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IN THE SUPREME COURT OF FLORIDA

RONALD PALMER HEATH,

Appellant,

v. CASE NO. 77,234

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

The state presents three claims for why this court should affirm: 1) Heath waived the issue by not agreeing to a curative instruction. 2) The state did not impermissibly comment on the defendant's right to remain silent, and 3) even if he did, such error was harmless.

As to the first argument, the waiver, the state does not say that Heath failed to object because he did. It says that the issue is foreclosed because after the court denied his motion for mistrial, he refused its offer for a curative instruction. It cites no authority for that claim, and to the contrary, this and other courts have rejected it. Roman v. State, 475 So.2d 1228, 1334 (Fla. 1985); Ingraham v. State, 502 So.2d 987, F.n. 2 (Fla. 3rd DCA 1987).

As to the second point, whether the comment impermissibly infringed upon Heath's right to remain silent, the defendant relies upon his argument in his Initial Brief.

Finally, as to the comment's harmlessness, Heath would reiterate that the evidence against him was far from overwhelming, coming largely from his brother, who had an obvious bias to testify against Ronald. Moreover, many of the details supplied by him were specifically contradicted by other witnesses. See, Initial brief at pages 18-19.

By referring to questions the defendant asked during voir dire and his request for a jury instruction on his not testifying at trial, the state has confused the harmless error analysis. As this court said in State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986):

> Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even close examination of the impermissible evidence which might have possibly influenced the jury verdict. (emphasis added.)

The harmless error analysis looks to the evidence introduced at trial, not comments made during voir dire. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN ADMITTING EVIDENCE ABOUT THE VICTIM, MICHAEL SHERIDAN, THAT HE WAS A NICE PERSON, IN VIOLATION OF HEATH'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The state claims, on page 27 of its brief that the jury did not hear evidence that the victim, Michael Sheridan, was a "good person." This is part of what the jury heard from his wife:

> Q. Did Michael pick up a southern slang?
>
> A. Yes, he did. He was the type of person that, if we were around some good friends of ours that were from Tennessee or Georgia or whatever, he liked to make them feel comfortable. So he would--you know, talked with a southern slang and --trying to make them feel comfortable, and he was just--that's how his personality was.
>
> * * *
>
> Q. What kind of training and education did he have to qualify for [his] job?
>
> A. His undergraduate degree was in business administration from a college in North Carolina, and his-- had a graduate degree in economics from Middle-Tennessee State University in Murfreesboro, Tennessee.
>
> * * *
>
> Q. Do you know whether, when Michael traveled, he would go into bars or somewhere to get something to eat and have a drink or whatever?
>
> A. Uh-huh, uh-huh. Michael was just a people-person. When he would go into a town, he would--he would not like to sit in his room by himself. He would much rather go down to the bar so he could talk to the people there, watch the sports on the TV, or get something to eat. He definitely would go out.

* * *

Q. Did Michael like sports?

A. He loved sports.

(T 760-62).

Such testimony shows the victim as an outgoing, friendly person. It also had no relevance to this case.

The state, apparently operating under the theory that a negative cancels a positive, listed several "negative" characteristics of the victim it brought out (Appellee's brief at p. 28) It is, first, puzzling how drinking alone at a bar is an undesirable personality trait, as the state asserts. Also, in the context of this case, that Sheridan had put his wedding band in a leather cosmetic case is at best ambiguous. Likewise, in a day when cocaine abuse is rampant, smoking marijuana hardly assumes the characteristics of a major character flaw.

Heath never said the state tried to make a saint out Sheridan (Appellee's brief at p. 29). The state's purpose was more subtle, and more prejudicial. We feel sympathy for the Mother Theresea who suffers for humanity, yet it is the Michael Sheridans who are good, friendly men and who are not much different than us that we empathize and identify with. While such feelings are natural, it is that close link between the average citizens who sit as jurors and the victim that prevents evidence of the victim's good character from being admitted. It detracts the fact finder's attention away from the relevant facts and applicable law and permits them to dwell on and

convict because of the real but irrelevant nature of the victim's character.

That the state used this impermissible evidence is clear from its closing argument. From the beginning it repeatedly mentioned that Sheridan was a decent, average kind of person.

> Michael Sheridan was a traveling salesman. He had a master's degree; he worked for Ammaco Fibers, selling a new line of carpet, a sophisticated new line of carpet. Michael liked what he did; Michael traveled a lot.
>
> * * *
>
> Michael Sheridan does not have very long to live. Michael Sheridan doesn't know that. Regina Sheridan told you about Michael: Michael was a trusting person; Michael was an outgoing person; Michael loved baseball, he like to talk. He was athletic; liked to talk about sports.

(T 2055-56).

Such evidence had only tangential relevance to the material issues of this case, and the trial court erred in admitting it. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN REFUSING TO LET DEFENSE WITNESS LAMAR STODGHILL TESTIFY REGARDING HEATH'S WORKING FOR HIM, THUS TENDING TO ESTABLISH THAT HEATH HAD NO MOTIVE TO ROB SHERIDAN.

The gist of the state's argument on this point is that whatever error may have occurred, it was harmless in light of Penny Powell's testimony which gave many of the details that Stodghill would have testified about. (Appellee's brief at pp. 31-32) Powell, however, considered herself as Heath's wife (T 2068), and hence her credibility was suspect. Stodghill, on the other hand, was not as emotionally involved in this case, and the jury would have naturally given his much more detailed testimony of Heath's work record more weight.

In light of the state's case resting almost entirely upon the testimony of Kenneth Heath, the court's error cannot have said to have been harmless beyond all reasonable doubt.

ISSUE V

THE COURT ERRED IN EXCLUDING TESTIMONY OF PENNY POWELL THAT HEATH SAID HE DID NOT KNOW SHERIDAN'S WATCH WAS IN HIS SUITCASE BECAUSE IT WAS SELF-SERVING HEARSAY IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state's claims on this issue are that 1) Heath did not want to admit any hearsay statements. 2) He did not seek to preserve the issue for appellate review. 3) The statement was inadmissible under one of the hearsay exceptions. 4) In any event, excluding it was harmless error.

As to the defendant not seeking to admit the statement, he did so only because the court had precluded him from doing so (T 2019-20). The issue is also preserved for appellate review because the court knew what Heath wanted admitted:

> [The Prosecutor]: Your Honor, [defense counsel] is intending to go into an area that I think he's going to- into [Heath's] having the watch in his luggage, her observations of that, and what [Heath] having the watch in his luggage, her observations of that, and what Ronnie said about that. That's all self-serving: He's going to say, "I didn't know the watch was there." --She's going to say he said. "I didn't know the watch was there." She's going to say he looked surprised."

(T 2019-20).

From what the prosecutor said, the court certainly had enough information to make a ruling, and at no point did either the court or the prosecutor criticize Heath's attorney for not laying the proper predicate or not having enough information upon which to either object or make a ruling. The issue has

been adequately preserved for appellate review. Castor v. State, 365 So.2d 702 (Fla. 1978).

On page 35 of its brief the state says that the state of mind exception relates only to the defendant's mental condition at the time of the killing. If the jury can consider a defendant's efforts to escape made long after he has allegedly committed a crime to show his guilty knowledge, Macliewocz v. State, 114 So.2d 684 (Fla. 1959), then evidence of his lack of guilty knowledge, as shown in this case by Heath's surprise at finding the victim's watch among his possessions, should likewise be admissible. The state of mind hearsay exception is not so narrowly drawn as the appellee suggests, and section 90.803(3)(2) allows statements offered to "prove or explain acts of subsequent conduct of the declarant." Here that the defendant "did not know the watch was there" clarified his girlfriend's testimony that he acted surprised when he said it.

Thus, excluding the statement significantly damaged Heath's case because it gutted the force of Penny Powell's observation that Heath acted surprised when he saw the watch. Physical actions or reactions often are ambiguous, having several possible explanations other than the one hoped for or suggested. C.f. Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976) (The defendant's silence after having been read his Miranda rights is ambiguous.) Allowing only evidence that Heath acted surprised is similarly subject to many interpretations. He could have, for example, been surprised to see the watch in the luggage rather than in their car. Or he

could have been surprised that the watch fell out of the luggage when he thought he had it secured in a sock or a box. Such uncertainty vanishes when Powell said that Heath told her that he did not know the watch was there. That statement, when coupled with Powell's observation, supports his claim that he knew nothing about the murder, and that his brother was trying to blame him for it. This court cannot say that excluding what Heath told Powell was harmless beyond a reasonable doubt.

ISSUE VI

THE COURT ERRED IN SENTENCING RONALD HEATH TO DEATH BECAUSE HE WAS NO MORE CULPABLE OF DEATH THAN HIS BROTHER, KENNETH, WHO DID NOT RECEIVE A DEATH SENTENCE.

Appellate counsel is a bit confused by the state's argument on this issue. The state seems to argue that because the sentencing court did not expressly find, as an aggravating factor, Heath's domination, it did not do so, as a matter of fact or law. In Mikenas v. State, 367 So.2d 606 (Fla. 1979), the trial court found that the defendant had a "substantial history of prior criminal activity." By doing so, which arguably was only to refute the presence of a mitigating factor, this court said the court "placed into the balance established by the statute, a nonstatutory aggravating factor." Id. at 610.

The court, in this case, did the same thing as the court in Mikenas: by refuting the presence of a mitigating circumstance, it has created a non-statutory aggravating factor. Contrary to the state's argument on page 40 of its brief, merely because the sentencer stated "its basis for rejection of the mitigating circumstances not found," does not refute Heath's claim that it based its death sentence, at least in part, upon that finding. If that were the case, then this court would not have ruled as it did in Mikenas but would have instead have affirmed the trial court's finding.

In justifying the disparate treatment of Heath and his brother, the court did not use the defendant's prior murder

conviction to distinguish the different sentences imposed. Instead, it relied upon the four factors discussed in the defendant's Initial Brief at pages 38-42. Those factors, upon analysis, do not adequately differentiate between the two men because 1) they applied with equal force to both defendants, or 2) they were not proven beyond a reasonable doubt. To those arguments, which formed the basis for Heath's claim on this point, the state says nothing. It made no effort to support the court's ruling that Heath controlled his brother, and presumably from its silence it could not. Thus, the only basis upon which this court can affirm the court's finding on this point is to retreat from its holding in Mikenas and other cases relying upon that case. There is, however, no reason to overturn such well settled and sensible law, and rather than searching for the argument the state has failed to present, this court should simply reverse the trial court's sentence and remand for resentencing.

CONCLUSION

Based on the arguments presented here and in his Initial Brief, Ronald Heath respectfully asks this honorable court to reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Anita J. Gay, Assistant Attorney General, Post Office Box 013241, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33101; and a copy has been mailed to appellant, RONALD PALMER HEATH, #065145, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 16TH day of January, 1992.

DAVID A. DAVIS