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IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON, :

Appellant, :

v. :

CASE NO. 79,509

STATE OF FLORIDA, :

Appellee. :

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Andrea Hicks Jackson, relies on her initial brief to reply to the state's answer brief, except for the following additions:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The State's brief on this issue contains factual omissions, erroneous interpretation of facts and relies on cases which are distinguishable. For clarity, Jackson will respond to the State's arguments in the order they appear in the answer brief.

On page 26 of the answer brief, the State alleges, "all the witnesses that testified at the resentencing stated that Jackson was not drunk nor high, although there was evidence that she had been drinking." This statement simply does not accurately reflect the testimony. First, Officer Griffin did testify that, in his opinion, Andrea was not drunk. (TR 671). He also testified that he detected the smell of alcohol on her breath, even though he was never closer than 1 1/2 to 2 feet from her. (TR 675). Second, David Lee, who gave Andrea a ride immediately after the homicide, testified that in his opinion, Andrea was intoxicated or high. (TR 994). He testified as follows:

Q: Did you think she was drunk?

A: I could -- she was intoxicated, I don't know from what.

Q: You knew she had been drinking?

A: Yeah.

(TR 994). Lee further testified that Andrea was hysterical, was hesitant, and fumbled around getting into the truck. (TR 990). He also detected a significant odor of alcohol. (TR 990). Third, Joy Shelton, who picked up Andrea from David Lee's truck, testified that Andrea was drunk. (TR 1028). Fourth, Shirley Freeman, who lived in the same residence with Joy Shelton, testified that Andrea had been drinking, but she was of the opinion that Andrea was not high. (TR 736-737). Fifth, Carl Lee, a taxicab driver who spoke with Andrea as she left Joy Shelton's residence, testified that Andrea did not appear normal; he thought she was drunk or high. (TR 760).

Edith Croft was with Andrea for a significant portion of the day before the evening hours. She testified they use heroin, T's and Blues, marijuana, and alcohol. (TR 1078). Although Croft was not with Andrea after the early evening hours on the day of the homicide, she was present at the time Andrea was arrested early the following morning. (TR 1086). She was of the opinion that Andrea was still high at that time. (TR 1086-1087).

Detective Bradley, who interviewed Andrea immediately after her arrest, testified that Andrea was under the influence of alcohol. (TR 495-498). He also sent Andrea to the hospital for an examination. (TR 498). Medical reports showed that Andrea's pupils were dilated at that time. (TR 1114). Dr. Miller later testified that dilated pupils shortly after Andrea's arrest indicated the presence of a drug acting on the central nervous system. (TR 1160-1162).

On page 28 of the answer brief, the State argues that Andrea did not perceive the struggle with Officer Bevel as an attempted rape. In support of this contention, the State notes that Officer Bevel's actions were within appropriate bounds for the circumstances. However, the propriety of Bevel's actions in arresting Andrea was never in question. Her misperception of what was happening to her is the critical question. Bevel did physically restrain her. Bevel did forcibly place her in the back seat of an automobile. Bevel did grab Andrea's legs in an attempt to place them into the car. And, at one point, Bevel had to have been leaning over Andrea since, after he was shot, he fell forward into the car on top of her. One witness, Anna Marie Allen, heard Andrea ask, "Why are you man-handling me like this?". (TR 563). Andrea made these statements as Officer Bevel grabbed her by the knees to put her the rest of the way into the back seat of the car. (TR 564). Although Bevel was not using inappropriate physical force to effect the arrest, the situation created circumstances prompting Andrea's flashback.

Also on page 28, the State argues that Dr. Miller's testimony discredited the testimony of Drs. Walker and Mutter. First, the State contends that Miller was of the opinion that Mutter's questions surrounding the rape asked during the hypnotic regression session were leading and suggestive. This statement does not accurately reflect Miller's testimony. He testified as follows:

Q: And isn't it possible, in fact, were not some of the questions maybe leading or suggestive in the sense that they were asked?

A: I sensed that in reviewing the tape.

(TR 152). Reviewing this testimony shows that Miller did not render such an opinion about questions surrounding the rape. His testimony was that he had the sense after reviewing the tape, that some of the questions may have been leading or suggestive in the way they were asked. He was not specifically asked about the questions surrounding the rape. Furthermore, he was not asked about the leading or suggestive nature of the hypnotic session in general. The question was simply "were not some of the questions maybe leading or suggestive." (TR 152) Moreover, Miller was of the opinion that Andrea may have misperceived what was happening to her at the time of her arrest and thought Bevel was trying to rape her. (TR 1137-1138). Miller relied upon, and accepted, the information gleaned from hypnotic regression session performed by Mutter. Miller also, like the other two mental health experts, was of the opinion that Andrea could not have committed the murder in a cold, calculated, and premeditated manner considering the emotional state she was in at the time of the crime. (TR 1135-1139).

On page 29 of the answer brief, the State attempts to discredit the testimony of Dr. Walker. The only matter in her testimony to which the State attaches significance, is Walker's statement that the ripping of Andrea's blouse was a factor in leading Andrea to misperceive Bevel's actions as an attempted

rape. Walker did point to a tear in the blouse during her testimony. It is accurate that the State established that the tears in the blouse occurred during testing at the laboratory. However, the blouse did not have to be torn to support Walker's conclusions. The tearing of the blouse or the buttons of the blouse popping open without an actual tearing of fabric would have been sufficient. In fact, when Walker testified as to Andrea's perceptions at the time, Andrea reported a sound like a "a rip, and like her buttons popping open." (TR 1295). When David Lee stopped to give Andrea a ride after the homicide, her blouse was unbuttoned and open. (TR 988-989) On cross-examination, Walker's testimony was as follows:

Q: You mentioned her clothes were disarray, are you aware she stated the buttons popped open, and they did not? In fact, she told you that her clothes were torn, and after that -- and in fact, all the buttons were there.

A: Well, what she says is that her clothes, that she heard a rip, is there is a rip on the shirt. Now I have no idea how that happened, but there is a rip.

She said she heard the sound of her clothes being torn and ripping, and that her buttons popped off. I don't know whether her buttons popped off or whether they popped open. I looked at the shirt earlier today to see if the buttons were off, and they were not. So it could well be that the buttons popped open.

She's a big bosomed woman, and that sometimes happens when you're in a struggle.

(TR 1348-1349). In addition, Walker's opinion was based upon more than Andrea's report of hearing her blouse rip. There

were numerous other factors which led to Andrea's flashback and misperception of Officer Bevel's actions.

On page 30 of the answer brief, the State contends that Andrea told Joy Shelton immediately after the murder that she killed a police officer because she was not going back to jail. Actually, Andrea first told Joy Shelton she shot the police officer because she believed he was trying to rape her. (TR 1032-1033, 1038-1039). When testifying about when Andrea initially told her she shot a police officer, Joy Shelton:

A: So, I asked her what she want, you know, what she do that for, what happened, and she told me.

Q: What did she tell you?

A: She told me he was trying to arrest her. And he put her in -- was putting her in the back seat of the car. And got on top of her, or something, I don't know. And she shot him.

(TR 1033).

* * * *

Q: Ms. Sheldon, do you recall whether Andrea ever told you she thought the officer was trying to rape her?

A: Yes.

Q: What else do you recall Andrea telling you about what the officer was trying to do?

A: He was on top of her. He was on top of her.

Q: And?

A: And she thought he was trying to rape her, and she didn't want to go to no jail. He was going to take her to jail, and he told her he was going to arrest her again

and take her to jail, she wasn't going to jail anymore.

(TR 1038-1039). While Andrea did mention the fact that she did not want to go to jail, the first reason she gave for shooting a police officer was her belief that he was attempting to rape her.

On pages 30 and 31 of the answer brief, the State suggests that Andrea specifically armed herself with a confrontation with Officer Bevel. However, Andrea acquired and carried the firearm to protect herself from her estranged husband, Sheldon Jackson. (TR 930, 1274-1275). She began carrying the gun with her at all times for protection if Sheldon became violent again. (TR 1275). Furthermore, Andrea returned to Officer Bevel with the firearm before she learned that she was about to be arrested. (TR 616-619).

The State relies upon two cases for the position that the killing in this case was cold, calculated, and premeditated -- Valle v. State, 581 So.2d 40 (Fla. 1991); Hall v. State, ___ So.2d ___, 18 Fla. L. Weekly S63 (Fla. 1993). Both of these cases are distinguishable since both involve evidence of a planned execution of the victim, which is not present in this case.

In Valle, the defendant had a prior intent to kill the police officer. Upon hearing the officer perform a license check over the radio, the defendant told someone that he would have to "waste the officer". He then obtained his gun, concealed it, walked to the officer, and shot him after calling to the

officer to get his attention so that he could get a better shot. The trial court, and this court, concluded this was a clear execution murder. In contrast, Andrea shot Officer Bevel only after a struggle and physical confrontation during the arrest process. Contrary to the situation in Valle, Andrea did not arm herself for this specific purpose of shooting Officer Bevel. She obtained the firearm to protect herself from future violence at the hands of her estranged husband. Andrea normally carried the firearm and did not know she was going to be arrested until she returned to Officer Bevel's patrol car. Additionally, the defendant in Valle walked to the officer and shot him from a distance of 1 1/2 to 3 feet, thus evidencing his intent to execute the officer. Andrea, on the other hand, did not pull the pistol until after she was in a physical struggle with Officer Bevel. If she had intended to shoot Bevel, it is illogical that she would wait until being in the middle of a physical confrontation with him.

Hall v. State is also easily distinguishable. The victim in that case was a pregnant woman who was abducted from the parking lot, driven to a remote area, raped, beaten, and finally shot in an execution-style manner. The State argues that Andrea could have left at any time without shooting Officer Bevel. However, her actions are consistent with someone who is unaware she is going to be arrested until the physical confrontation occurred. Once the struggle ensued, her actions were reactive to the circumstances. She did not plan a murder. She

did not plan an execution as did the defendants in Hall and Valle.

On page 33 of the answer brief, the State contends that Andrea was not someone in a panicked and frightened situation, but rather acted calmly in devising a method to catch Officer Bevel off guard in order to shoot him. This is contrary to the evidence in the record. First, there was no evidence that Andrea deliberately dropped her keys in order to catch Officer Bevel off guard. The keys dropped. However, there is no evidence to show this was a deliberate action on Andrea's part. It is just as reasonable to conclude that the keys accidentally dropped. The testimony of the State's witnesses show a woman out of control, not someone calm and calculating. Shortly before Officer Bevel's arrival, Andrea was yelling and screaming at her automobile and smashing the windows.

Finally, the State contends that the fact that the Officer was shot six times shows a cold, calculated and premeditated murder. These shots were fired in rapid succession. In fact, the firearms expert who examined the pistol testified that the six shots could have been fired within three seconds. (TR 772). His testimony proceeded as follows:

Q: Can you tell us, Mr. Warniment, how fast it is possible to empty that pistol completely if it is fully loaded?

A: Well, demonstrate?

Q: Either demonstrate or tell us, if you know.

A: I don't know, but basically, by pulling the trigger, that's one shot, its,

basically, limited by the reaction of the finger, one, two, three, four, five, six.

Q: You do it when I ask you to start, please. Start.

A: One, two, three, four, five, six.

Q: I count that to be about [two, three]¹ seconds, Mr. Warniment, did that sound right to you?

A: It sounds fair.

(TR 772). The six shots could have easily been fired reactively without reflection.

¹The transcript on page 772 reads "about 32 seconds." However, the court reporter corrected the transcript via an errata sheet dated May 4, 1993. A copy of the errata sheet filed in this Court is attached to this brief for the Court's convenience.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FAILING TO PROPERLY FIND, WEIGH, AND CONSIDER ANDREA JACKSON'S MENTAL AND EMOTIONAL CONDITION AT THE TIME OF THE SHOOTING IN MITIGATION.

On page 38 of the State's brief, the contention is made that, "that the evidence presented in mitigation was not controverted." Jackson acknowledges that Drs. Mutter, Miller, and Walker used slightly different analytical models to evaluate her condition. However, each of them were consistent in their opinion that Andrea's mental state at the time of the crime qualified her for the two statutory mitigating circumstances. (TR 932-933, 1138-1139, 1310-1312). The State presented nothing to contradict these opinions.

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE THE VIDEO TAPE OF THE HYPNOTIC REGRESSION DR. MUTTER PERFORMED ON ANDREA JACKSON AND WHICH BECAME A SIGNIFICANT BASIS FOR HIS EXPERT OPINION ON HER MENTAL CONDITION AT THE TIME OF THE CRIME.

Jackson relies on her initial brief to respond to the State's argument on this point. However, she wishes to address one portion of the State's answer brief on this subject. On page 43, the State argues that there was no need to present the video tape of the hypnotic regression to rebut the State's charges of unreliability and improper influences during the session. This position is rebutted by an example from the State's brief.

On page 11 of the State's answer brief, in the Statement of Facts, the following statement is made:

Jackson never mentioned to [Dr. Mutter] anything about the previous rape or believing she was going to be raped until after defense counsel handed him a note asking the doctor to ask Jackson about it.

This statement of fact is incorrect. A review of the videotape of the hypnotic regression shows that Andrea said she believed she was about to be raped during the struggle with Officer Bevel before defense counsel handed Mutter the note which prompted his asking about Jackson's childhood sexual abuse. Contrary to the State's assertion in the brief, Jackson did mention the belief that she was going to be raped Officer Bevel before Mutter brought up the subject of her ever having been

raped in the past. The videotape clarifies this point and refutes the State's assertion of improper questioning during the hypnotic regression. This is precisely the reason why the videotape should have been played to the jury.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Andrea Hicks Jackson asks this court to reverse her death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by delivery to Carolyn M. Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Florida, 32301; and a copy has been mailed to appellant, Andrea Hicks Jackson, on this 13 day of May, 1993.


W. C. McLain