IN THE SUPREME CQURT OF FLORIDA

CASE NO. 79,383

RONNIE JOHNSON,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL FRQM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

LAW OFFICES OF
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INTRODUCTION

The appellant was the defendant and the appellee ths prosecution, State of Florida, in the lower court, The parties will be referred to as they stood in the trial court. The record on appeal will be referred to by the letter "R". All emphasis is added unless otherwise indicated.

NOTICE OF ADOPTION

The appellant would respectfully adopt the Statement of the case, Statement of the Facts and Summary of the Argument of his initial brief.

STATEMENT OF THE ISSUES

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS

II

WHETHER THE TRIAL COURT ERRED TN STRIKING JUROR WILLIAMS FOR CAUSE IN THE ABSENCE OF A THROUGH AND SEARCHING INQUIRY AS TO HIS ABILITY TO CONSIDER THE IMPOSITION OF THE DEATH PENALTY

III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN, DURING TRIAL, THE DEFENSE HAD LEARNED THE KEY IDENTIFICATION WITNESS HAD MADE A SUBSEQUENT MORE POSITIVE IDENTIFICATION OF THE DEFENDANT WHICH HAD NOT BEEN DISCLOSED

IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHICH WAS BASED UPON THE UNAUTHORIZED TAKING OF NOTES BY JURORS

V

WHETHER THE CLOSING ARGUMENT OF THE PROSECUTION, BY IMPLYING AN UNPROVEN INTENT TO COMMIT ANOTHER MURDER, DENIED THIS DEFENDANT A FAIR TRIAL

VI

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS

At the time the police took the defendant to the police station, defendant was told "if he was willing to go there, I would take him there, and everything, and then I would bring him back" (R. 48-49). There was no intention of bringing this defendant back. From its deception to first lure the defendant to the police station, the police strategy was one of deception and deceit which misled this defendant, as to his true position (about to be arrested for first-degree murder).

The state has acknowledged that the defendant initially denied any involvement in the instant crime (p. 32 of state's brief). Nat content with that denial, the police continued to pressure the defendant and stopped only when they achieved the goal/confession that they wanted.

The defendant testified that he was told that if he cooperated, he would not get the electric chair (T. 111). The trial court made no finding which refuted that specific allegation.

The defendant testified that he signed the confession while in fear for his family. The trial court made no finding which refuted this specific allegations.

The defendant testified that he was physically assaulted during the questioning (T. 112, 125). The trial court made no finding which refuted this specific allegation,

The trial court was the trier of fact with regard to these very specific allegations which were supported by the defendant's testimony. It was the function of the trial court to resolve any questions of believability by ruling on the three specific allegations raised by the defendant. The defendant submits that was error for ths trial court to admit the defendant's statement without making a specific finding that the statement was voluntary which ruling would specifically resolve the three specific allegations raised by the defendant. See, Smothers v. State, 513 So.2d 776 (Fla. 1st DCA 1987).

In the absence of a specific ruling as to voluntariness of the defendant's confession, which ruling would have to address the three specific allegations raised by the defendant's testimony which either singularly or cumulatively supported a suppression of his statement/confession, the defendant submits that the admission of this statement/confession at the defendant's trial was reversible error.

II

THE TRIAL COURT ERRED IN STRIKING JUROR WILLIAMS FOR CAUSE IN THE ABSENCE OF A THROUGH AND SEARCHING INQUIRY AS TO HIS ABILITY TO CONSIDER THE IMPOSITION OF THE DEATH PENALTY

The fact that Juror Williams did not prefer to sit on the jury was not a valid basis to challenge for cause.

There was no showing or finding that she would not follow the trial court's instruction. There was no showing that Juror Williams would not be able to render a verdict as to-guilt because of a reluctance to impose the death penalty. Within the facts of this case, the defendant submits that it was error to excuse Juror Williams for cause. See, Farina v. State, 21 Fla.L.Weekly S173 (Fla. 1996).

III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN, DURING TRIAL, THE DEFENSE HAD LEARNED THE KEY IDENTIFICATION WITNESS HAD MADE A SUBSEQUENT MORE POSITIVE IDENTIFICATION OF THE DEFENDANT WHICH HAD NOT BEEN DISCLOSED

The defense began trial with Brigg's photo-lineup identification statement that he was 80% sure of the photo identification of ths defendant (T. 623). During trial, the defense learned that Briggs again viewed the phata lineup, this time shown by the prosecutor, and now was positive of the defendant's identity.

The defense argued far a mistrial alleging thnt this re-identification procedure had never been disclosed to the defense (T. 644).

Under the state's theory, witness depositions could become useless. while a witness at deposition may testify to a percentage/degree of: identification certainty, the state/police could after, deposition increase that degree of certainty by further identification procedures (another photo lineup(s)) and never disclose those procedures to the defense. The defense then could go to trial never knowing a witness's degree of identification certainty had been enhanced post-deposition hut pre-trial by the state/prosecution.

The fact that this identification enhancement was done by the

prosecutor himself and not disclosed to the defense only underscores the prejudicial nature of this discovery violation.

Briggs was tha state's chief identification witness. The prosecutor knew that. He also knew that Brigg's degree of identification uncertainty would be a pivotal defense point. When he himself took actions to decrease that degree of uncertainty and thus strengthen ths state's case, he was obligated to inform the defense. That is the very purpose of the Discovery Rule. Otherwise, key witnesses should be m-deposed immediately before trial (a move prosecutors may oppose) to determine haw their identifications/perceptions have changed due to further contact with police/prosecution.

Brigg's identification capability did not "magically improve". It improved due to prosecution action which should have been revealed to the defense.

The failure of the trial court to hold an adequate Richardson hearing as to this violation was reversible error, See, Barrett v. State, 649 So.2d 219 (Fla. 1994); Tarrant v. State, 21 Fla.L.Weekly D298 (Fla. 4th DCA 1996): Sears v. State, 656 So.2d $95 (Fla. 1st DCA 1995); James v. State, 639 So.2d 688 (Fla. 2d DCA 2994); Sun v. state, 627 So.2d 1330 (Fla. 4th DCA 1993).

IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHICH WAS BASED UPON THE UNAUTHORIZED TAKING OF NOTES BY JURORS

The defendant would rely upon the argument in his initial brief.

V

THE CLOSING ARGUMENT OF THE PROSECUTION, BY IMPLYING AN UNPROVEN INTENT TO COMMIT ANOTHER MURDER, DENIED THIS DEFENDANT A FAIR TRIAL.

The prosecutor implied that way Briggs "may not have been here this week to testify" was because he would have been shot by the defendant if he jumped up and run to the assistance of the deceased (R. 913-914). There is no evidence to suggest that this defendant intended to shoot Briggs or anyone else. The defendant'& suggestion that this defendant would have shot Briggs was unwarranted by the evidence and unfairly prejudiced this defendant in the eyes of the jury, The harm to this defendant is only underlined by tha 7-5 penalty recommendation by the jury where one or more votes may have been unduly swayed by this improper closing argument,

It is submi tted that this unwarranted argument was reversible error. See, Thiefault v. State, 655 So.2d 1277 (Fla. 4th DCA 1995) .

VI

'THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT 'THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

There is no evidence that this defendant fired at any other person besides "Sugar Mama". No one testified that the defendant pointed his gun at them. The state's brief acknowledges that ricochet marks were found at the scene (p. 78) which marks would explain bullet fragments being found in various locations.

In the case of Coney v. State, 653 So.2d 1009 (Fla. 1995), this Court considered the instant issue and stated:

> ""Great risk" means not a mere possibility, but a likelihood or high probability".
>
> (p. 1015)

In Jackson v. State, 599 So.2d 103 (ala, 1992), this Court stated:

> The tarm "great risk" as used in section 921.141(5)(c), Florida Statutes (1989), means more than a mere possibility; it means a likelihood or high probability of death to may people.
>
> (p. 109)

In Williams v. State, 574 So.2d 136 (Fla. 1991), this Court considered this issue and stated:

> This factor is properly found only when, beyond any reasonable doubt, the actions of the defendant created an immediate and present risk of death for many persons.
>
> (p. 138)

The only evidence was that this defendant shot at a struggling "Sugar Mama". Bullets either missed or went through her and ricocheted around tha laundromat. There is no evidence that this defendant either intended or took any action which, beyond a reasonable doubt, created a likelihood or high probability of death for many people. This factor was improperly presented to the jury and relied upon both by it and the trial court in sentencing this defendant to death. The vote to impose the death penalty was 7 to 5. Without argument and improper consideration of this non-existent aggravating factor, it is conceivable/likely that the jury may have returned a majority penalty verdict of Life which the trial court should have honored.

In this case, on these facts, improper consideration of this aggravating factor requires that the death penalty be Vacated and this defendant resentenced.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the appellant Respectfully submits that his convictions must be Reversed, Sentences Vacated and this Cause Remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail. to the Office of the Attorney General at Post Office Box 013241, Miami, Florida 33102, on this 25 day of ..... 1996 .

Respectfully submitted,

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