IN THE SUPREME COURT OF FLORIDA

GARY WHITTON, :

Appellant, :

v. : CASE NO. 80,536

STATE OF FLORIDA, :

Appellee. :

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This brief is submitted in reply to the Answer Brief of Appellee.

Appellant relies on the arguments in his Initial Brief, with the following additional comments. The Initial Brief will be desginated herein as "IB," followed by the appropriate page number in parenthesis. Appellee's brief will be referred to as "AB." All other references will be as set forth in the Initial Brief.

II STATEMENT OF THE CASE AND FACTS

In its Statement of the Case and Facts, Appellee accepts appellant's history of the case but provides its own detailed statement of facts, without specifying any areas of disagreement, as required by the Florida Rules of Appellate Procedure 9.210(c). Appellee alleges that "Appellant's statement, while generally correct, is somewhat incomplete and, in addition, tends to set out the facts in a manner favoring the Appellant, contrary to established law. On appeal, all facts and all inferences from the facts must be taken in favor of the judgment and sentence." (AB 1). As authority for this proposition, Appellee cites two cases, Gilvin v. State, 418 So. 2d 996 (Fla. 1982), and Shapiro v. State, 390 So. 2d 344 (Fla. 1980), both of which involved review of lower court rulings on motions to suppress.

It is undisputed that on appeal, the reviewing court must interpret the evidence and all reasonable inferences therefrom in the light most favorable to the trial judge's conclusions of fact in ruling on a suppression motion. Appellee inappositely transforms this standard of review into a procedural necessity for appellate briefs. There is no such requirement in the law. See, generally, Fla. R. App. P. 9.210(b)(3); Padovano, Florida Appellate Practice, §12.17 (West 1988).

Appellant stands by the accuracy and completeness of his statement of facts set forth in the Initial Brief.

III ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED ON HIS POST-ARREST SILENCE DURING CLOSING ARGUMENT, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, FLORIDA CONSTITUTION.

Appellee initially argues that this issue has been waived because trial counsel failed to timely object to the first two comments on appellant's silence during the direct examination of Investigator Cotton and the cross-examination of appellant. Appellant argued in his initial brief, and maintains here, that the trial court reversibly erred in denying his motion for mistrial when the prosecutor commented on his post-arrest silence during closing argument. Appellant did timely object and move for a mistrial during the prosecutor's summation, and the trial court had an opportunity to rule on the motion. That appellant declined the trial court's offer to give a curative instruction did not constitute a waiver. In Clark v. State, 363 So. 2d 331 (Fla. 1978), this Court outlined the precise obligations placed on trial counsel when a comment on silence occurs, and nothing in Clark obligates counsel to request a cautionary instruction. Further, as recognized by this Court, in Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992), "such instructions are of dubious value. Once the prosecutor rings that bell . . ., the bell cannot, for all practical purposes, be 'unrung' by instruction from the court." Accord, Czubak v. State, 570 So. 2d 925, 928

(Fla. 1990)(Court rejected the state's argument that Czubak was required to ask for a curative instruction, noting that such an instruction would not have overcome the error). Thus, the issue before the Court was properly preserved for appellate review.

Furthermore, the Court is not obliged to review this issue in a vacuum.

There were no less than three improper references at trial to appellant exercising his right to remain silent. As stated by this Court in State v. DiGuilio, 491 So. 2d 1129, 1136 (Fla. 1986), "It is clear that [such comments] are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict." Furthermore, application of the harmless error test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the verdict. State v. DiGuilio, supra, at 1138. Consequently, the improper comment in closing argument must be viewed in the context of the whole trial, not in isolation. Here, the prosecutor's argument reinforced the two prior illicit, albeit unchallenged, comments, and hammered home the point that appellant, in the face of mounting accusations, elected to exercise his constitutional right to remain silent. The Court must, therefore, consider not only the prosecutor's improper closing argument, but the cumulative effect of all of the comments on silence in analyzing this issue.

Appellee next argues that the various comments on appellant's post-arrest silence were invited error. This argument is devoid of merit.

Investigator Cotton's gratuitous remark, in response the prosecutor's question, "I'd like for you to tell us basically what he said at the various time you talked to him and perhaps point out to the jury the inconsistencies as we go along, if you can" (R 1763), was anything but invited. Of course, questioning which invites a general, narrative response is dangerous for the very reason that it often elicits an improper and irrelevant response, but it could not be anticipated that the witness would directly refer to appellant's invocation of his right to remain silent. Czubak v. State, supra, at 928 (comment which was unresponsive to defense counsel's question was not "invited").

Appellee characterizes this comment as "inconsequential" (AB 15), ignoring its own reference to DiGuilio, wherein this Court recognized the "high risk" of such comments, regardless of whether they are direct or indirect, or advertent or inadvertent. Unsolicited comments on silence are just as anathematic as intentional and calculated ones. See Carr v. State, 561 So. 2d 617 (Fla. 5th DCA 1990). Cotton's remark, "[O]nce we were getting much closer to what we felt was the truth and we were tightening down on him being at the murder scene, he decided he did not want to talk to us any more" (R 1771), was an egregious violation of appellant's Fifth Amendment right to

silence and created the unmistakable impression that appellant was guilty because he refused to answer questions any further.

The offending cross-examination in the instant case was no more "invited" than was the evidence held inadmissible in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), wherein the Supreme Court determined that the defendant's trial testimony could not be impeached with his post-arrest silence. Indeed, the following excerpt from the cross-examination in the Doyle case is strikingly reminiscent of that here:

> Q. And I assume you told him all about what happened to you?
>
> A. No.
>
> Q. You didn't tell Mr. Beamer?
>
> A. No.
>
> * * *
>
> Q. You mean you didn't tell him that?
>
> A. Tell him what?
>
> * * *
>
> Q. But in any event you didn't bother to tell Mr. Beamer anything about this?
>
> A. No, sir.

426 U.S. at 613-614. The prosecutor below similarly questioned Whitton about his failure to talk further to the Cotton:

> Q. You didn't say anymore, did you?
>
> A. Excuse me?
>
> Q. You didn't say anymore then, did you?
>
> A. No, . . .

Q. And when you told him that, then you didn't say nothing else.

A. No, sir.

(R 1885-1886). The prosecutor inquired along these same lines in questioning Investigator Cotton:

Q. Did he tell you he went to the police at midnight on the 2nd (sic) and said, 'Hey, I found a body in a room; my friend is dead.'?

A. No, sir, he did not.

Q. Did he tell you he did that on Wednesday, October 10th?

A. No, sir, he did not.

(R 1771).

In Wood v. State, 552 So. 2d 235, 236 (Fla. 4th DCA 1989), the Court "recognize[d] that a prosecutor can fairly respond to defense counsel 'opening the door' with comment about a defendant's silence," but held that the prosecutor went too far when he asked a series of questions about what the defendant did or did not say at the time of his arrest. The error was compounded in closing argument when the prosecutor then urged the jury to consider the defendant's silence as evidence of guilt. See also, State v. Smith, 573 So. 2d 306, 316 (Fla. 1991)(error to allow the state to introduce evidence about what the defendant did not say at the murder scene and then to argue those points to the jury). The same is true here.

Appellee blatantly misrepresents both the testimony below and the holding of Doyle as it applies to this case. Appellee contends that Doyle established two exceptions to the general

prohibition against using post-Miranda silence as impeachment: 1) a defendant's silence is admissible to impeach a claim that the defendant cooperated with law enforcement; 2) a defendant's silence may be used when said defendant waives Miranda, answers some questions and then invokes his rights. These "exceptions" are a perversion of the Supreme Court's actual holding. Doyle expressly recognizes that silence in the wake of Miranda warnings may be nothing more than the arrestee's exercise of these Miranda rights. "Thus, every post-arrest silence is insolubly ambiguous. . .," 426 U.S. at 617, and "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id., at 618. See State v. Burwick, 442 So.2d 944, 948 (Fla.1983)(post-arrest, post-Miranda silence has dubious probative value by reason of the many and ambiguous explanations for such silence). The Court in Doyle went on to observe in a footnote that

> [T]he fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id., at 619 n. 11. Impeaching a defendant's claim that he told the police at the time of his arrest the same version he testified to at trial is a far cry from using post-arrest silence to impeach a generic claim that the defendant cooperated with the

authorities. In any event, Whitton's cooperative attitude was not the thrust of his testimony on direct, and the prosecutor's cross was not invited by any theory of the defense or preceding testimony.

Although Whitton did cooperate with law enforcement during more than three hours of interrogation, he candidly admitted on cross-examination that he lied to Cotton about returning to the motel. More significantly, Whitton never claimed that he told the officers more than what he testified to at trial. Indeed, his trial testimony (R 1814-1843) was not materially different from his pre-trial statements, as related to by Cotton (R 1763-1771). Whitton never once claimed that he notified the police of Mauldin's death and, in fact, admitted that he failed to do so (R 1837, 1839, 1843), the state having already elicited his silence on this subject in its examination of Cotton (R 1771). Whitton also admitted both to Cotton and at trial that he took Mauldin to the bank and to the motel on the morning of October 9, left the incorrect tag number on the registration, lost his job and paid his rent the following day, and he eventually admitted returning to the motel at midnight to find Mauldin dead. The prosecutor's cross-examination did not reference a single fact which Whitton claimed he told the police but which he, in fact, failed to tell them. Thus, the sole exception recognized in Doyle is inapplicable.

Moreover, it stretches the imagination to contend that the prosecutor was merely using Whitton's silence to assail the impression that he was being cooperative with the investigators.

Clearly, it is one matter to point out inconsistencies between a defendant's trial testimony and his pre-trial statements and quite another to emphasize that after making some statements, the defendant "doesn't say anything else. He realizes at that point 'uh-oh.'" (R 1956). Compare Smith v. State, 539 So. 2d 514 (Fla. 2d DCA 1989)(no error in state's questions aimed at pointing out inconsistencies in defendant's exculpatory statements), and State v. DiGuilio, supra (comment on a defendant's invocation of his right to remain silent after he has answered some questions is constitutional error). As explained by the Court of Appeals in United States v. Canterbury, 985 F. 2d 483, 486 (10th Cir. 1993):

> While due process permits no comment on the defendant's post-arrest, post-Miranda silence, a prosecutor may impeach a defendant's trial testimony with prior inconsistent statements. . . .
>
> . . . This court has recognized that when a defendant answers some questions and refuses to answer others, . . ., this partial silence does not preclude him from claiming a violation of his due process rights under Doyle. [Citation omitted]. Therefore, this case turns on whether the cross-examination was designed to impeach the defendant's trial testimony by calling attention to prior inconsistent statements or, instead, was designed to suggest an inference of guilt from the defendant's post-arrest silence.
>
> The cross-examination in this case was improper. The questions were not designed to point out inconsistencies between Canterbury's trial testimony and his statements at the time of arrest. In fact, Canterbury's post-arrest statements are not inconsistent with his entrapment defense. The inference suggested by the line of questioning is that Canterbury was

> guilty because an innocent person would have presented the set-up theory to the arresting officers. The focus of the examination was therefore not on inconsistent stories . . ., but on Canterbury's failure to present his exculpatory story at the time of arrest. Because the examination was designed to discredit the defendant's trial testimony by drawing attention to his post-arrest silence, it was a violation of his due process rights under Doyle.

Canterbury describes the precise situation here.

The prosecutor's cross-examination of Whitton, as well as his closing argument, was calculated to show that Whitton lied to Investigator Cotton and then remained silent when caught in that lie. By taking the witness stand, Whitton placed his credibility in issue; he did not put his silence in issue as well. Spivey v. State, 529 So. 2d 1088, 1092 (Fla. 1988)(post-arrest, post-Miranda silence is not a prior inconsistent statement and cannot be used for impeachment purposes when a defendant takes the stand).

This was not invited error.

As demonstrated here and in the initial brief, the prosecutor's cross-examination and closing argument was a clear-cut violation of appellant's constitutional right to remain silent. This was not an isolated incident, nor did these comments fall under any lawful exceptions to the general prohibition against the use of post-arrest silence. These were blatant violations of the Fifth Amendment privilege.

Appellee lastly contends that the error is harmless under State v. DiGuilio, supra. In so doing, appellee relies on the strength of its evidence.

While DiGuilio holds that comments on silence can be harmless, it also suggests that such a case is rare because of the "high risk" of such comments. Here, the state's harmless error argument in reality amounts to an "overwhelming evidence" argument. DiGuilio makes it very clear that the proper test is not an overwhelming evidence test. The cumulative errors here went directly to Whitton's credibility. The offending testimony and argument insinuated that Whitton was guilty because of the fact that he remained silent in the face of accusations. Evidently, the prosecutor believed this fact would have some effect on the jury because he asked Whitton three times, "You didn't say anymore then, did you?" (R 1885-1886), and then hammered home the point in closing argument:

> But in the last part of that interview, before the defendant says, 'I'm not talking to you anymore,' he tells him, 'I went back over there, I walked in, and I say my friend dead and I left.: Then he doesn't say anything else. He realizes at that point, 'Uh-oh.'

It cannot be said beyond a reasonable doubt that the prosecutor's closing argument, combined with Cotton's unsolicited remark on Whitton's silence and the state's cross-examination, did not affect the jury's verdict. Appellant is entitled to a new trial.

ISSUE III

THE TRIAL COURT ERRED IN GIVING THE STANDARD INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE, SINCE THE INSTRUCTION UNCONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE.

Appellee contends that appellant's proposed jury instruction on the heinous, atrocious or cruel aggravating factor was properly rejected by the trial judge as it substantially misrepresented the law. Contrary to this assertion, the proposed instruction was a correct statement of the applicable law and was not adequately covered by the instructions given at trial.

The applicable law here was that in order to establish the aggravating circumstance under Section 921.141(5)(h), Florida Statutes, the state had the burden of proving beyond a reasonable doubt that the crime "was meant to be deliberately and extraordinarily painful." Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)[emphasis in original]. Even assuming arguendo that the language in the standard instruction given below, "'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others," could be considered somewhat equivalent to the intent to cause extraordinary mental or physical pain, this cannot save the standard instruction because it goes only to the definition of "cruel." The aggravating circumstance is framed disjunctively, "heinous, atrocious, or cruel," and the standard instruction allows the jury to find this aggravator without proof of the requisite intent merely by finding that the crime was "heinous"

or "atrocious." See Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990)(Marshall, J., concurring)(where the trial court's definitions of "heinous" and "atrocious" were constitutionally inadequate, it is of no consequence that court defined "cruel" in an arguably more concrete fashion, since the aggravating circumstance was submitted to the jury on alternative theories).

When intent is an element of a criminal offense and a jury instruction has the effect of relieving the state of its burden of proof in the critical question of the defendant's state of mind, such instruction amounts to a constitutional error under the Fourteenth Amendment. Sandstrom v. Montana, 442 U.S. 510, 521, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979). In a penalty phase of a capital trial, where heightened standards of reliability apply under the Eighth Amendment, an instruction which relieves the state of its burden of proof of the mental state necessary to establish an aggravating factor is equally defective.

Had the jury been properly instructed on this aggravating factor, it might well have found that while the victim may have suffered a great deal of pain, appellant did not act with the intent to inflict extraordinary mental or physical pain. The proposed jury instruction may have made the difference between the jury finding or not finding this aggravating circumstance.

The trial court reversibly erred in denying appellant's requested instruction. Appellant's death sentence should be reversed for resentencing before a new jury.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

An aggravating circumstance may not be weighed in imposing a death sentence unless it is proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Where the evidence of an aggravating factor is circumstantial, it cannot satisfy the burden of proof unless it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, supra, at 1163. Appellant maintains the evidence at trial did not meet this burden.

In urging that the evidence below was sufficient to prove the heinous, atrocious or cruel aggravator beyond a reasonable doubt, appellee selectively relies on certain facts and ignores others, and mischaracterizes aspects of the medical examiner's testimony.

The evidence in this case was uncontroverted that the victim was highly intoxicated at the time of his death, having a blood alcohol level of .340. Appellee slights this evidence, arguing that Mr. Mauldin felt pain, anguish and a sense of his impending death, and denies that the victim was in any stupor during this frenzied attack (AB 34). The state's own medical expert, however, testified that "At that [blood alcohol] level the individual would be considered to have been in a state of stupor" (R 1679), and the expert "presume[d] that this individual, with that much alcohol, was probably out of it" (R 2150).

Dr. Kielman further conceded that "Alcohol in any amount has a depressant effect," but "when you get this high, it is severely depressant" (R 2142).

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), and Rhodes v. State, 547 So.2d 1201 (Fla. 1989), both cited in appellant's initial brief (IB 63), this Court expressly considered the victims' intoxication as negating the heinous, atrocious, or cruel aggravator found by the respective trial courts. Conspicuously absent from the answer brief is any discussion of Mr. Mauldin's intoxication as it relates to either the trial court's findings or the applicable case law. Because the medical testimony was entirely consistent with the reasonable hypothesis that Mauldin was in a drunken stupor or semiconscious during the attack, the heinous, atrocious, or cruel aggravator was not proven beyond a reasonable doubt. Geralds v. State, supra.

Appellee misrepresents Dr. Kielman's testimony by stating that the expert testified that Mauldin was conscious throughout the attack (AB 33). Dr. Kielman speculated that the victim was "probably not" rendered unconscious from the initial injury due to the bloody trial between the south bed and the north wall of the motel room, where the body was found (R 2136). Dr. Kielman suggested, however, that "Even one blow might have been enough to render him unconscious. And, so, as he fell between the bed and that far wall, he might then have been in a semi-conscious state" (R 2139). Kielman said the victim could not have moved very far with the stab wounds to the heart (R 2139-2140), and, further, that the head wounds would have caused "very rapid un-

consciousness. The unconsciouness would have been very quick" (R 1685). Consequently, it is entirely reasonable that Mauldin was not conscious throughout the attack.

Appellee compares this case to a number of others in which the heinous, atrocious, or cruel aggravator has been upheld for stabbing, beating and strangulation murders. While Mr. Mauldin was admittedly stabbed multiple times and beaten, the method in which death is incurred does not automatically qualify for this aggravating circumstance. In none of the cases cited by Appellee is there any indication that the victims were inebriated or semi-conscious during the assaults, and indeed all of the cited cases suggest that the respective victims were alive and aware of their impending deaths. That is not so here.

In sum, the state failed to prove this aggravating factor beyond a reasonable doubt, and the trial court erred in relying upon this factor in sentencing appellant to death. Appellant's death sentence must be reversed.

IV CONCLUSION

For all of the foregoing reasons, as well as that in the initial brief, appellant requests in Issues I and II that this Court reverse his convictions and sentences and remand the case for a new trial. Appellant requests in Issues III and V that the Court reverse his death sentence and remand the case for a new penalty proceeding. Appellant requests in Issues IV and VI that the Court reverse his death sentence and remand for a new sentencing proceeding. In Issue VII, appellant requests that this Court vacate his death sentence and remand for imposition of a life 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 U.S. Mail to Mark C. Menser, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Gary Whitton, on this 24th day of June, 1994.

Paula S. Saunders
PAULA S. SAUNDERS