IN THE SUPREME COURT OF FLORIDA

BRIAN KEITH GIBSON, :

Appellant, :

vs. : Case No. 81,769

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HENDRY COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Brian Keith Gibson, in reply to the Brief of the Appellee, the State of Florida. Appellant will rely upon the argument and authorities cited in his initial brief with regard to Issues IV, V, VI, VIII, IX, and X.

References to pages of the record on appeal are designated as follows: "R" for the record proper, "T" for the trial transcript, "P" for the penalty phase transcript, "S" for the sentencing transcript, and "SR" for the supplemental record.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY IMPOSING A DEATH SENTENCE WITHOUT ENTERING A WRITTEN ORDER SETTING FORTH ITS FINDINGS OF FACT UPON WHICH THE SENTENCE WAS BASED.

The state's only answer to Gibson's argument in Issue I of his initial brief is that this Court should recede from Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989), and its progeny. The state contends that the court reporter's transcription of the trial court's orally stated reasons for imposing death should satisfy the provision of section 921.141(3), Florida Statutes (1992 Supp.), requiring the sentencing court to "set forth in writing its findings upon which the sentence of death is based." Brief of the Appellee, pp. 23-31.

But the transcription of the judge's oral statements in pronouncing sentence plainly does not satisfy this Court's purpose to ensure that the death sentence

> results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime as dictated by the United States Supreme Court and our own state constitution.

Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993). Transcription of the judge's oral remarks would not ensure that the sentence was not the result of "a hasty, visceral, or mistakenly reasoned initial decision imposing death." Id. If the sentencing judge has

not bothered to read or pay attention to the statutory requirement of written findings to support a death sentence, nor to this Court's decisions enforcing the requirement, the judge cannot be relied upon to be knowledgeable about and to comply with the much larger and more complex body of law governing the judge's decision to impose a death sentence.

In Mills v. Maryland, 486 U.S. 367, 383-84, 108 S. Ct., 100 L. Ed. 2d 384 (1988), the Supreme Court declared,

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

See also Zant v. Stephens, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 72 L. Ed. 2d 235 (1983).

This Court's decision in Grossman implements the constitutional requirement of reliability in capital sentencing. The state's proposal to recede from Grossman could only reduce the reliability of the Florida capital sentencing process, and the state has offered no compelling reason for doing so. This Court should adhere to Grossman and vacate the death sentence with directions to impose a life sentence on remand. Hernandez v. State, 621 So. 2d at 1357; Christopher v. State, 583 So. 2d 642, 646-47 (Fla. 1991).

ISSUE II

THE TRIAL COURT ERRED BY DEPARTING FROM THE SENTENCING GUIDELINES PERMITTED RANGE FOR THE BURGLARY SENTENCE WITHOUT PROVIDING WRITTEN REASONS FOR THE DEPARTURE.

The state contends that the conviction for first-degree murder is a sufficient reason for departure from the guidelines in sentencing Gibson for the burglary. Brief of Appellee, p. 32. While it is true that this Court has approved departure from the guidelines because of a contemporaneous conviction for an unscorable capital offense, Torres-Arboledo v. State, 524 So. 2d 403, 414 (Fla. 1988), the mere existence of a sufficient reason for departure does not excuse the court's failure to articulate the reason in writing, either in the appropriate place on the scoresheet, as was done in Torres-Arboledo, or in a separate order. The failure to provide a contemporaneous written reason for departure requires reversal and resentencing within the guidelines. Owens v. State, 598 So.2d 64 (Fla. 1992).

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S ATTEMPTS TO HAVE ANAL INTERCOURSE WITH HIS WIFE AND GIRLFRIEND BECAUSE IT WAS NOT RELEVANT TO ANY MATERIAL ISSUE OTHER THAN APPELLANT'S BAD CHARACTER OR PROPENSITY.

The state's reliance on FDLE crime scene analyst Tucker's testimony that he observed what he thought was seminal fluid on Ms. Luevano's anus (T 1491), Brief of the Appellee, p. 34, is mistaken because both the medical examiner, Dr. Graves, and the FDLE serologist, Billie Shumway, examined anal smears or swabs and testified for the state that they found no evidence of sperm. (T 1812-13, 1995-97, 2016-18, 2032)

The state's assertion that the question of inadmissible Williams[1] Rule evidence does not arise when the circumstances do not establish all the elements of a crime, relying on dicta from Malloy v. State, 382 So. 2d 1190, 1192 (Fla. 1979), Brief of the Appellee, p. 34, is wrong. When the legislature codified the Williams Rule, it included similar fact evidence of other crimes, wrongs, or acts. § 90.404(2)(a), Fla. Stat. (1993). In Jackson v. State, 522 So. 2d 802, 805 (Fla. 1988), this Court ruled, "Evidence of collateral crimes or acts committed by the defendant is inadmissible if its sole relevancy is to establish bad character or propensity of the accused." [Emphasis added.]

The state's assertion that Florida's sodomy laws apply only to

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[1] Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959).

homosexual acts, Brief of Appellee, p. 34, is also wrong. Section 800.02, Florida Statutes (1993), is gender neutral and proscribes "any unnatural and lascivious act with another person." The term "unnatural offense" is defined as "sodomy or buggery." Black's Law Dictionary, p. 1538 (6th ed. 1990). "Sodomy" is defined as "oral or anal copulation between humans, or between humans and animals." Id., p. 1392. See Thomas v. State, 326 So. 2d 413, 416 (Fla. 1975)(§ 800.02 applies to oral or anal copulation). In Lason v. State, 152 Fla. 440, 12 So. 2d 305 (1943), this Court found that the "crime against nature" statute applied to acts of consensual oral intercourse between a man and two young girls. In Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971), this Court held that the "crime against nature" statute was unconstitutionally vague, but the same conduct, oral or anal sexual activity between consenting partners, is proscribed by the "unnatural and lascivious act" statute, section 800.02. Unless the state contends that our society has changed to the point that heterosexual people are no longer considered to be "human," the sodomy statute plainly applies to any act of oral or anal sex between consenting partners regardless of their gender or sexual orientation. To rule otherwise would violate the equal protection provisions of the United States and Florida Constitutions. U.S. Const. amend. XIV; Art. I, § 2, Fla. Const.

The state's assertion that Gibson's conduct with his wife and girlfriend could not be prosecuted because the statute of limitations had expired, Brief of Appellee, p. 35, has nothing whatsoever

to do with the question of whether their testimony about those acts was relevant to a material issue in the murder trial.

The prosecutor urged the trial court to allow evidence of Gibson's unsuccessful attempts or requests to have anal sex with his wife and girlfriend on the sole ground that his course of conduct was relevant to show his identity as the person who killed Luevano. (T 1245-49, 1599-1603) But the state now argues that the evidence was relevant to motive and state of mind. Brief of the Appellee, p. 36. The state should not be heard to change the grounds for its argument in favor of admitting the evidence because procedural default rules apply to the state as well as the defense. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Furthermore, both the wife and girlfriend testified that Gibson peacefully acquiesced in their refusal to engage in anal sex. (T 1264, 1611) There was no evidence at trial that the murder of Luevano was motivated by Gibson's frustrated desire for consensual anal sex with his wife and girlfriend.

The state was not entitled to present this evidence to establish Gibson's identity as the perpetrator of the murder, because similar fact evidence of other crimes, wrongs, or acts is not admissible to show identity unless there are pervasive points of similarity between the charged offense and the collateral act, and the similarities are so unusual as to point to the defendant as the perpetrator of both. Henry v. State, 574 So. 2d 73 (Fla. 1991); Drake v. State, 400 So. 2d 1217 (Fla. 1981). The state has not even tried to satisfy this standard. Nor has the state

demonstrated beyond a reasonable doubt that the error in admitting the irrelevant collateral act evidence was harmless to the defense as required by State v. Lee, 531 So. 2d 133, 136-38 (Fla. 1988). The convictions must therefore be reversed, and the case must be remanded for a new trial.

ISSUE VII

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ADMITTING IRRELEVANT VICTIM IMPACT EVIDENCE AND BY FINDING NONSTATUTORY AGGRAVATING CIRCUMSTANCES BASED UPON SUCH EVIDENCE.

The state's contention that Gibson is improperly changing the basis for his objection to the irrelevant victim impact evidence, Brief of the Appellee, p. 48, is wrong. Defense counsel objected that the evidence was irrelevant to any statutory aggravating circumstance at trial. (P 61-64, 69, 103, 109) He also objected to the court's consideration of victim impact statements in the presentence investigation report and letters from friends and relatives of Luevano and the victim of the prior homicide. (S 4-5) Appellant's argument in Issue VII of his initial brief does not change the grounds for objection, it explains the legal basis for the objections and the reasons for granting him relief on this issue.

Surely the contemporaneous objection rule was never intended to confine appellate counsel to mere repetition of the exact statements made by trial counsel. The state certainly does not confine its appellate arguments to the exact words of the trial prosecutor. Such a rule would obviate the need for either party to have counsel for appeal. This Court could just as well review the record and decide whether it agreed or disagreed with the trial court's rulings on objections. The purpose of appellate briefs is not only to summarize the facts and identify the issues, it is also to

provide counsel for both parties the opportunity for advocacy on behalf of their respective clients.

Counsel did not receive a copy of the PSI report until after appellant's initial brief was filed. The third page of the report contains a victim impact statement by one of Ms. Luevano's sisters, Diana Weiss. Ms. Weiss stated, in part:

> I feel that the defendant should get the death penalty. My sister was only twenty years old, the life it took my mother nine months to carry and bear, and twenty years to mature, was destroyed in less than fifteen minutes.... Her chance for a happy life, for getting married, having children, celebrating holidays, and growing old were stolen from her.... The defendant didn't just take my sister's life, he destroyed our family....I feel I speak for the entire family when I say I just want the defendant to have the death penalty.

These remarks violate the final provision of section 921.141-(7), Florida Statutes (1992 Supp.), which states, "Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence." This provision codifies the Eighth Amendment prohibition of such remarks as construed in that portion of Booth v. Maryland, 482 U.S. 496, 502-03, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), which survived the decision in Payne v. Tennessee, 501 U.S. __, 111 S. Ct. 2597, 115 L. Ed. 2d 720, 739 n. 2 (1991). See Hodges v. State, 595 So. 2d 929, 933 (Fla), vacated on other grounds, __ U.S. __, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992), affirmed on remand, 619 So. 2d 272 (Fla. 1993).

The state agrees with appellant that section 921.141(7) does not create a new aggravating circumstance to be weighed by the

sentencing jury and judge. Brief of the Appellee, pp. 58-59, 62-64. But the state fails to explain how to reconcile section 921.141(7) with the provisions of sections 921.141(2), (3), (4), (5), and (6), which restrict the co-sentencers to weighing proven aggravating and mitigating circumstances to determine the appropriate sentence.

The state asserts that the victim impact evidence permitted by section 921.141(7) may be considered without being weighed with the aggravating and mitigating circumstances. Brief of the Appellee, pp. 58-59, 62-64. The state does not explain how this is to be accomplished. Instead, the state cites Teffeteller v. State, 495 So. 2d 744 (Fla. 1986), and Jackson v. State, 502 So. 2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S. Ct. 3198, 96 L. Ed. 2d 686 (1987), as examples of this Court allowing the sentencing jury to consider evidence not directly relevant to the aggravating and mitigating circumstances. Brief of the Appellee, pp. 60-62.

In Jackson, at 412-13, this Court ruled that the sentencing jury in a felony murder case must make a determination of whether death is a permissible sentence for an accomplice who was involved in the felony but did not personally kill the victim. This decision implements the Eighth Amendment prohibition of the death penalty for such a defendant unless the state proves that he intended to kill or that he was a major participant in the felony and had a reckless indifference to human life. Tison v. State, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). This threshold test to determine whether felony murder accomplices are eligible

for the death penalty must be satisfied before the jury can consider and weigh any aggravating or mitigating circumstances. It is not at all analogous to the consideration of victim impact evidence.

Teffeteller was a resentencing case in which the jury had not heard the evidence from the guilt phase trial. This Court was properly concerned that the jury could not recommend the proper sentence if it did not know the essential facts of the case, and therefore allowed the presentation of some of the guilt phase evidence, including a single photo of the victim. Id., at 745.

Here, the sentencing jury heard all of the guilt phase evidence and was well acquainted with the essential facts of the case before the victim impact evidence was introduced. The victim impact evidence consisted of testimony by Ms. Luevano's family members about her unrealized hopes for her future and the family's grief and fear resulting from her death. (P 65-75, 105-08, 110-14) These matters were not necessary to the jury's understanding of the essential facts of the case and do not fall within the purview of Teffeteller.

It is apparent from the judge's orally stated reasons for imposing the death sentence that he not only considered the victim impact evidence, he treated it as a nonstatutory aggravating circumstance and accorded it decisive weight in favor of death:

> There was a person that was taken from us, but you took more than just a person. You took a daughter, you took a sister, you took a friend, and you took a future wife. You took a future mother. She was more than just a person. She meant a lot to many, many people.

> In consideration and reflection of this case, it simply wasn't a murder that you committed. It was a desecration of life itself in review of these photographs.
>
> You took Lupita Luevano to her grave, and many hearts from this community with her.

(S 18) No matter how accurate the judge's findings were, no matter how much loss and grief was experienced by Ms. Luevano's friends and relatives, these findings were not relevant to the statutory aggravating circumstances and should not have been weighed in determining the sentence. See Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989).

Obviously, the portion of the Grossman decision holding the admission of victim impact evidence unconstitutional under Booth is no longer valid to the extent Booth was overruled in Payne, but this Court also found that the impact of the death on the victim's family was a nonstatutory aggravating circumstance and was not an appropriate basis for a death sentence under Florida law. Id., at 842. There is no reason to overrule the latter holding because of Payne, which is permissive and not mandatory, or the enactment of section 921.141(7). Article I, section 16(b), of the Florida Constitution expressly provides that victim impact evidence must be heard only "when relevant" and only to the extent that it does not interfere with the constitutional rights of the accused. This Court can reconcile section 921.141(7) with the other subsections of the statute, Article I, section 16(b), and Grossman by ruling that victim impact evidence is admissible when it is relevant to the aggravating and mitigating circumstances which must be weighed,

but not otherwise. Compare Hodges v. State, 595 So. 2d at 933-34 (victim impact evidence relevant to aggravating circumstances and admissible), with Burns v. State, 609 So. 2d 600, 605-07 (Fla. 1992)(error to admit victim impact evidence not relevant to any material issue).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 29th day of November, 1994.

Respectfully submitted,

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