IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,411

HENRY GARCIA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Defendant incorporates and relies upon the Introduction and Statement of the Case and Facts set forth in his initial brief.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

A. PRESERVATION

The State argues that although Defendant's counsel moved for judgment of acquittal, his present claims should not be considered because the specific arguments now made were not articulated at the time the motions were made. The State's position fails to recognize the nature of the arguments being presented with regard to the insufficientcy of the evidence. Defendant maintains that there was a lack of evidence to show that the crimes of first degree murder, sexual battery and burglary occurred at all. It is Defendant's position that the State's evidence demonstrated only the commission of a second degree murder. This court has noted that "a conviction imposed upon a crime totally unsupported by the evidence constitutes fundamental error." Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984). Thus, when, as in the present case, there is an absence of a prima facie showing of the crime for which a defendant is convicted, reversal is appropriate regardless of whether an objection was made at trial. O'Connor v. State, 590 So. 2d 1018 (Fla. 5th DCA 1991); K. A. N. v. State, 582 So. 2d 57 (Fla. 1st DCA 1991); Johnson v. State, 569 So. 2d 872 (Fla. 2d DCA 1990).

B. PREMEDITATION

The State correctly notes that premeditation can be shown by circumstantial evidence. In order to be sufficient, however, such evidence must be inconsistent with every other reasonable inference. Taylor v. State, 583 So. 2d 323 (Fla. 1991); Cochran v.

State, 547 So. 2d 928 (Fla. 1989). The evidence here is not inconsistent with such other inferences and, indeed, is perhaps, as discussed in Defendant's initial brief, more consistent with second degree murder than with premeditation.

The State relies exclusively on the "number, depth and nature (State's brief, p. 25)" of the wounds in arguing that the evidence was inconsistent with second degree murder. While the type of injuries to a victim is a proper factor to consider in determining whether the evidence is sufficient to show premeditation to the exclusion of other hypotheses, the nature of the injuries here was equally consistent with second degree murder.

Accepting the State's argument would mean that premeditation exists whenever multiple stab wounds occur. Such a conclusion would clearly not be appropriate. As the State admits, other factors, such as the nature of the weapon used, the presence or absence of adequate provocation and previous difficulties between the parties must also be considered. Larry v. State, 104 So. 2d 352 (Fla. 1958). Here, the weapon was one that is frequently carried by individuals for proper purposes and its nature therefore does not suggest premeditation. Further, there was no evidence whatsoever as to whether there was or was not any provocation or previous difficulties between the parties. Thus, the mere fact that the wounds were the sort that could have occurred in a premeditated killing is not a sufficient basis to conclude that the evidence excluded other reasonable hypotheses, including the hypothesis that the killing was a second degree murder.

C. FELONY MURDER, SEXUAL BATTERY AND BURGLARY

The State recognizes that the sexual battery and burglary counts of the indictment charged Defendant with committing those crimes in certain specific manners, rather than with each possible manner under the appropriate statutes. The State maintains, however, that since the murder counts simply charged the two felonies by name, without any specifics, the murder convictions can be upheld based upon proof of the commission of the underlying felonies in manners other than those charged in the counts charging the felonies themselves. This argument is without merit. If a defendant is acquitted of an underlying felony, a conviction for felony murder based on that crime cannot be sustained. Mahaun v. State, 377 So. 2d 1158 (Fla. 1979); Pray v. State, 571 So. 2d 554 (Fla. 4th DCA 1990). Clearly, the same rationale applies even more strongly when, as here, a judgment of acquittal should have been granted as to the underlying felony.

Further, to conclude otherwise would be to mislead defendants as to the charges against them and thus violate their right to be put on notice of the charges against them, Aaron v. State, 284 So. 2d 673 (Fla. 1973); Young v. State, 141 Fla. 529, 142 Fla. 361, 195 So. 569 (1940), as well as raise serious double jeopardy questions.

As to the sexual battery conviction, the State initially asserts that the evidence was sufficient to demonstrate penetration of the anus. Defendant was only charged with penetration of the vagina, however, so the evidence relating to the anus is immaterial. Moreover, the evidence relied on by the State refers only to a laceration in the "anal canal." There was no evidence as

to the meaning of that term. The evidence thus failed to make clear whether penetration of the anus would be necessary to cause a laceration of the anal canal. Likewise, the evidence failed to establish whether the laceration was caused by an initial contact with the anal canal or by a stab wound to some other part of the body that caused the laceration from the inside. Therefore, to whatever extent the laceration of the anal canal is said to be relevant, the evidence was insufficient to demonstrate that the anus was penetrated.

Secondly, the State points to testimony of bruises to the outer folds of the vagina and "an abrasion going around the back of the vagina, near the entrance part of the vagina." Again, this evidence fails to show penetration. An injury to the outer folds of the vagina clearly does not require penetration. Moreover, an injury "around the back" and "near the entrance" of the vagina can be an injury to the injury to the area behind and near, but not inside, the vagina.

It is therefore clear that the State's claim that the evidence proved penetration is not supported by the testimony.

II. THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE ELEMENTS OF THE OFFENSES CHARGED.

The State relies on cases that deal with the propriety of first degree murder instructions and to what extent it is necessary to define underlying felonies as part of those instructions. There is no indication that any of the cases cited by the State dealt with situations in which the charge as to the underlying felony was specifically limited to one of multiple methods of commission. The State's cases are thus inapplicable.

Moreover, even if the State's argument was to be accepted, it would only apply to the murder instruction. There can certainly be no serious argument that it was proper for the court to instruct on sexual battery and burglary in a manner that allowed the jury to convict for those crimes based upon a finding that the crimes were committed in a manner other than the manner charged.

The State's argument that any error was harmless because jurors are presumed to disregard therories and instructions not supported is entirely inconsistent with its argument to Point I that there was sufficient evidence of sexual battery by penetration of the anus (State's brief, p. 32) and that there was sufficient proof as to both entering and remaining with the necessary intent to commit burglary (State's brief, p. 34). Since neither sexual battery by penetration of the anus, nor burglary by entering with the requisite intent, was charged, the State's own theory regarding the sufficiency of the evidence is an admission that the jury's verdicts could have been based on uncharged crimes. Clearly, the error in this regard was not harmless.

III. THE COURT ERRED IN READING PORTIONS OF THE TESTIMONY TO THE JURY.

A. ELIZABETH FELICIANO

The State bases its argument on the fact that the jury requested Elizabeth Feliciano's testimony as to her "DESCRIPTION OF MR. GARCIA HOW HE WAS DRESSED," and asserts that the testimony relating to Defendant not being in possession of a purse or wallet is not encompassed within that request.

The State's argument simply ignores the rest of the jury's

request. In its entirety, the request was for the testimony "AS TO HER DESCRIPTION OF MR. GARCIA HOW HE WAS DRESSED; AND THE BLOOD ON HIS FOREHEAD AND THE FIRST TIME SHE SAW MR. GARCIA (R 89; emphasis added)."

Clearly, the excluded testimony fell within this request. It is also clear that the testimony was quite significant, as the State now argues (State's brief, p. 35) that one of the reasons for upholding the burglary conviction and the murder convictions on a felony murder theory, is the fact that no purses or wallets were found at the scene. Moreover, the significance of the excluded testimony is also demonstrated by the fact, not addressed by the State, that the jury, after being denied the right to hear the testimony, subsequently again asked for Feliciano's testimony "as to Mr. Garcia's activities when she first saw him (R 90)."

The State's contention that the portions of the testimony that were read were agreed upon by both parties is misleading. After the court ruled against Defendant's request that the portion of the testimony relating to the purse and wallet be included, the parties were able to agree as to what testimony fell within the scope of the court's ruling, but there was certainly no agreement as to the exclusion of the testimony in question.

B. CHANGING THE TESTIMONY OF RUFINA PEREZ-CRUZ

The State argues (State's brief, p. 39) that the court was entitled to change the testimony as taken down by the court reporter under the authority of "Fla. R. Crim. P. 9.200 (f) (1)." The State has confused an appellate rule with a rule of criminal procedure. The rule referred to by the State is actually Florida

Rule of Appellate Procedure 9.200 (f) (1) and it applies only to corrections to a record for appellate purposes. It has no applicability to the procedures to be followed during a trial and no rule of criminal procedure authorizes the action by the court here.

The State further argues that the use of the plural "las," rather than the singular "la" was consistent with certain other testimony. This position ignores the fact that, as discussed in Defendant's initial brief, "la" was also consistent with certain other testimony. Thus, it is not clear from the context what term was used and in the absence of evidence to overcome the presumption of correctness of the court reporter's notes, there was no basis for the court to order the testimony changed.

The State additionally maintains that there no prejudice resulted from the changing of the testimony because the conversation Perez-Cruz claimed to overhear was inconsistent with the version of the events related by Defendant. That fact, however, strongly demonstrates that the testimony was not only harmful, but devastating. The defense's theory was that Perez-Cruz was either incorrect or lying, that she either didn't hear what she claimed to have heard or that it was someone else who said it. Indeed, the defense even presented evidence that Defendant was not working on the day the statements were supposedly made. Obviously, the error in this regard was severely prejudicial.

C. REREADING THE TESTIMONY OF RUFINA PEREZ-CRUZ

The State argues this aspect of this issue by simply asserting that the fact that the statements allegedly overheard by Perez-Cruz

may have been a joke was not included within the scope of the jury's request for what was said.

The State ignores the thrust of Defendant's argument, which is the inconsistency between the fact that the court accepted the rationale now being asserted by the State in this instance, but ruled in a contrary manner when the defense objected on the same grounds with regard to whether the terms "la" and "las," discussed in Section B of this point were masculine or feminine and whether they were singular or plural.

The court ruled inconsistently on these points, allowing the testimony the State wanted and refusing the testimony the defense wanted. While consistent rulings either way, allowing or excluding both, may well have been within the court's discretion, no rationale can justify ruling against the defense as to both. The jury's request could have been strictly construed as including just what was said or it could have been broadly construed as including evidence that put what was said in perspective. Construing in an inconsistent manner that impacted detrimentally on Defendant, however, was error.

IV. THE COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE INADMISSIBLE HEARSAY THAT WAS PREJUDICIAL TO DEFENDANT.

The State argues that it is proper under certain circumstances to show the lack of a record of something. While this is sometimes the case, when it is appropriate, it must be done through the proper witnesses. Thus, even if it is said that the custodian of records of the appropriate hospitals could have testified that their records failed to show stab injuries, there is no theory

that would allow a police officer to testify that he learned from someone that the records showed that fact. Such testimony is hearsay upon hearsay. Even if the State's argument can circumvent one hearsay problem, it cannot avoid the second.

The State further asserts that the testimony was not presented for the truth of the matter asserted but to show "the fact on non-occurrance (State's brief, p. 43)." The fact of non-occurrance is precisely the matter that was being asserted, however. Clearly, the testimony was hearsay.

With regard to the nature of the offense for which Feliciano Aguayo was arrested, the State contends that because the defense brought out that Aguayo had been arrested, the door was opened for testimony as to the offense involved. That is not the case. The fact that a witness is facing charges is relevant, but the specific charges may not be brought out. Rolle v. State, 386 So. 2d 3 (Fla. 3d DCA 1980).

V. THE COURT ERRED IN ADMITTING AND ALLOWING THE IMPROPER USE OF INFLAMMATORY PHOTOGRAPHS, THE UNFAIR PREJUDICE OF WHICH OUTWEIGHED THEIR RELEVANCE.

Defendant respectfully relies on his initial brief with regard to this point.

VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE AND IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S EFFORTS TO PLACE A BURDEN ON DEFENDANT TO PROVE HIS INNOCENCE BY PROVING A DEFENSE HE NEVER RAISED AT TRIAL.

Defendant respectfully relies on his initial brief with regard to this point.

VII. THE COURT ERRED IN INSTRUCTING THE JURY ON CIRCUMSTANTIAL EVIDENCE.

This court should reject the "errata sheet" submitted by the State with regard to this issue. The State has not sought relinquishment of jurisdiction to correct any error it believes may have occurred in transciption or to supplement the record in this case. It is the burden of the party asserting that the record should be corrected to see that the matter is corrected in the trial court, Stuyvesant Ins. Co. v. State, 375 So. 2d 620 (Fla. 3d DCA 1979); Nations v. State, 145 So. 2d 259 (Fla. 2d DCA 1962), and to supplement the record. Florida Rule of Appellate Procedure 9.200. Consideration of the "errata sheet" is therefore inappropriate.

VIII. THE COURT ERRED IN EXCUSING A JUROR BASED ON THE JUROR'S INCONSISTENT AND INCONCLUSIVE COMMENTS REGARDING THE DEATH PENALTY.

Defendant respectfully relies on his initial brief with regard to this point.

IX. PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL DEPRIVED DEFENDANT OF A FAIR TRIAL.

The State points to the fact that many of the prosecutorial comments and other improprieties were not objected to. In this regard, it should be noted that, as detailed in Defendant's initial brief, there were numerous objections. Moreover, many of the comments related to improper testimony that was admitted during the trial over defense objection. Clearly, it would have been futile to have objected to these comments and futile objections are not required when the court's feelings on the issue involved are apparent. Thomas v. State, 419 So. 2d 634 (Fla. 1982); Thomas v.

State, 599 So. 2d 158 (Fla. 1st DCA 1992); Ramos v. State, 413 So. 2d 1302 (Fla. 3d DCA 1982). Perhaps most significant, however, is the fact that the overall impact of the comments and other misconduct deprived Defendant of a fair trial. Under such circumstances, objections as to each and every impropriety are not required. Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), rev. denied, 462 So. 2d 1108 (Fla. 1985); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So. 2d 642 (Fla. 1980); Ailer v. State, 114 So. 2d 348 (Fla. 1st DCA 1959).

The State's argument is an effort to isolate each single impropriety and argue the effect of that impropriety in a vacuum. Such a focus fails to consider the cumulative effect that the steady barrage of improprieties in this case carried with it. That effect mandates reversal.

The State also contends that the prosecutor's comments in her final closing argument were in response to comments made by defense counsel during his closing argument. This claim should be rejected.

In the first place, many of the improprieties here occurred during the evidentiary portion of the trial and during the prosecutor's initial closing argument and thus had nothing to do with what was said during the defense closing. Further, many of the prosecutor's comments during her final closing argument were based on the improprieties that occurred during the evidentiary portion of the trial and they too therefore had nothing to do with anything said by defense counsel. Additionally, the comments made

by defense counsel during his closing argument were directed to and invited by the prosecutor's earlier improprieties and the comments made by the prosecutor during her initial closing argument.

Clearly, defense counsel in no way initiated the exchange of comments. Rather, they occurred as the culmination of a series of improprieties by the prosecutor that began during voir dire and continued throughout the trial. The prosecutor's comments in her final argument cannnot be excused because the defense counsel responded to some extent to the prosecutor's pattern of impropriety.

Moreover, to whatever extent Defendant's counsel's argument is said to have invited some response, the response here clearly exceeded the scope of the invitation. The prosecutor did not walk through an open door; she demolished the entire wall to get to where she wanted to go.

Even when a defense counsel argues that a prosecutor's conduct in prosecuting a case evidences a lack of good faith, a prosecutor may not go so far as to essentially become a witness by expressing a personal opinion. Harris v. State, 578 So. 2d 397 (Fla. 3d DCA 1990). As noted in Harris, 578 So. 2d at 399, "there are limits to the responsive measures that can be taken." Likewise, in Williams v. State, 548 So. 2d 898 (Fla. 4th DCA 1989), the same rationale was applied when a prosecutor responded to a defense argument by suggesting the existence of uncalled witnesses who could corroborate the State's case. See also Williamson v. State, 459 So. 2d 1125 (Fla. 3d DCA 1984); Wilder v. State, 355 So. 2d 188 (Fla. 1st DCA 1978). Clearly, the comments here went far beyond

the scope of any permissible response.

X. THE CUMULATIVE EFFECT OF THE ERRORS MANDATES REVERSAL.

As it did with regard to the numerous improprieties asserted as a part of Point IX, dealing with prosecutorial misconduct, the State asks this court to consider each error in isolation and to ignore their overall impact. The argument and authorities set forth in the argument to Point IX of this brief are equally applicable here and are therefore incorporated as part of this argument. Defendant was denied a fair trial and reversal is therefore compelled.

XI. THE COURT ERRED IN SENTENCING DEFENDANT TO DEATH.

A. AGGRAVATING CIRCUMSTANCES

The State's argument that it was proper to introduce evidence as to convictions in names other than that of Defendant because the indictment charged him under those other names as well as his own is a classic example of bootstrapping. Obviously, the charges were brought in the manner they were because the prosecution believed that they were convictions of Defendant. The prosecution certainly cannot relieve itself of its burden of proving that the documents referred to Defendant by simply charging him under the names stated in the documents.

Moreover, the State's effort to rely on the defense's failure to make an effort to prove that Defendant was not the person named on the documents is an effort to shift the burden of proof. It was the State's obligation to prove that Defendant had any prior convictions, not Defendant's obligation to disprove it.

With regard to Defendant's contention that the State failed to prove that the prior convictions involved the use or threat of violence, the State responds that no cases interpreting the federal bank robbery statute have dealt with the hypothetical situations postulated by Defendant and that the case law that does exist deals with situations involving the use or threat of violence. The fact that the circumstances discussed by Defendant may not have arisen is not material. The State does not dispute that if they did, they would fall within the prohibitions of the statute.

With regard to the Texas aggravated robbery conviction, the State argues that the crime requires that the "victim must be physically injured or threatened" and that "committing a theft with a gun and breaking a window pane" would not constitute aggravated robbery (State's brief, p. 80)." The State misreads both the Texas statute and Defendant's hypothetical. The statute merely requires injury to "another," not to the victim of the robbery. Texas Penal Code, Section 29.02. Moreover, there is no requirement that the injury be contemporaneous with the taking. Thus, Defendant's hypothetical, which involved the use of a gun to break a glass door, the shards of which later cause injury to the investigating police officer, falls within the statute.

With regard to the Texas conviction for assault with intent to commit robbery, the only case cited by the State, Pitts v. State, 197 S.W. 2d 1012 (Tex. App. 1946), merely demonstrates the indisputable fact that such a crime could have been committed with the use or threat of violence. The case in no way precludes other methods of commission, as suggested in Defendant's initial brief.

Likewise, the commentary cited by the State refers to assault and violence as seperate concepts, thus also validating Defendant's interpretation of the statute.

It is clear therefore that each of these three offenses can be committed without violence or the use of violence. Since the State chose to rely on the face of the documents and not present any evidence as to the facts of the actual offenses that formed the basis for the convictions, they may not properly form the basis for the application of this aggravating circumstance. Since the State has conceded that the fourth conviction relied on in support of this circumstance, the one for mutiny, can also be committed without the use or threat of violence, it must be concluded that this circumstance was improperly found.

B. MITIGATING CIRCUMSTANCES

The State's argument that the court was not required to consider some of the mitigating circumstances established by the record because Defendant's attorney did not bring them to the court's attention is without merit.

Mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is believable and uncontroverted, even if the defendant asks the court not to consider it. Farr v. State, ___ So. 2d ___ (Fla. 1993), 18 Fla. L. Weekly S380, case no. 77,925, opinion filed June 24, 1993. Clearly, therefore, the mere failure to bring the court's attention to a mitigating circumstance cannot constitute a waiver of the right to have that circumstance considered.

C. REMEDY

The State offers no response whatsoever to Defendant's argument on page 95 of his brief that the death sentences in this case were improperly imposed. In light of the State's failure to even dispute this contention, reversal is clearly called for.

XII. THE COURT ERRED IN ENHANCING THE SENTENCES FOR SEXUAL BATTERY AND BURGLARY.

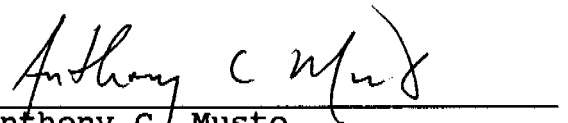
The State's argument that this issue should not be considered due to the lack of a defense objection must be flatly rejected in light of the fact that the prosecutor specifically waived the right to have the jury make a finding as to the existence of an enhancing factor (T 5/28 97-98). Thus, there was nothing for the defense to object to.

Further, the prosecutor's waiver gives rise to the application of the doctrine of estoppel asserted in Defendant's initial brief, an argument to which the State has chosen not to respond.

CONCLUSION

Based upon the foregoing and the argument set forth in his initial brief, Defendant respectfully submits that relief as requested in his initial brief should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Fariba Komeily, Assistant Attorney General, 401 N.W. 2d Ave., Ste. 921N, Miami, Fl. 33128, this 9th day of August, 1993.

Anthony C. Musto