IN THE SUPREME COURT OF FLORIDA

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO: 82925

Circuit Court No. 93-1659CF (Duval)

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ISSUE I

THE TRIAL COURT ERRED IN LIMITING DEFENDANT THOMAS MOORE'S CROSS-EXAMINATION OF KEY STATE WITNESSES VINCENT GAINES AND CARLOS CLEMONS ON CRUCIAL POINTS OF FACT.

The State in its answer brief dismisses the Appellant's argument that his trial counsel's efforts to thoroughly cross-examine key State witnesses Clemons and Gaines were thwarted, as "redundant" and "improper." (Appellee's brief at 26). Assuming that by "redundant," the State means that the questions were repetitive, this is clearly not the case. A careful examination of the Record shows that defense counsel was simply not getting straight answers to his questions, but, rather, at best, equivocal ones. Therefore, defense counsel was forced to keep pursuing his questions because they were not being answered. This is not "redundant"; it was necessary to protect Appellant's due process rights and confrontation rights.

Further, the State boldly states that the curtailment of cross-examination was harmless beyond a reasonable doubt, but offers no support for such a contention. The State has the burden of showing that an error is harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Here, as set out further in Appellant's merit brief, the harm was great: the thwarted questioning was key to the theory of the defense that Clemons was the real shooter and lied against Appellant MOORE in order to protect himself.

Moreover, Appellant stresses the fundamental legal principle that the defense is to be permitted wide latitude on cross-examination, particularly with regard to the key

State witnesses in a criminal prosecution. Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. den. 102 S.Ct. 2257, reh. den. 102 S.Ct. 3500; Rivera v. State, 462 So. 2d 540, 544 (Fla. 1st DCA 1985).

ISSUE II

THE TRIAL COURT ERRED IN LIMITING DEFENDANT THOMAS MOORE'S CROSS-EXAMINATION OF THE FIRE CAPTAIN, REFUSING TO HEAR A PROFFER OF THE QUESTIONING, AND DENYING THE MOTION FOR A MISTRIAL.

The State argues that the curtailment of defense counsel's cross-examination of Fire Captain Maddox was not error in that the questions were irrelevant because he stated on direct examination that he could not detect any accelerants. (Appellee's brief at 29).

The State misses the Appellant's point. The captain's testimony that he found no accelerants is the very reason the cross-examination on that point was not only relevant but crucial. As explained in Appellant's merit brief, key State witness Chris Shorter claimed that Appellant MOORE "confessed" to overturning a lawn mower and using the gasoline to start the fire. (T1003). In order to impeach Shorter, it was imperative that defense counsel be permitted to pursue the accelerant issue with the expert who examined the scene and determined the cause of the fire.

Thus, the attempted cross-examination and rejected proffer were relevant and crucial to the defense's ability to present the entire picture of the shooting and fire. Alexander v. State, 627 So. 2d 35, 44 (Fla. 1st DCA 1993). This limitation on cross-examination was clearly error, and it involved such an important area of the defense that

it cannot be deemed harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE III

THE TRIAL COURT ERRED BY REPEATEDLY MAKING REMARKS IN THE PRESENCE OF THE JURY WHICH CONSTITUTED IMPROPER COMMENTS ON THE EVIDENCE AND DISPARAGEMENT OF THE DEFENSE, AND THE CUMULATIVE EFFECT OF THESE REMARKS DENIED THOMAS MOORE HIS RIGHT TO DUE PROCESS OF LAW.

The State accuses Appellant of taking the trial Judge's comments out of context and then proceeds to attempt to excuse each and every remark by quoting the conversation surrounding the offensive remark. (Appellee's brief at 33). None of the State's excuses or quotations or other remarks is good enough to overcome the clear, cumulative prejudicial effect of the trial Court's repeated disparaging remarks and comments on the evidence and the credibility of witnesses.

The simple fact is that the trial Court's running commentary "pass[ed] beyond the bounds of neutrality or impartiality," Hamilton v. State, 366 So. 2d 8, 11 (Fla. 1978), and deprived Appellant of his due process right to a fair trial.

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY BY LARRY DAWES THAT DEFENDANT THOMAS MOORE WAS IN POSSESSION OF A FIREARM TWO DAYS AFTER PARRISH'S DEATH.

The State in its answer brief focuses mostly on Dawes' testimony as to the statement MOORE made two days after the shooting, and characterizes it as an admission by a party opponent. (Appellee's brief at 53, 55).

The statement is not what Appellant complains of; the error was allowing Dawes to testify that when MOORE made the statement, MOORE showed him a gun. Clearly, since not a speck of evidence connected the gun to the subject murder two days earlier, the testimony was irrelevant and prejudicial because it served only to show MOORE's bad character and propensity for murder.

Surely this improper character evidence had an impact on the jury and the potential of such evidence to improperly sway the jury against a defendant is the reason it is prohibited in the first place. Therefore, the error in admitting this evidence was not harmless beyond a reasonable doubt.

ISSUE V

THE TRIAL COURT ERRED IN ADMITTING A COPY OF CARLOS CLEMONS' WRITTEN STATEMENT GIVEN TO POLICE AT THE TIME OF HIS ARREST.

The State argues that Clemons' prior consistent statement to police was admissible to rebut charges of recent fabrication. (Appellee's brief at 59). An examination of the Record shows that, on cross-examination of Clemons, defense counsel launched a general attack on Clemons' credibility as a witness. However, defense counsel did not accuse Clemons of recent fabrication, and only if he had could the prior consistent statement be introduced pursuant to §90.801(2)(b), Florida Statutes.

Because no charge of recent fabrication was raised by defense counsel, the admission into evidence of Clemons' written statement to police served only to bolster Clemons' direct testimony at trial. Prior consistent statements are inadmissible for this purpose as they are clearly hearsay. Jackson v. State, 498 So. 2d 906 (Fla. 1986).

Finally, the improper admission of the statement was not harmless beyond a reasonable doubt because Clemons, the co-defendant and only alleged eyewitness, was the State's star witness against Appellant MOORE.

ISSUE VI

THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE WHICH DID NOT FALL WITHIN THE STANDARD SET FORTH IN SECTION 921.141(7), FLORIDA STATUTES.

The State argues that the victim impact evidence was allowable under the law because it focused on the "uniqueness" of the victim, Johnny Parrish, in accordance with §921.141(7), Florida Statutes. A look at the plain words testified to -- that he was "a good man" who "never bothered anybody" and was "very free-hearted" and he "loved everybody" -- shows that the testimony had nothing even remotely to do with uniqueness, as required by the statute.

The State's argument that the qualities of goodness, kindheartedness and lovingness are "unique" is disingenuous. Surely most people have those qualities; the statute would be meaningful and completely ineffectual if kindness were enough to satisfy the requirements.

The testimony served only to arouse sympathy in the minds and hearts of the jurors for the victim, and sympathy has no place in the due process scheme. Surely, such heartstring-tugging was not harmless beyond a reasonable doubt in that the extreme danger of sympathy for the victim clouding the issues at penalty phase is the reason for the statutory limitation on victim impact evidence.

ISSUE VII

THE TRIAL COURT ERRED IN PERMITTING THE STATE DURING CLOSING ARGUMENT OF THE PENALTY PHASE TO UTILIZE MITIGATION AS NON-STATUTORY AGGRAVATION.

The State attempts to excuse the prosecutor's use of mitigation as non-statutory aggravation by quoting liberally from the prosecutor's penalty phase closing argument. (Appellee's brief at 66). What the State ignores is the plain meaning of the words the prosecutor used: "it may sound like mitigation, but to me it's the most -- well, I would submit to you that it's the most aggravating factor of all." (T1528).

There is no other way to characterize this statement but that the prosecutor took mitigating evidence and asked the jury to consider it as not only aggravating evidence but even the most aggravating evidence of all. (emphasis applied). Therefore, Appellant MOORE was denied due process of law at sentencing, and a new sentencing phase is required.

CONCLUSION

The Appellant prays for this Court's ruling reversing and remanding with appropriate directions to the trial Court below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: GYPSY BAILEY, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, PL-01 - The Capitol, Tallahassee, FL 32399 by U.S. MAIL this 10th day of MAY, 1996.

BY: 

BILL SALMON