IN THE SUPREME COURT OF FLORIDA

BRODERICK WENDELL MONLYN,

Appellant,

v.

CASE NO. 82,779

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR MADISON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

ISSUE I

THE COURT ERRED IN ALLOWING THE MEDICAL EXAMINER TO TESTIFY THAT THE VICTIM SUFFERED MORE BLOWS TO THE HEAD AFTER HE HAD BEEN BOUND AND GAGGED AND WAS STILL ALIVE, A VIOLATION OF MONLYN'S SIXTH AND FOURTEENTH AMENDMENTS' RIGHTS.

As gleaned from the State's argument on this issue, the Appellee has made four points: 1) Three of the cases Monlyn relied on in his Initial Brief, Johnson v. State, 393 So. 2d 1069 (Fla. 1980), Shaw v. State, 557 So. 2d 77 (Fla. 1st DCA 1990); and Drew v. State, 551 So. 2d 563 (Fla. 4th DCA 1989) are "factually distinguishable from the instant case." (Appellee's Brief at p. 10). 2) The three cases it cited, Jones v. State, 440 So. 2d 570 (Fla. 1983); Dragon v. State, 429 So. 2d 1329 (Fla. 1st DCA 1983), and Peacock v.

State, 160 So. 2d 541 (Fla. 1st DCA 1964), on the other hand, are "more like this case." 3) The medical examiner was qualified to express an opinion. (Appellee's brief at pp. 10-11.) 4) Whatever error may have occurred was harmless.

1. Johnson, and the rest, are "factually distinguishable."

Well, sure they are. Any case Monlyn could have found would have been "factually distinguishable." More pertinent, the State never showed how the facts in the opinions Monlyn cited differed from those presented at his trial, and how they make their holdings inapplicable to this case. It did not because it cannot. Experts can give opinions about matters outside the ordinary understanding of the jury, but they cannot do so regarding issues jurors are as capable of understanding. Johnson, cited above. Particularly, as Shaw and Drew suggest, experts generally cannot voice opinions about the Defendant's intentions in committing some criminal act. The jury can figure that out without any help from an expert, particularly one who dissected bodies, and dead ones at that.

2. Jones, and the rest, are "more like this case."

This is an amazing statement for two reasons. First, as the State admits in its brief, the challenged witnesses in Jones, Dragon, and Peacock were nonexperts. The opinions they gave lacked the essential element the State relied on at Monlyn's trial: that Dr. Floro gave an opinion within the scope of his expertise (T 956-57). More significantly, those cases dealt with observations of physical events: rifle marks on a window sill, tire tracks, and the point of impact in a car accident. None of them concerned an opinion

about the Defendants intentions at the time of the various incidents, the crucial distinction. As Monlyn's Initial Brief argued, the jury was as qualified as Dr. Floro to reach a conclusion about why Monlyn tied up Mr. Watson. His testimony unfairly and improperly invaded the province of the jury.

3. The medical examiner was qualified to express an opinion.

Of course he was, just not on what Monlyn was thinking at the time he tied up the victim. That was beyond the scope of his expertise, and that intention, in any event, required no expert testimony. The jury could have reached the same conclusion or any other without the imprimatur of this expert.

4. Whatever error occurred was harmless.

Monlyn had a difficult defense to make at trial. He conceded not only that he had killed Mr. Watson, he admitted he had murdered him. He defended himself by arguing he had committed only a second degree murder, not a first degree one. The only distinction between those homicides was his mental state, his intent. Dr. Floro's comment, therefore, attacked the only issue Monlyn contested at his trial.

Monlyn, in an effort at damage control, sought to minimize the impact of Dr. Floro's impermissible opinion testimony. If Dr. Floro had never talked about there being "no rhyme or reason . . . ", the quoted portion of his cross-examination would have never occurred. (See pp 11-12 of the Appellee's brief). Moreover, this expert's inadmissible opinion only weakened the force of Monlyn's contention: that when he tied up Mr. Watson he was unconscious. The State, in its closing argument, of course, could have

made Dr. Floro's point, but that would have been only argument. It would not have been evidence, a "fact" from an unbiased witness. His "no rhyme or reason" testimony strongly supported the State's contention that the homicide was premeditated rather than the act of a depraved mind, as Monlyn argued. As such, this expert's inadmissible opinion testimony could have affected the jury's deliberations, and this court cannot say with easy confidence that the court's error in admitting it had no affect on the jury's verdict.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN OVERRULING MONLYN'S OBJECTION TO THE PROSECUTOR ASKING THE DEFENDANT ON CROSS-EXAMINATION IF THE MEDICAL EXAMINER WAS CORRECT IN THAT HE SAW NO EVIDENCE OF A BITE MARK ON THE VICTIM'S HAND, CONTRARY TO WHAT MONLYN SAID, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State has two points to make in this issue: 1) The argument made on appeal differs from the one presented at trial. (Appellee's brief at p. 14.) 2) Even if preserved, the questioning was within the limits allowed in cross-examination. Notably, it has made no harmless error argument, and since it has the burden of doing so, it must believe that if the court erred, it was reversible to have done so.

1. Monlyn has made a different argument to this court than he did at trial.

Relying on Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982), the state argues by fiat that "As is readily apparent from the record, Monlyn did not make the same claim to the trial court the he advances before this Court."(Appellee's brief at p. 14.) Monlyn, with as much bravado, can say that yes he does. With more logic and examination of the record he supports that conclusion.

The issue presented on appeal, whether Monlyn had to explain why Dr. Floro was lying, is within the scope of the Defendant's objection at trial, and it certainly was an issue the lower court was aware of. Mr. Hunt, Monlyn's lawyer below, said that the objected to question was wrong because, "I don't think it's proper to ask him what

somebody else is talking about." Mr. Blair, the prosecutor, further clarified the issue by claiming, "it's entirely proper to ask him if he has an explanation where there might not have been a bite mark on him at the time of the autopsy." (T 1555). As presented in the Initial Brief, "The state's improper questioning strongly implied Monlyn was lying on the stand before the jury when he claimed he bit Mr. Watson." (Initial Brief at p. 21)

Steinhorst, and cases following it, rightly condemn "sandbagging," the technique of raising an issue on appeal different from that presented to the trial court. The contemporaneous objection rule 1) puts the trial court on notice of its purported mistake and gives it an opportunity to correct any error, and 2) lays an adequate record for appellate review. Castor v. State, 365 So. 2d 701 (Fla. 1978). Thus, the trial court has no notice that, for example, testimony is inherently inflammatory when the Defendant objects only because he believes it irrelevant. Rodriquez v. State, 609 So. 2d 499 (Fla. 1992). Or, a Defendant claims at trial that the "especially heinous, atrocious, or cruel" aggravating factor has no applicability, but on appeal the instruction on that aggravator was unconstitutionally vague. Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994).

In this case, on the other hand, Monlyn on appeal has made an argument fairly encompassed by the objection he raised below.

As to the merits, the Defendant has no objection to the State's recitation of the law on cross-examination. The right to ask a broad range of questions, however, provides no carte blanche authority to call Monlyn a liar, as this prosecutor impliedly did. Boatwright v. State, 452 So. 2d 666, 668 (Fla. 4th DCA 1984). Even cross-examination has some

limits.

The court allowed the State to exceed them, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN FAILING TO GRANT MONLYN'S REQUEST FOR A MISTRIAL WHEN THE PROSECUTOR ASKED THE DEFENDANT WHY HE HAD NOT TOLD ANYONE HE HAD GOTTEN INTO A FIGHT WITH THE VICTIM, AND IF HE HAD NOT REALIZED THAT WATSON WOULD DIE IF HE DID NOT RECEIVE MEDICAL ATTENTION, VIOLATIONS OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State makes several arguments that will be considered according to the comment made.

A. "Well, I got into a scuffle with a fellow. . . "

Regarding the prosecutor's question about why Monlyn had not told the police "Well, I got into a scuffle with a fellow. . . " the State claims, 1) The question was within the bounds of cross-examination. 2) Statements that violate Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) can impeach a witness. 3) The objected to comment was not a comment on Monlyn's right to remain silent. (Appellee's brief at p. 19.)

As to the first two points, we need to recognize the court agreed with the Defendant. (T 1597). The prosecutor had commented on his right to remain silent. "It's beginning to get to imply that he had some duty, so I will sustain it from going that far." That ruling means that the question (which was argumentative and speculative) was outside the bounds prescribed for cross-examination, and it violated Miranda. As to the law that statements taken without regard to the holding of that case are admissible to

impeach, there has to be a finding that they were at least voluntarily made. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). Here, we have no such finding. More significantly, Monlyn never made the statements. The prosecutor did. Monlyn said nothing, and the State had to create a hypothetical response so he could ask this Defendant why he had not given it to the police when arrested.

Such questioning became a comment on his right to remain silent. Because he said nothing when the state argued he should have protested his innocence, the jury likely rejected his claim that he believed Watson was alive when he left. As the court recognized, "It's beginning to get to imply that he had some duty." (T 1597) What the State asked was fairly susceptible of being interpreted as a comment on Monlyn's right to remain silent.

B. "So you didn't realize that unless he received medical treatment that he would die?"

The only argument made regarding this comment was that "The prosecutor did not exceed the bounds of permissible cross-examination." (Appellee's brief at p. 22). Monlyn relies on what he presented in his Initial Brief to respond to that. It was error because "it encouraged the jury to ignore Dr. Floro's testimony and convict Monlyn of first, rather than second degree murder because he had shown no pity, no interest in saving the man he had beaten" (Initial Brief at p. 28).

Finally, the state claims whatever errors occurred were harmless because they created no substantial harm. That standard, however, is wrong. Error is harmless if there is no reasonable possibility that the error had any effect on the jury's verdict. State v.

DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Here, Monlyn conceded he had murdered Watson (T 2133). He disagreed with the prosecution only on the degree. That was a much closer question. See, Rogers v. State, 660 So. 2d 237 (Fla. 1995). The court's error in refusing to grant Monlyn's repeated requests for a mistrial became reversible error in light of the emotional reaction the jury would have had to the State's frequent allusions to Monlyn's lack of sympathy for the victim. They became a feature of the trial in the sense that they helped arouse the jury's animosity to the Defendant, and they encouraged it to reject Monlyn's arguments for emotional rather than dispassionate reasons. The court's several errors could not have been harmless.

ISSUE V

THE COURT ERRED IN DENYING MONLYN'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT DURING THE GUILT PHASE PORTION OF THE TRIAL, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The question presented in the Initial Brief was simply whether the State, in the guise of fair comment, can ask the jury to consider the suffering Mr. Watson endured when it determined if Monlyn killed him with a premeditated intent or a reckless disregard. As the State notes on page 28 of its brief, "Closing argument 'must not be used to inflame the minds and passions of jurors.'" Yet, the Prosecutor's objectionable observation did just that by asking the jurors to consider the suffering Watson could have avoided had Monlyn shown more humanity to his victim.

Thus, the State has missed the point of his argument. At no time did he ever mention the suffering the victim endured. Of course, he wanted the jury to know that if Monlyn intended to kill Mr. Watson, a more effective way would have been to have shot him, but he never invited them (which would have been stupid for him to have done anyway) to consider his suffering. That focus, not on the victim's suffering, explains the testimony and comments Monlyn's lawyer made that the state quoted on pp. 29-30 of its brief.

Admittedly, Monlyn's defense was risky. Often times courts and juries have difficulty distinguishing between first and second degree murder. See, Rogers v. State, 660 So. 2d 237 (Fla. 1995). Yet, because the distinctions he wanted the jury to make

were subtle, and his argument difficult, the court should have sustained his objection to the State's inflammatory comment. It encouraged the jury to sweep away all dispassionate consideration of the evidence and react on an understandable, but improper, emotional level. Thus, just as a single match can destroy an entire forest, the State's argument, in this highly charged trial (See Initial Brief at pp. 38-39), amounted to reversible error.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IX

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BECAUSE THAT GUIDANCE, AS THIS COURT HAS DECLARED, WAS UNCONSTITUTIONALLY VAGUE, A VIOLATION OF MONLYN'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State says Monlyn has failed to preserve this issue because "The CCP instruction proposed . . . is inadequate." (Appellee's brief at p. 40.) Whether it was inadequate or not, he still objected to the court giving the jury the guidance this court has found constitutionally flawed. (T 2285-97) He has preserved this issue for appellate review.

It claims the failure to give a constitutionally adequate instruction amounted to only harmless error, and supporting that conclusion it recites the trial court's sentencing order finding the CCP aggravator. In his Initial brief, Monlyn contended that the jury could have disregarded that interpretation of the evidence, and concluded that "Watson had the misfortune to catch Monlyn in his barn before the latter could leave." (Initial Brief at pp. 62-63) So, the question becomes what view of the evidence should this court use in determining if an error is harmless.

This was the same problem this court faced and resolved against the Defendant in Archer v. State, 673 So. 2d 17 (Fla. 1996). Using the instruction proposed in Jackson v. State, 648 So. 2d 85 (Fla. 1994), this court found evidence in the record to support its conclusion that the error in giving a bad instruction would have been harmless under any

definition of that aggravator. The dissent, however, argued that was the wrong analytical approach. "While [Archer's] assessment goes too far in ignoring the contrary evidence of Archer's role, it correctly identifies an evidentiary basis for the jury to reject CCP as an aggravator." Id. at 23. That is, harmless error occurs if, when the evidence is viewed in the light most favorable to the defendant, this court can conclude beyond a reasonable doubt that the jury's verdict would have remained the same. This latter conclusion accords with various pronouncements from the United States Supreme Court:

> Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." Yates v. Evatt, 500 U.S. ___, ___ (1991)(emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

Sullivan v. Louisiana, ___ U. S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

The correct analysis, then, looks at the evidence in the light most favorable to the Defendant. Then, if the facts support the finding of the CCP aggravator this court can say the error in reading a deficient instruction was harmless beyond a reasonable doubt.

The harmlessness of the court's error, therefore, becomes quite simple to resolve, depending on which analysis of the evidence does this court accept.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE X

THE COURT ERRED IN FINDING THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF MONLYN'S EIGHTH AMENDMENT RIGHTS.

Monlyn relies on what he said in his Initial Brief to rebut the State's argument here.

ISSUE XII

THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION DEFINING MITIGATION, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State presents two arguments: 1) This issue is not preserved for this court's review. 2) If so, the "catch-all" instruction is adequate.

To preserve this issue for appeal, Monlyn needed to do one of two things: Object to the instruction the court intended to give, or 2. Present the court with a requested jury instruction. Walls v. State, 641 So. 2d 381, 387 (Fla. 1994). He has preserved this issue for appeal.

As to the second argument made by the state, quoting the "catch-all" instruction as somehow providing the missing definition Monlyn requested misses the point he argued. He wanted a definition of mitigation, not examples of what it is. That term encompasses more than simply "any aspect of the defendant's character or record, and any circumstances of the offense." The definition of that term he provided captured its essence and broad scope. (Initial Brief at p. 78).

The court, rather than letting the jury consider what could mitigate a death sentence, should have given them the definition the Defendant requested.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE XIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY COULD NOT "DOUBLE" THE AGGRAVATING FACTORS OF PECUNIARY GAIN AND THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A ROBBERY, A VIOLATION OF MONLYN'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State seems to think that as long as the trial court's sentencing order recognized the doubling problem and avoided it, no error occurred in refusing to give the jury an instruction alerting them to the danger. The argument it makes, as correct as it may be regarding the court's actions, has no relevance here. Monlyn, therefore, sees nothing in it that requires any response, and he relies on what he presented in his Initial Brief.

CONCLUSION

Based on the arguments presented here, the Appellant, Broderick Monlyn, respectfully asks for the following relief: reversal of the trial court's judgment and sentence and remand for a new trial, reversal of the sentence of death and remand for a new sentencing hearing before a jury, or reversal of the sentence of death and remand for resentencing before the court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Barbara J. Yates, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, BRODERICK WENDELL MONLYN, #086458, Union Correctional Institution, Post Office Box 221, Raiford, Florida, on this 30 day of October, 1996.

DAVID A. DAVIS