IN THE SUPREME COURT OF FLORIDA

LARRY DEAN KRAMER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,659

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE STATE'S USE OF A PEREMPTORY CHALLENGE TO THE ONLY BLACK JUROR ON THE POTENTIAL PANEL WHERE THE REASON GIVEN BY THE PROSECUTOR WAS INSUFFICIENT AND PRETEXTUAL.

Appellee initially argues that this issue is not preserved for appeal or that somehow Appellant has waived any objection. Such argument borders on the ridiculous. Defense counsel upon hearing the prosecutor announce that he intended to backstrike juror number 27, specifically objected that she believed the only purpose that Jeffrey Ashton was exercising this peremptory challenge was to remove the only black left on the jury. In fact, defense counsel stated that she couldn't recall juror Davis giving any answers that indicated that she could not

be fair. (R 294-295) Upon hearing the state's supposed explanation, the trial court specifically ruled that this reason was racially neutral and therefore the challenge was legitimate. There was nothing more that defense counsel could do to preserve this issue for appeal since her clear objection was previously made and obviously overruled.

With regard to juror Davis' attitude towards the death penalty, Appellee claims that Appellant has overlooked the juror questionnaires wherein Miss Davis answered, "No" to question number eight, which was "If the evidence and the law was such that the death penalty was appropriate in this case, could you vote to impose the death penalty?." (R 1027) Appellant has not overlooked this fact because Miss Davis made it clear that she did not mean to answer no. She specifically repudiated this answer when she stated:

> Well, I should have said due to the circumstances. It all depends. (R 24)

To this response, Mr. Ashton, the prosecutor, stated:

> Okay. Well, certainly, that will be consistent with the law. You have to look at the circumstances and the law. (R 24)

Miss Davis then continued by stating that if she felt the circumstances and the law were such that the death penalty was appropriate, she could agree to impose it. (R 24) Therefore, it is clear, that Miss Davis' initial response on the juror questionnaire was simply a mistake.

Since Appellee places much emphasis on the juror questionnaires, Appellant would point out to this Court that a

comparison of Miss Davis' answers to other questions on the questionnaire with the jurors who actually served, reveals that Miss Davis had stronger beliefs in the death penalty than other jurors. As an example, in response to the question as to whether the juror felt the death penalty was used too often, too seldom, or randomly, Miss Davis clearly stated she felt the death penalty was used too seldom. (R 1027) Of the jurors that served, jurors Cook, Moore, and Leonard felt as Miss Davis did, that the death penalty was used too seldom. (R 1015, 1039, 1085) Juror Bordner felt the death penalty was used too often. (R 998) Juror Forbis felt that if anything, the death penalty was used too often. (R 1010) Juror Christiansen, the juror whom the prosecutor purported to prefer over Miss Davis, stated that she felt that the death penalty was used too randomly. (R 1000) From this example, it is clear that Miss Davis' answers regarding the death penalty were as strong, if not stronger, in favor of it than other jurors whom the prosecutor chose to accept.

Appellee next argues that the prosecutor placed a lot of emphasis on the jurors, response to his "personal responsibility" question. With regard to this question, Miss Davis' response indicated unequivocally that she believed a person should be held responsible for his actions. Her statement regarding "circumstances" does not indicate that she subscribed to that common thought. Once again, the record belies the prosecutor's asserted "reasons" for excusing Miss Davis.

Finally, with regard to Jeffrey Ashton's personal

rating scale, Appellee contends that this scale is rational and race neutral, assertions which are purportedly supported by the record. However, this simply is not true. Although Jeffrey Ashton stated he does not note the race of the person on his notes, he "knew" that Miss Davis was black. (R 295) Appellant asserts that since he "knew" Miss Davis was black, there simply was no reason for him to note the race on his scale. As stated in his initial brief, Appellant asserts that allowing this personal rating scale to pass constitutional muster, simply invites the most invidious form of discrimination since there will be no way to ever refute a prosecutor's personal rating scale.

In summary, Appellant reiterates that the state exercised its peremptory challenge to effectively eliminate all blacks from the jury panel. The reasons given by the state for doing so were not race neutral and therefore it was error for the trial court to accept such reasons. Appellant is absolutely entitled to a new trial.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF APPELLANT'S CONSTITUTION RIGHT GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF A STATE'S WITNESS.

Appellee argues that this issue is not cognizable on appeal for two reasons. First, Appellee states that since there was no proffer, the claim is too speculative. This argument is absurd. It is quite obvious that fresh needle marks were found on the victim's arm. Otherwise, the defense would not be seeking to ask about them. If the medical examiner had answered that no needle marks were found, then that would have been the end of this line of questioning. If that in fact was the case, one wonders why the state objected to the question being asked. The second reason the state argues that this issue is not cognizable is that the alleged relevance of the evidence was never argued to the trial court. Appellant answers this by stating that it was unnecessary to allege the specific relevance since the entire matter was first brought up by the state during its direct examination. It was the prosecutor who specifically asked the medical examiner questions about the victim's blood alcohol level and whether any other drugs were found in the victim's system. (R 366-368)

Next, in addressing the merits, Appellee offers various

"explanations" for the presence of fresh needle marks. Such argument would certainly have been appropriate during closing argument by the prosecutor. By making these arguments on appeal, Appellee underscores the harm suffered by Appellant: He was denied the right to elicit testimony which would have supported his theory of the case, that this was <u>not</u> a premeditated murder. The refusal of the trial court to permit this inquiry denied Appellant a valuable tool and served to violate his constitutional rights to a fair trial. He is entitled to a new trial.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO VARIOUS COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENTS IN THE GUILT PHASE WHICH IMPLIED THAT APPELLANT HAD SOME DUTY TO PRESENT EVIDENCE IN HIS BEHALF.

With regard to the comment by Jeffrey L. Ashton concerning the defense of voluntary intoxication, Appellee first argues that no error is shown since somehow no **further** objection or motion for mistrial was presented to the judge. (Brief of Appellee at 30-31) What this argument ignores, is the **fact** that the trial court overruled the defense objection **and** permitted the state to instruct the jury concerning voluntary intoxication and then tell them that it is not applicable. The arguments by the prosecutor were improper since the defense never presented a defense of voluntary intoxication. The drinking by the participants was brought up by the defense solely to show that the instant offense was something less than first degree murder, not that Appellant was not guilty. Further, intoxication was made an issue by the state when it elicited evidence of the victim's blood alcohol level. (R 366) By permitting the prosecutor to argue concerning the defense of voluntary intoxication, it constituted an impermissible attempt to instruct

the jurors. See generally, Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988).

With regard to the prosecutor's questions about the missing knife, Appellee argues that these statements were proper as being logical inferences drawn from the evidence to demonstrate the apparent lack of logic and thus credibility of Appellant's statement. Appellant obviously disagrees. These comments carried with them the obvious insinuation that somehow the defense had the burden of presenting evidence to back up his statement. It is certainly within the realm of probability that the jurors hearing these statements by the prosecutor interpreted it to mean that the defense indeed had some burden of presenting evidence. This was clearly error. See Brown v. State, 17 FLW D528 (Fla. 2d DCA February 21, 1992); Dunbar v. State, 458 So.2d 424 (Fla. 2d DCA 1984).

Appellee is next heard to sing the familiar tune of "harmless error." (Brief of Appellee at 33) Appellant notes however, that Appellee has admitted at page 22 of her brief, that the primary issue in this case was premeditation. This was not a case of Appellant claiming he was not guilty. The evidence of premeditation was less than overwhelming. The effect of the prosecutor's comments particularly telling the jurors in essence, not to consider intoxication at all serve to undermine the very heart of Appellant's defense. The harmless error doctrine is simply inapplicable in the instant case.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE REPEATED IMPROPER COMMENTS BY ASSISTANT STATE ATTORNEY JEFFREY L. ASHTON DURING THE PENALTY PHASE OF HIS TRIAL.

Appellee initially argues that the record does not support the allegation that these comments by Jeffrey Ashton were deliberately made. This argument is simply hogwash!

The trial court made a specific ruling in response to the defense's motion in limine that before any evidence that the victim of the prior attempted first degree murder conviction of Appellant had subsequently died, that the state would have to proffer it to the court. Jeffrey Ashton told the court he would do this through the testimony of Dr. Ruiz. (R 572) However, Ashton later told the court that he would not be calling Dr. Ruiz since he was not under subpoena. (R 615-617) Since Ashton had to know that Ruiz was not under subpoena at the time he made his statement to the court, he was simply lying. It is certainly apparent that he never intended to proffer this evidence through Dr. Ruiz.

Appellee argues next that the record supports the fact that the prosecutor simply "accidentally misspoke." Maybe one slip of the tongue is explainable and forgivable, but in this case, Jeffrey Ashton made three separate statements concerning

the prior murder. It is important to note that defense counsel took specific steps to prevent just this kind of occurrence. Perhaps defense counsel knew of Jeffrey Ashton's penchant for improper rhetoric. Regardless, the record does not support an argument that these comments were anything but deliberate.

Appellee next argues that while it is true that Jeffrey Ashton did "misspeak" on three occasions, he correctly referred to the prior offense as an attempted murder at least nineteen times. This is irrelevant. It does not minimize the prejudice that accrued from Ashton's characterization of the prior offense as a murder. Appellee recognized this herself at page 25 of her Answer Brief when she stated:

> Finally, it is difficult to imagine that two slides could have affected the weight given to this aggravating factor [prior violent felony], since it was already entitled to the greatest possible weight.

If the jury is subtly told that this prior felony is a prior murder it obviously is extremely prejudicial.

Appellant was on trial for the murder of Walter Traskos, yet the prosecutor in effect was exhorting the jury to recommend death because of the offense committed by Appellant against Robert Milhauser. In effect, the prosecutor violated the terms of the plea agreement of this prior felony, since pursuant to the plea agreement, Appellant would not face any further criminal prosecution if the victim (Milhauser) died. In effect, the prosecutor was asking the jury to recommend death for Appellant because Robert Milhauser had died and stated this on at

least three occasions.

Appellee next points out that the deposition of Dr. Ruiz which was relied upon by the trial court in denying the motion for mistrial, supports the proposition that Robert Milhauser did die as a result of the criminal actions of Appellant. Appellant wonders how this argument is at all relevant. Dr. Ruiz did **not** testify and the state never even attempted to get him to testify, even though it initially told the court that it would, a statement later shown to be blatantly false. Finally, Appellee argues that the evidence concerning the **"death"** of Robert Milhauser would have been admissible during the guilty phase if the state chose to present it. Such argument is nothing more that mere speculation since the state never did attempt to present it and no evidentiary hearing was conducted by the trial court to determine the admissibility.

Appellee next argues that the fact that the prosecutor mentioned that Appellant was on probation for the prior offense at the time of the instant offense was committed was a relevant consideration for the jury. This is simply not true. Certainly Appellee offers no legal authority for such a case and in fact all the legal authority states that the fact that someone is on probation at the time a capital offense is committed is not a proper aggravating circumstance. Peek v. State, 395 **So.2d 492** (Fla. **1981**); Ferguson v. State, 417 **So.2d** 631 **(Fla. 1982)**; Bolender v. State, **422** So.2d **833** (Fla. 1982).

CONCLUSION

Based on the arguments presented herein as well as in the initial brief, Appellant respectfully requests this Honorable Court to grant the following relief: As to Point 111, reverse and remand with instructions to adjudicate Appellant guilty of second degree murder and to sentence thereon; as to Points I, 11, IV, V, and VI, reverse and remand for a new trial; as to Points VII and IX, reverse and remand for a new penalty phase; **and** as to Points VIII, X, XI, and XII, reverse and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 *in* his basket at the Fifth District Court of Appeal and mailed to Larry Dean Kramer, No. A 109626, P. O. Box 747, Starke, FL 32091 on May 27, 1992.

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