DA 4-4-94

COPY

IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON, :

Petitioner, :

vs. : Case No. 78,336

STATE OF FLORIDA, :

Respondent. :

_____ :

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

PRELIMINARY STATEMENT

Appellant, Emanuel Johnson, has two cases pending before this Court. References in this brief to the record in case number 78,336, in which the victim was Iris White, will be designated by "W," followed by the appropriate page number. References to the record in case number 78,337, in which the victim was Jackie McCahon, will be designated by "M," followed by the page number.

Appellant also has two appeals pending in the Second District Court of Appeal. In case number 91-2368, in which the victim was Kate Cornell, Appellant was convicted of attempted murder, armed burglary of a dwelling and armed robbery. In case number 91-2373, in which the victim was Lawanda Giddens, Appellant was convicted of battery, burglary of an occupied structure and robbery.

Appellant will rely upon his initial brief in reply to the arguments presented in the State's supplemental answer brief as to Issues IV and V.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW MITIGATING EVIDENCE AND ARGUMENTS AND REFUSED TO ALLOW EVIDENCE THAT WOULD REBUT NONSTATUTORY AGGRAVATORS.

With regard to Appellant's argument that he should have been permitted to present to his jury evidence that the death penalty does not function well as a deterrent and is more expensive than life imprisonment, Appellee argues that "this claim has not been preserved for appellant review" because Appellant did not renew his motion to present this evidence during the penalty phase. (Supplemental Brief of Appellee, p. 7) Appellee cites no authority whatsoever in support of its position that such renewal is required; it is not. This Court has recognized in several cases that counsel is not required to do something that is pointless in order to preserve an issue for appeal. The trial court had already ruled Appellant's evidence inadmissible, and so there was no need for him to raise the matter again. Thomas v. State, 419 So. 2d 634 (Fla. 1982) (No requirement to do a useless act.) Brown v. State, 206 So. 2d 377, 384 (Fla. 1968) ("A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless. [Citation omitted.]" Birge v. State, 92 So. 2d 819, 822 (Fla. 1957) ("It is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the trial judge.")

Furthermore, Appellee misses the point when it says at pages 7-8 of its answer brief that this type of evidence was not proper mitigation. The primary purpose of this evidence was to rebut nonstatutory aggravating circumstances that may have borne upon the jurors' minds. They may erroneously have believed that the threat of the death penalty is an effective deterrent to those who might otherwise commit murder, and/or may have believed that they should vote to execute Appellant because this would be cheaper than keeping him in prison for life. Appellant simply wished to put on evidence to disabuse his jury of these incorrect assumptions.

In Simmons v. South Carolina, 512 U.S. ___, 114 S. Ct. ___, 129 L. Ed. 2d 133 (1994), the Supreme Court of the United States recently recognized that the Due Process Clause requires that a capital defendant be permitted to counter evidence presented by the State as a reason for executing him. Simmons is particularly relevant to the argument Appellant wished to present to his jury regarding the lengthy prison terms he was facing for the other felonies of which he had been convicted (attempted murder, armed burglary of a dwelling and armed robbery in the case involving Kate Cornell and burglary of an occupied structure and robbery in the case involving Lawanda Giddens). In Simmons the Court decided that the petitioner should have been permitted to inform his jury of his ineligibility for parole in order to counteract the prosecutor's general argument regarding the defendant's future dangerousness. The prosecutor below, in his penalty phase argument to the jury, emphasized these incidents, and the fact that Appellant had been

convicted of five violent felonies as a result thereof. (W 6080-6082) He asked, "What does this say about the defendant's character? What does this say about the defendant's ability to commit crimes of violence?" (W 6082) Later, he told the jury to "[l]ook at these five prior felony convictions. Look at that defendant's character, his ability to commit violent crimes." (W 6084) Subsequently, he asked the jury, "What did Lawanda Giddens and Kate Cornell and the facts of Iris White say about the defendant's character? What do they say, ladies and gentlemen, about his ability to kill?" (W 6085) The prosecutor further suggested to the jury that Appellant committed a violent crime "every six months." (W 6082, 6091-6092) The evidence the State presented of prior violent felonies and the prosecutor's arguments based thereupon are exactly the type of matters touching upon future dangerousness or propensity to commit violent offenses that Appellant was entitled to counteract, pursuant to Simmons, by arguing that he might receive lengthy prison terms, such as consecutive life sentences, in the Cornell and Giddens cases. If the State is to be permitted to use prior violent felonies in aggravation, the defendant on trial for his life must be allowed to demonstrate the "flip side" by showing that he may be incarcerated for the rest of his life as a result of these convictions, and that it is therefore not necessary that he be put to death in order for society to be protected. It is only in this manner that the playing field can be leveled, which is the essence of due process, as the Supreme Court recognized in Simmons. To say that the only

issue before the jury is what sentence the defendant should receive for the homicide, and not for any other cases [see Marquard v. State, 19 Fla. L. Weekly S314 (Fla. June 9, 1994), cited by Appellee on page 3 of its brief] fails to acknowledge that the State is permitted to use other cases (prior violent felony convictions) in an effort to persuade the jury that the ultimate sanction is warranted; the defendant should be permitted to round out the picture for the jury by demonstrating that he will be punished severely for these other offenses, and that any propensity to commit acts of violence that might be established by them does not necessarily mandate that a sentence of death be imposed, but rather a life sentence for the homicide may suffice, when considered in conjunction with the potential penalties for the previous violent felonies.

ISSUE II

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INJECT IRRELEVANT AND HIGHLY PREJUDICIAL FACTORS INTO APPELLANT'S PENALTY PROCEEDING THROUGH ITS IMPROPER CROSS-EXAMINATION OF A DEFENSE WITNESS AND ITS IMPROPER ARGUMENT TO THE JURY.

Appellee asserts that Appellant's challenge to the prosecutor's penalty phase closing argument "is procedurally barred because counsel did not object to the statement until after the jury retired and after an evidentiary hearing on a collateral matter was held." (Supplemental Brief of Appellee, p. 9) Several cases are instructive on the preservation question raised by Appellee. 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. These precedents indicate that this Court can consider Appellant's issue; it is not procedurally barred.

ISSUE III

THE COURT BELOW USED AN INCORRECT LEGAL STANDARD IN REJECTING THE MENTAL DISTURBANCE MITIGATOR AND SHOULD INSTEAD HAVE FOUND IT TO EXIST.

Appellee erroneously states that there was nothing apart from the facts of the crime to suggest any mental infirmity on the part of Appellant. (Supplemental Brief of Appellee, p. 10) Appellee completely ignores such evidence as Appellant's two suicide attempts, one at the age of 13 and the other when he was incarcerated on the instant charges, Appellant's confession, in which he talked about the pressure he felt and his losing control, the fact that he was placed on antipsychotic medication after his arrest, etc. There was ample evidence in addition to the facts of the crime to show that Appellant qualified for the "mental" mitigating circumstances. There would have been even more such evidence if the trial court had not unduly hampered Appellant in the presentation of his penalty phase defense by excluding certain items of evidence, as discussed in Issue I in the supplemental briefs filed herein.

ISSUE VI

EMANUEL JOHNSON'S DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTIONS 9 AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY. FURTHERMORE, THIS AGGRAVATING FACTOR WAS SUBMITTED TO JOHNSON'S JURY UPON AN IMPROPER AND INADEQUATE INSTRUCTION.

Appellee asserts at pages 17-18 of its brief that Appellant's claim is procedurally barred, citing Castro v. State, 19 Fla. L. Weekly S435 (Fla. September 8, 1994). Castro only dealt, in a footnote, with a jury instruction on HAC, and thus provides no authority for arguing that the portion of Appellant's argument dealing with the vagueness of the HAC aggravating circumstance itself has not been preserved for appellate review. Defense counsel below did raise this matter in the trial court (W 5786, 5858), and it has been preserved. Indeed, while Appellee indicates at the beginning of its argument that Appellant's entire claim has not been preserved, Appellee then goes on to address only the jury instruction that was given on HAC, ignoring the remainder of Appellant's argument.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Emanuel Johnson, renews his prayer for the relief requested in his initial supplemental brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 2nd day of November, 1994.

Respectfully submitted,

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