IN THE SUPREME COURT OF FLORIDA

ROBERT E. HENDRIX,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 79,048

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

JAMES B. GIBSON
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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 FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SUGGESTION OF DISQUALIFICATION PURSUANT TO SECTION 38.02, FLORIDA STATUTES (1989).

Appellee argues that Appellant has waived this issue by failing to file a petition for writ of prohibition prior to trial. This contention is totally false. This Court on numerous occasions has specifically rejected the contention that an order denying the suggestion of this qualification must be immediately challenged. In In Re: Florida Conference Ass'n. of Seventh Day Adventists, 128 Fla. 677, 175 So. 715 (1937), this Court held:

> When a judge upon a suggestion of his disqualification being filed enters an order holding that he is qualified, it is not mandatory for the aggrieved party to immediately appeal from that order, but he may allow the cause to proceed to

> a final determination on its merits and then appeal from the final decree or judgment, and on that appeal ask review of the order of a judge holding himself to be qualified.

175 So. at 718. In Livingston v. State, 441 So. 2d 1083 (Fla. 1983), this Court reversed a first degree murder conviction on the grounds that the trial judge should have granted a motion for disqualification. In so ruling, this Court specifically rejected the contention of the dissenting justices who believed that Mr. Livingston had waived the issue by failing to file a petition for writ of prohibition.

It is ludicrous to accept Appellee's contention that in order to preserve an issue for appellate review, a litigant must attempt to secure review by means of an extraordinary writ. It has been held that an original proceeding in prohibition cannot be used as a substitute for appellate proceedings. State ex rel Arnold v. Revels, 113 So. 2d 218, 224 (Fla. 1st DCA 1959). Thus, Appellee's waiver argument is simply untenable.

Turning to the merits of the issue, Appellee argues that since Judge Lockett had no real interest in the outcome of this case, there simply was no reason for him to be disqualified. This argument simply misses the point. Judge Lockett, before he took the bench, was consulted by counsel for the co-defendant, Denise Turbyville. In this regard he was privy to privileged information regarding the facts not only of the case but of any potential defenses. Appellant himself was not privy to this information since it fell in the realm of attorney/client

privilege between his co-defendant and her attorneys. Yet Judge Lockett, with this information, sat in judgment of Appellant. Appellant likens the instant situation to that which existed in Gardner v. Florida, 430 U. S. 349 (1977), wherein the Supreme Court vacated the death sentence and held that Mr. Gardner had been denied due process when the death penalty was imposed at least in part on the basis of confidential information which was not disclosed to the defendant or his counsel. So too in the instant case Appellant's death sentence was imposed upon confidential information known only to the presiding judge. There is no way to undo the harm except to reverse Appellant's conviction and remand for a new trial before a new judge.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL ON THE BASIS OF VARIOUS COMMENTS MADE BY THE PROSECUTOR DURING OPENING AND CLOSING STATEMENTS.

Appellee has once again totally misunderstood the thrust of Appellant's argument. Appellant was not contending that a state attorney in his opening statement could never use the term "I" or "we" but instead the objection was to the way he used these pronouns. The state attorney below used the term "we" in telling the jury what the police did in this particular cause. The prosecutor was not a policeman and therefore it was improper for him to imply that he did the work of the police. By using these personal pronouns, the assistant state attorney was in essence giving his express personal opinion or in effect was stating facts of his own knowledge which is improper. Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984); Blackburn v. State, 447 So. 2d 424 (Fla. 5th DCA 1984).

With regard to the propriety of the state attorney informing the jury that several of the witnesses have given prior consistent statements, Appellee simply dismisses this with the statement "the jury is well aware that witnesses give statements prior to trial and that, in effect, is how they become witnesses." (Brief of Appellee, Page 36) Once again, Appellee

seems to just miss the point. The purpose of opening statements is to give the jury an idea of what the evidence will show. The evidence would not show prior consistent statements. Indeed, prior consistent statements by a witness are inadmissible absent impeachment based on an attempt to show recent fabrication or other reason for the witness' lack of credibility. Demps v. State, 462 So. 2d 1074 (Fla. 1984). In the instant case there certainly was no suggestion that these witnesses had just fabricated their expected testimony. Thus, the statement by the prosecutor that the witnesses had given the same statements several times is clearly impermissible bolstering of their testimony.

The prosecutor's statements in closing argument were clearly erroneous. The trial judge realized the impropriety concerning the prosecutor's statement as to what this Court had in mind when it wrote instructions. Contrary to Appellee's assertion this was more than simply an attorney relating the applicable law to the facts of the case. Rather, the effect of this statement by the prosecutor was that a higher court had already reviewed this particular evidence and concluded that the defendant was guilty. This is clearly improper.

Finally, with regard to the prosecutor's statement in closing argument to the effect that the jury had to decide whether or not Appellant and his lawyer were going to get away with murder, Appellee states this was merely the prosecutor trying to convey the idea that the defense was incredible in

light of the substantial evidence presented by the state. (Brief of Appellee, Page 38) To the contrary, this went beyond merely commenting on the overwhelming nature of the evidence. Instead, this statement exhorted the jury to either convict or allow the defendant to get away with murder. Such abusive closing argument and disparagement of defense counsel had been repeatedly condemned. Adams v. State, 192 So. 2d 762 (Fla. 1966); Cochran v. State, 280 So. 2d 42 (Fla. 1st DCA 1973).

The cumulative affect of the prosecutor's improper comments in opening and closing statements, served to destroy any semblance of due process and a fair trial. Appellant is entitled to a new trial.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON THE PREJUDICIAL EFFECT OF THE EMOTIONAL OUTBURST BY THE VICTIM'S FATHER.

It is important to note exactly what occurred when the state called Elmer Scott, Sr. to the stand. Defense counsel objected and asked for a proffer to this evidence. The trial court denied the proffer after the state attorney gave a brief summary of what he intended to elicit from the witness. However, the state attorney clearly anticipated the problem that defense counsel was attempting to alert the court to when he stated, "I talked to him about maintaining his composure, and I think he's going to be able to do it." (R2080) After only a dozen questions, the state attorney abruptly ended his direct examination and defense counsel announced that he had no questions but he wanted to take up a matter outside the presence of the jury. (R2085) As Mr. Scott left the witness stand he stated to the defendant, "You done it, didn't you?" (R2085) The jury was then escorted from the room and defense counsel made a motion for mistrial on the grounds that the witness made an emotional outburst on the stand and secondly that he made this obviously prejudicial comment in the presence of the jury. (R2085-2087) Defense counsel said that the prosecutor should have anticipated that Mr. Scott would break down in tears.

Contrary to what Appellee states, the record does not only reflect that the witness grimaced. Rather the state attorney himself stated, "I did not know that Mr. Scott would tend to lose his composure as he did there just at the end." (R2091) From the entire record it certainly can be gleaned that defense counsel had a reasonable "fear" that Mr. Scott would create a highly prejudicial situation if he were allowed to testify. In fact, that is exactly what happened. It is just this type of situation that occurred for which courts have ruled that family members should only testify in murder cases when it is absolutely necessary. Welty v. State, 402 So. 2d 1159 (Fla. 1981); United States v. King, 713 F. 2d 627 (11th Cir. 1983).

Turning to the relevance of Mr. Scott's testimony, quite simply, there is none. None of the asserted questions had any relevance whatsoever to the issues at trial. Other witnesses already testified that Appellant had been to the house on previous occasions. The fact that the victims smoked cigarettes which were found in the home was not relevant to any issue at trial. The fact that Michelle Scott wasn't working and therefore was probably going to be home on the day of the killing, was not relevant since there was no showing that Appellant knew that she was not working. Contrary to Appellee's suggestion, this was nothing more than a cheap attempt to inflame the passions of the jury and to create sympathy for the victims. As such, Appellant's right to a fair trial was totally destroyed. The trial court should have granted the motion for mistrial or at the

very least should have admonished the prosecutor and stricken the testimony of Mr. Scott. Failure to do this mandates a new trial.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE LIMITING INSTRUCTIONS WITH REGARD TO THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED AS REQUESTED BY DEFENSE COUNSEL.

The state argues that the Appellant has somehow waived this issue on appeal by failing to object to the vagueness of the heinous, atrocious and cruel instruction. (Brief of Appellee, Page 59) This is simply not true. Even the United States Supreme Court noted that the rule requiring a party to object after the trial judge has instructed the jury is not applicable where there was an advance request for a specific jury instruction that is explicitly denied. Sochor v. Florida, 504 U. S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992). In this regard, the Supreme Court cited this Court's decisions in State v. Heathcoat, 442 So. 2d 955, 957 (Fla. 1983) and Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla. 1983). It is clear now that the instruction given by the trial court does not pass constitutional muster. Espinosa v. Florida, 505 U. S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (1992).

Appellee does not even address the denial of the special requested instruction regarding cold, calculated and premeditated, except to say any error was harmless. (Brief of Appellee, Page 68) A review of the bare bones instruction given,

clearly points out that the jury was given no guidance in determining the applicability of this instruction. See generally Hodges v. Florida, 121 L. Ed. 2d 6 (1992). Appellant's death sentences must be vacated and the cause remanded for a new penalty phase.

CROSS APPEAL

THE TRIAL COURT CORRECTLY RULED THAT THE STATE WAS NOT PERMITTED TO PRESENT EVIDENCE OF A PRIOR VIOLENT FELONY COMMITTED WHILE APPELLANT WAS A JUVENILE; ANY ERROR IS HARMLESS.

The propriety of using juvenile convictions in aggravation is apparently a very uncommon occurrence in this state. The only case which even remotely considers it is Campbell v. State, 571 So. 2d 415 (Fla. 1990), wherein this Court held the following:

> Campbell claims the court erred in its findings relative to aggravating and mitigating circumstances. The court correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convictions cannot be considered in aggravation.

Id. at 418. This statement is somewhat ambiguous as to the admissibility of juvenile convictions. There is nothing in the Campbell opinion to indicate what the crime was, how old Campbell was when he committed it, or whether Campbell had other previous violent convictions as an adult. Under Chapter 39, Florida Statutes (1989), juvenile convictions are to be kept confidential.

The question on appeal however is somewhat moot. The jury was instructed and the state permitted to argue that the contemporaneous murder convictions could be used to fulfill this aggravating circumstance for each of the murders. The jury

recommended death by a 12-0 vote. The judge found this aggravating circumstance in each of the murders. Appellant has not argued that it was improper to find these aggravating circumstances on appeal. Under these facts, any error is harmless beyond a reasonable doubt. State v. DiGuilio, 492 So. 2d 1129 (Fla. 1986).

CONCLUSION

Based on the reasons and authorities cited in this brief as well as the initial brief, Appellant respectfully requests this Honorable Court to grant the relief as requested in the initial brief. With regard to the issue on cross appeal, Appellant respectfully requests this Honorable Court to affirm the trial court.

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 Mr. Robert E. Hendrix, #A-104721, P.O. Box 747, Starke, FL 32091, this 25th day of March, 1993.

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