SENTENCED TO DEATH.	11
ISSUE V	
THE FINDINGS OF THE COURT BELOW AS TO APPELLANT'S SENTENCE OF DEATH ARE NOT SUFFICIENTLY CLEAR BECAUSE OF THE INCONSISTENT MANNER IN WHICH THE COURT TREATED THE SUBJECT OF APPELLANT'S REMORSE.	12

TOPICAL INDEX TO BRIEF (continued)

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CITATIONS

CASES	PAGE NO.
Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)	11, 12
Carr v. State, 561 So.2d 617 (Fla. 5th DCA 1990)	2
Donovan v. State, 417 So.2d 674 (Fla. 1982)	4
Gill v. State, 16 F.L.W. D2507 (Fla. 4th DCA Sept. 25, 1991)	10
Grant v. State, 194 So.2d 612 (Fla. 1967)	2
Grossman v. State, 525 So.2d 833 (Fla. 1988)	12
Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)	8
Ingram v. State, 393 So.2d 1187 (Fla. 3d DCA 1981)	10
Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989)	12
Jackson v. State, 451 So.2d 458 (Fla. 1984)	1, 3
Jackson v. State, 522 So.2d 802 (Fla. 1988)	4
Johnson v. State, 465 So.2d 499 (Fla. 1985)	8, 9
Johnston v. State, 497 So.2d 863 (Fla. 1986)	1
McAbee v. State, 391 So.2d 373 (Fla. 2d DCA 1980)	10
Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983)	3
Payne v. Tennessee, 501 U.S. ____, 111 S.Ct. ____, 115 L.Ed.2d 720 (1991)	11, 12

TABLE OF CITATIONS (continued)

Roban v. State,
384 So.2d 683 (Fla. 4th DCA 1980) 1

State v. Cumbie,
380 So.2d 1031 (Fla. 1980) 3

State v. Prieto,
439 So.2d 288 (Fla. 3d DCA 1983) 4

Woodson v. North Carolina,
428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) 12

Wright v. State,
16 F.L.W. S595 (Fla. Aug. 29, 1991) 7, 8

OTHER AUTHORITIES

§ 921.141, Fla. Stat. (1989) 12
§ 921.141(5)(b), Fla. Stat. (1989) 7, 9
§ 921.141(5)(d), Fla. Stat. (1989) 7

PRELIMINARY STATEMENT

Appellant, Larry Eugene Mann, will rely upon his initial brief in reply to the arguments presented in the State's answer brief as to Issues II and VI.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER ONE OF THE STATE'S WITNESSES TESTIFIED CONCERNING APPELLANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT.

Appellee first takes the position that Appellant's objection and motion for mistrial after Manuel Pondakos gave improper testimony came too late to qualify as a "contemporaneous" objection. (Brief of the Appellee, pp. 6-7) However, Appellee candidly acknowledges that objections coming several questions after inadmissible testimony has been given have been held sufficiently timely in this Court's opinion in Johnston v. State, 497 So.2d 863 (Fla. 1986) and in Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1980). Of similar effect is Jackson v. State, 451 So.2d 458 (Fla. 1984), in which defense counsel objected several questions after a State witness gave inadmissible testimony. This Court cogently observed that "[a]n objection need not always be made at the moment an examination enters impermissible areas of inquiry," and that where the "objection was made during the impermissible line of questioning," it was "sufficiently timely to have allowed the court, had it sustained the objection, to disregard the testimony

or to consider a motion for mistrial." 451 So.2d at 461. Here, Appellant's objection and motion for mistrial, coming as they did at the conclusion of defense counsel's cross-examination of Pondakos, were made in sufficient time for the court to have taken corrective measures. In Carr v. State, 561 So.2d 617 (Fla. 5th DCA 1990), the court dealt with a situation where the defense attorney belatedly moved for a mistrial after a State witness had offered testimony which was fairly susceptible of being construed as comment on the defendant's invocation of his right to remain silent, and noted as follows in finding the motion sufficiently timely:

> The purpose of requiring contemporaneous objection is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue. [Citation omitted.] When objection is made to unsolicited comments of a witness, the immediacy of the objection is not as critical as when the objection is to a question. Neither the questioner nor other counsel can anticipate such voluntary statements from the question. Thus, courts have long recognized that objections to unsolicited comments are timely if made within a reasonable time. [Footnote omitted.]

561 So.2d at 619. The above principles apply in the instant case, where counsel for Appellant had no reason to expect the testimony volunteered by Pondakos, and was undoubtedly taken aback by it. His objection was made within "a reasonable time," and this Court should consider Appellant's issue on its merits.

Cases dealing with objections to final arguments are also instructive on the question of timeliness. In Grant v. State, 194 So.2d 612 (Fla. 1967), for example, this Court found appellate

review not to be barred where defense counsel did not object to improper remarks the prosecutor made during final argument, but waited until the conclusion of final arguments to move for a mistrial. In State v. Cumbie, 380 So.2d 1031 (Fla. 1980), this Court held that a motion for mistrial based upon prosecutorial comments during closing argument is sufficiently timely if made at the conclusion of the closing argument. And in Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983), in which the prosecutor made an improper remark during closing argument, but defense counsel waited for a recess that followed to move for a mistrial, the court held that it was not fatal that the objection was not made immediately following the improper utterance. It seems logical that Appellant's counsel here would not wish to interrupt the flow of his cross-examination by breaking it off unnaturally to make an objection at the bench. His objection and motion were timely in accordance with the concepts expressed in the cases discussed above, and appellate review of Appellant's issue is not precluded.

Appellee next argues that defense counsel's objection and motion below were not specific enough and/or were not the same as the grounds for reversal urged on appeal. (Brief of the Appellee, pp. 7-8) However, Appellant's objection and motion for mistrial clearly indicated to the trial court that he was complaining of a violation of his constitutional right to remain silent. (R1241-1243) This was the proper objection, and was at least as specific as the relevancy objection made by defense counsel in Jackson to testimony that Jackson had said he was "a thoroughbred killer from

Detroit," which objection this Court held to be sufficiently specific. Appellant is arguing on appeal exactly that which was argued below: that Pondakos' testimony violated Appellant's right to remain silent.

Appellee's next argument is that the record does not indicate that Appellant invoked his right to remain silent. (Brief of the Appellee, page 8.) The cases cited by Appellee, Donovan v. State, 417 So.2d 674 (Fla. 1982) and State v. Prieto, 439 So.2d 288 (Fla. 3d DCA 1983), are inapposite. Both involved situations where the defendant had made statements to the police which the State wanted to use at trial. More to the point is Jackson v. State, 522 So.2d 802 (Fla. 1988). There a Detective Luis was called as a defense witness. "Defense counsel asked Detective Luis if anyone had attempted to interview Jackson's wife or son, who testified as alibi witnesses at trial. Detective Luis replied: 'No. We at that point had no reason to interview them. Mr. Jackson made no statement to us when we arrested him insofar as any possible information that they may have.'" 522 So.2d at 807. This Court agreed with the trial court that this testimony constituted comment on Jackson's exercise of his right to remain silent, but the error was harmless. The remark in Jackson was similar to Pondakos' testimony in the instant case that he and another deputy went to the hospital to question Appellant, but that "there was no statements given." (R1236) In Jackson the Court noted that the Court has "adopted a very liberal rule for determining whether a comment constitutes a comment on silence. If the comment is

'fairly susceptible' of being interpreted by the jury as a comment on the defendant's exercise of his right to remain silent it will be treated as such." 522 So.2d at 807. It cannot seriously be argued that Pondakos' testimony was not "fairly susceptible" of being interpreted by the jury as a comment on Appellant's exercise of his right not to incriminate himself.

Appellee's final attack on Appellant's position is that any error that occurred in admitting Pondakos' testimony was harmless. Appellee endeavors to counter Appellant's argument that Pondakos' testimony undercut the defense attempt to establish Appellant's extreme remorse concerning his actions by contending that the evidence did not show that Appellant felt any remorse at the time he was in the hospital, or any time prior to the signing of his first death warrant in 1986. (Brief of the Appellee, pp. 8-9) However, the defense made a determined effort to present extensive evidence regarding Appellant's suicide attempt on the day Elisa Nelson disappeared, including testimony from the emergency room doctor, Dr. Boyce Nathaniel Berkel, who testified about the seriousness and extent of Appellant's injuries (R1396-1402), and photographs of the wounds Appellant inflicted to his arms. (R485-486, 1239-1240) The purpose of this evidence was to demonstrate that Appellant immediately felt such great sorrow and revulsion over what he had done that he attempted to take his own life. Defense counsel stressed this theme in his argument to the jury (R2051):

> Ladies and gentlemen, the first evidence of remorse is Larry's attempt to take his

> life, and you can look at these pictures again, if you wish to. And to suggest that he did this for any other purpose than because he was ashamed and disgusted with himself for what he had done and feeling remorseful is ridiculous.
>
> The doctor said it was a serious attempt. It took him a couple of hours to sew this man back together. He had great losses of blood. And when he came into the hospital, he was in shock. And as we know, he spent four to five days in the hospital before he was released.

Defense counsel continued to discuss evidence of Appellant's remorse, and noted (R2052): "We have physical evidence from the time of the crime when he tried to cut himself open. Well, whether he did cut himself open; and number two, we have the evidence of the people that have known him over the last ten years." Thus, an important part of the defense evidence and argument was devoted to proving that Appellant was indeed remorseful from the very beginning.[1] Pondakos' testimony that "there was no statements given" when the deputies went to the hospital to question Appellant may well have influenced at least some of Appellant's jurors to believe that any remorse Appellant felt came much later, in that if Appellant were truly sorrow, he would have said something to that effect when approached by the officers initially. The error in admitting this improper testimony in violation of the Florida and United States Constitutions therefore cannot be deemed harmless.

---

[1] In its argument to the jury, the State sought to denigrate Appellant's evidence of remorse. (R2025-2027)

ISSUE III

THE INSTRUCTIONS THE TRIAL COURT GAVE APPELLANT'S JURY ON THE AGGRAVATING CIRCUMSTANCES FOUND IN SECTIONS 921.141(5)(b) AND 921.141(5)-(d) OF THE FLORIDA STATUTES WERE IMPROPER. THE INSTRUCTION ON PRIOR CONVICTION OF A VIOLENT FELONY DIRECTED A VERDICT AGAINST APPELLANT, AND THE INSTRUCTION ON COMMITTED DURING A KIDNAPPING DID NOT CONFORM TO THE ALLEGATIONS OR THE PROOF.

A. Prior Violent Felony

In addition to the cases cited in Appellant's initial brief regarding the impropriety of directing a verdict against the accused, the recent case of Wright v. State, 16 F.L.W. S595 (Fla. Aug. 29, 1991) is instructive. In Wright the charges against the defendant included two charges of battery on a law enforcement officer. An essential element of this offense is that the victim was in fact a law enforcement officer. In the instruction he gave to the jury on this offense, the trial court said that the victims were law enforcement officers. This Court found that this instruction invaded the fact-finding province of the jury. Whether the particular victims were law enforcement officers at the time of the offense was a matter of fact constituting an essential element of the crime. As such, it was the sole province of the jury to determine whether the State had proved this and every other element of the offense beyond a reasonable doubt. (It appears that there was no objection to the instruction in question, as this Court stated in a footnote that it would not address the question of whether the error in giving this instruction constituted fundamen-

tal error, as it was reversing Wright's convictions on other grounds.) The instruction in Wright which incorrectly removed from the jury the question of the victims' status as law enforcement officers is analogous to the instruction given below, which incorrectly removed from Appellant's jury the question of the status of the burglary with intent to commit unnatural carnal intercourse as involving the use or threat of violence.

Appellee's statement on page 21 of its brief that "[t]he cases cited by appellant dealing with directing a verdict deal with an element of a crime" is inaccurate. In Johnson v. State, 465 So.2d 499 (Fla. 1985), cited on pages 28 and 29 of Appellant's initial brief, this Court essentially held that it was error for the trial court to direct a verdict against the defendant at the sentencing phase of a capital trial on the matter of whether a burglary is a felony involving the use or threat of violence, which is the issue involved herein.

Appellee cites Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) for the proposition that "'[T]he existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty"'" (Brief of the Appellee, p. 21), but Hildwin is inapposite. Whether the existence of an aggravating factor is termed "an element of the offense" or "a sentencing factor" is an empty exercise in semantics; the fact remains that under Florida's capital sentencing scheme the jury must find beyond a reasonable doubt as a factual matter that one or

more aggravating circumstances exist. If they do not so find, they cannot recommend a sentence of death. Therefore, as this Court implicitly recognized in Johnson, directing a verdict against a capital defendant as to an element of an aggravating circumstance is no less subject to condemnation than directing a verdict against a defendant as to an element of a crime.

Appellee argues at page 22 of its brief that because the trial court instructed the jury that aggravating circumstances had to be established by the evidence, "it was necessary under the totality of the trial court's instructions for the jury to determine whether the prior violent felony existed based upon the evidence which was presented at the penalty phase (including the testimony of the victim and the investigating detective)." This statement is not entirely accurate. As instructed by the court, all Appellant's jury had to find in order to determine that the section 921.141(5)-(b) aggravating circumstance could be applied to Appellant was that Appellant had been convicted of burglary with the intent to commit unnatural carnal intercourse. They did not need to look further to determine whether this offense constituted a violent felony, as the court had already told them that it did.

With regard to the issue of preservation of Appellant's point for appeal, which Appellee addresses at pages 19-21 of its brief, although defense counsel did not specifically object to the jury instruction in question, he did argue that the jury should not be permitted to consider Appellant's Mississippi conviction for several reasons, including that it was "not properly a conviction

for a prior violent crime as our statute requires..." (R1328) Furthermore, jury instructions which misled the jury as to what they were required to decide, as did the instructions here, have been held to constitute fundamental error in cases such as Gill v. State, 16 F.L.W. D2507 (Fla. 4th DCA Sept. 25, 1991) and Ingram v. State, 393 So.2d 1187 (Fla. 3d DCA 1981). In McAbee v. State, 391 So.2d 373 (Fla. 2d DCA 1980), the court defined "fundamental error" as "error which goes to the foundation of the case or goes to the merits of the cause of action." 391 So.2d at 374. Certainly, an error which directs a verdict against an accused as to an essential element of an aggravating circumstance must be considered as going to the "foundation of the case," and the "merits of the cause of action," as it directly relates to the question of what penalty can and should be imposed, which is the ultimate issue involved at penalty phase.

B. Committed During A Kidnapping

Appellee's suggestion that Appellant may have acted with intent to facilitate the commission of masturbation when he allegedly kidnapped Elisa Nelson (Brief of the Appellee, p. 23) is pure speculation. There was no more physical proof of this than there was of a sexual battery, reference to which the prosecutor agreed to delete from the jury instruction on kidnapping. (R1941-1943)

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO RECUSE HIMSELF AT APPELLANT'S SENTENCING AFTER APPELLANT LEARNED THAT THE COURT HAD REVIEWED EX PARTE A NUMBER OF LETTERS FROM MEMBERS OF THE COMMUNITY URGING THAT APPELLANT BE SENTENCED TO DEATH.

Appellee makes much of the fact that the court below said that he had "reviewed" the letters from members of the community, but he had not "studied" them. (Brief of the Appellee, p. 26) While the court's comment was indeed cryptic, it is evident that he was aware of what was contained in the letters, and Appellee does not appear to dispute this.

On page 26 of its brief, Appellee attempts to distinguish Appellant's case from Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) on the ground that the improper material here was provided by members of the community, including friends and family of the victim, rather than being introduced into evidence by the prosecution. Either way, however, the evil condemned in Booth, namely, the injection of irrelevant factors into the sentencing process, creating the risk of arbitrary and capricious infliction of the death penalty, is present, and Appellee is urging a distinction without a difference.

Appellant discussed in his initial brief the fact that Payne v. Tennessee, 501 U.S. ____, 111 S.Ct. ____, 115 L.Ed.2d 720 (1991) did not adversely impact Appellant's issue (Initial Brief of Appellant, p. 36), and Appellant would also note that the type of material provided to the judge here remains inadmissible in

Florida. In Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989) this Court observed that "[v]ictim impact evidence is irrelevant to a capital sentencing decision, and its introduction ... creates a risk that the decision to impose the death penalty was made in an arbitrary and capricious manner. [Citing Booth.]" And in Grossman v. State, 525 So.2d 833 (Fla. 1988), the Court indicated that victim impact evidence should not be considered in the sentencing process because it is not included in the exclusive list of aggravating factors enumerated in section 921.141 of the Florida Statutes. Although these cases were decided prior to Payne, the principles expressed therein were not altered by that decision and remain valid.

In sum, then, the fact that the sentencing court "reviewed" irrelevant and inflammatory letters before sentencing Appellant to die in the electric chair must lead this Court to conclude that the need for heightened reliability in the determination that death is the appropriate punishment, see Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), has not been met and that, accordingly, Appellant's death sentence cannot stand.

ISSUE V

THE FINDINGS OF THE COURT BELOW AS TO APPELLANT'S SENTENCE OF DEATH ARE NOT SUFFICIENTLY CLEAR BECAUSE OF THE INCONSISTENT MANNER IN WHICH THE COURT TREATED THE SUBJECT OF APPELLANT'S REMORSE.

Appellee's claim that "there simply is no evidence that appellant exhibited remorse shortly after he committed the homicide

but, rather, this remorse developed after the signing of his first death warrant" (Brief of the Appellee, p. 32) ignores the evidence pertaining to Appellant's serious suicide attempt on the day of Elisa Nelson's disappearance, which is discussed in Issue I of this brief.

On page 31 of its brief, Appellee states that it "was not clear when...feelings of remorse actually came upon appellant." This acknowledgment by the State that there was an issue at Appellant's sentencing proceeding as to exactly when he first showed evidence of remorse lends further support to Appellant's argument under Issue I that the testimony of Manuel Pondakos regarding Appellant remaining silent when the deputies went to question him at the hospital undermined defense efforts to establish that Appellant's remorse was felt right away, on the very day of the offense.

CONCLUSION

Appellant, Larry Eugene Mann, hereby respectfully renews his request for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of October, 1991.

Respectfully submitted,

Robert F. Moeller

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 0234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

RFM/an