IN THE SUPREME COURT OF FLORIDA

ANTHONY FLOYD WAINWRIGHT,

Appellant,

v. CASE NO. 86,022

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION TO REPLY BRIEF

Mr. Wainwright has read and studied the State's Answer Brief. (Cited as the SAB.) As a consequence of this review, he will reply to Issues 1, 2, 3, 4, 8, and 9. The Initial Brief adequately covers Issues 5, 6, and 7. It does appear that the State has conceded error as to the sentences imposed for the non-capital convictions. See Issue 9.

ISSUE I:

THE TRIAL COURT ERRED IN ALLOWING STATEMENTS MADE BY MR. WAINWRIGHT TO THE POLICE IN EVIDENCE AT THE TRIAL.

The State seeks to justify the admissibility of Mr. Wainwright's statements by arguing that "his own admissions [other than those statements made on May 9, 10, 11 or 20] . . . reveal Wainwright was an active participant in the sexual battery and murder of Carmen Gayheart. (SAB pg. 30) These were statements allegedly made to different cellmates during Wainwright's pretrial incarceration. It is, of course, not these statements that Mr. Wainwright sought to suppress.

The State argues that ***Groover v.*** *State,* **458, *So.*** 2d 226 (Fla. 1984), controls the outcome of this issue. This conclusion is wrong. It is important to remember that Wainwright was tried with another individual. The State argued that Wainwright was either the actual shooter (as the jailhouse confessions supported) or guilty under the principal theory of liability. This meant that Wainwright could be held responsible for the conduct of his co-defendant Hamilton if Wainwright knew what was going to happen; intended to participate actively or share in some benefit; and actually did something which was intended to and did "incite, cause, encourage, assist or advise the other person to actually commit the crime." Terry v. ***State, 668 So.*** 2d 954 (Fla. 1996). (Vol. VII - **pg.** 1110)

The parties discussed the conditions that must be met before the State would agree not to seek death. The first condition was that: Wainwright "not have contributed in any manner to [Gayheart's] death." This provision was so lacking in specificity that the defendant was required to divulge information for some determination to be made. Mr. Wainwright had emphatically denied shooting Mrs. Gayheart, but there was a universe of behavior that could snare him under this provision. Only by having complete freedom to discuss all of his potential criminal conduct could the parties resolve this issue. This is precisely what Rule 3.172(h), Fl.R.Cr.P. and Section 90.410, Florida Statutes, seek to encourage; an open, candid exchange of information. Otherwise, these contacts could not be held without a violation of a defendant's Fifth Amendment right not to incriminate himself.

Wainwright's case is not "identical to the facts in Groover." Groover had already entered a plea in exchange for a life sentence. The plea agreement mandated that Groover cooperate against his co-defendants by testifying against them. In fulfillment of the plea agreement, Groover gave two statements which incriminated him. These statements were clearly given as part of the performance stage of the plea process; it was a routine debriefing by law enforcement.

Groover was subsequently allowed to withdraw his plea. When he went to trial, the State used the two statements he gave after his plea, This Court allowed the use of these statements. In addition to being made as part of the plea agreement, the agreement

itself between Groover and the State expressly told Groover "that any information he provided would be used to prosecute him if he breached the plea agreement."

These facts are not remotely the same as the ones adduced in Wainwright's case. Wainwright had not entered into any formal plea arrangement that had been accepted by a judge. Wainwright and the State were trying to define the parameters of how a deal might evolve. The State's argument to the contrary is disingenuous. All of the cases cited by the State are not apposite because they follow the rule and draw a distinction between pre- and post- plea statements. Analyzing the continuum of where Mr, Wainwright's statements fall, it is clear that they were part of the encouraged "free **and** open discussion between the prosecution and the defense during attempts to reach a compromise," *Anderson* v. State, 420 So. 2d 574 (Fla. 1982).

ISSUE II:

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE RESULTS OF THE FINAL THREE DNA LOCI.

The State correctly identifies this issue as one denying Mr. Wainwright's right to a fair trial. *See Bracy v. Gramley*, ____ U.S. ____ 65 L.W. 4435 (6/9/97). The unique facts of Mr. Wainwright's case are that after his lawyer had given an opening statement based on the evidence available at that time, the State produced additional DNA results.

The trial court's resolution of this issue ignored the problem. The State says "It is unclear exactly what remedy, other than a new trial, Wainwright seeks to gain based on this issue." (SAB pg. 41) This is exactly what Mr. Wainwright deserves. The trial court simply gave defense counsel a 24 hour continuance to consult with his expert. This did not ameliorate the tremendous harm caused by Wainwright's opening statement, in a critical part, being rendered a lie.

The cases argued by the State miss this critical point. This was more than just a discovery violation; it goes to the heart of the fairness of the adversary system. The trial court's granting a continuance under these circumstances was inadequate. The only constitutionally appropriate choices were to either (1) exclude the evidence, or (2) grant a mistrial.

It is true that an opening statement is not evidence and in this case the jury was told this. *See Spaziano* v. *State*, 429 So.

2d 1344, 1346 (Fla. 2d DCA 1983). However, in accordance with the standard jury instruction, the jury was also told that "the opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during the trial." *Florida* ***Standard*** *Jury Instruction in* ***Criminal Cases,*** Preliminary Instructions, 1.01 (1981 Edition as Amended). There is no question that the opening statement is a very important part of the trial. The opening statement is the first opportunity to make an impression on the specific group of people who will decide the case. It is generally agreed that opening statements can and often do make the difference in the outcome of the case.

The importance of an opening statement derives from its timing and function in the trial. From the beginning a jury is given the opportunity to relate to the client and his cause, as well as giving a lawyer the chance to sell themselves. The opening statement is the initial entry in the trial when the lawyer can enhance the lawyer's credibility with the jury. The lawyer who tells a jury, right off the bat, that something is **true and** then has that fact turn out to be false, has serious believability problems with the jury. The lawyer who lies, either intentionally or not, does so to the detriment of the client.

The State argues that "no discovery violation occurred." Mr. Wainwright never said that one did. What he argued "might be analogized to a discovery violation." (Initial Brief of Wainwright pg. 26) What happened was a violation of his constitutional right to a fair trial.

The State makes the argument that assuming some violation occurred, "the trial court made sufficient inquiry and took sufficient remedial action to dispel any prejudice that may have accrued." (SAB pg. 44) The trial judge's supposed cure is more properly characterized as a misdiagnosis. Delaying the trial for 24 hours could not dissipate the position the State had placed Mr. Wainwright in. No expert could explain to the jury why Wainwright's lawyer would tell them information that the State could contradict only because of the timing of the disclosure.

ISSUE 111:

THE TRIAL COURT ERRED IN ALLOWING THE CASE TO BE JOINTLY TRIED WITH SEPARATE JURIES.

The State argues that Wainwright "can point to no error or prejudice which accrued to him warranting reversal of this innovative process." (SAB pg. 45) Mr. Wainwright is aware that Florida courts **and** courts of other jurisdictions have allowed co-defendants to be tried at the same time before two different juries. This is a case where there is demonstrable prejudice. Specifically, the State Attorney took advantage of the fact that the co-defendant's (Hamilton) trial had been concluded. This told the jury that Hamilton's jury had already determined Hamilton's guilt or innocence.

The State argued below and its mantra is repeated here, that the State's closing argument was not prejudicial because it "did not specifically state what the verdict was." This argument ignores the context in which the State Attorney's closing was made. The State Attorney was telling Wainwright's jury that Wainwright was guilty as a principal, that is, Wainwright "is responsible for everything that Richard Hamilton did . . . ." The prosecutor, in the same breath, next said ". . . just as Richard Hamilton is responsible for everything that Anthony Floyd Wainwright did." This was the context that the prosecutor told the jury, "Now bear in mind, it's not your job to determine guilt or innocence of Richard Hamilton. Another jury has already done that earlier today.

It was no secret to Wainwright's jury that Hamilton's jury had their own job to do. The prosecutor's intent was to telegraph to the Wainwright jury that the Hamilton jury had returned a guilty verdict. There was no other reason for this gratuitous comment. This was the danger that the defense sought to avoid by having totally separate trials. The dual jury in the courtroom technique used in this case denied Mr. Wainwright's right to a fair trial guaranteed by the Fourteenth Amended to the United States Constitution.

ISSUE IV:

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS.

The State argues that the Williams rule evidence admitted prior to the kidnapping and ultimate death of Mrs. Gayheart "explained, in material part, Wainwright's motive for not just stealing the Bronco and leaving a live witness." (SAB pg. 48) Of course, "motive" is not a pertinent issue or element of any crime. Therefore, it was not relevant to an issue of material fact.

The State also argues that the evidence is admissible because "that evidence of other crimes which are 'inseparable from the crime charged' is admissible under § 90.402, Florida Statutes." (SAB pg. 50) This position does not accurately describe the record for purposes of the guilt phase of the trial. The case got to be about a multi-state crime spree that included the death of Mrs. Gayheart as a highlight.

In Griffin v. State, 639 So. 2d 966 (Fla. 1994), Griffin was one of three persons who drove around in a stolen car looking for a place to burglarize. They found a convenience hotel and stole a cellular phone and purse from a room. While driving away and dividing the loot, the three men spotted a police car. Griffin then directed the car's driver to get some distance from the police car. In doing so, Griffin's car attracted the attention of another police car. The driver, over Griffin's objections, stopped the car

and got out. Contemporaneously, Griffin began shooting and ultimately killed a police officer.

Griffin was charged by indictment with murder, burglary of the hotel, grand theft, and possession of a firearm by a convicted felon. He sought to keep out six pieces of evidence offered by the State, including the keys to the stolen car; a robbery where Griffin stole the gun **used** to kill the police officer; the testimony of a co-defendant about what the trio were thinking of doing criminally before the hotel burglary and Griffin's statement that the hotel was an easy place to burglarize because he had done it five hundred times before; and two instances where the defense did not object.

This Court held that "the State is entitled to present evidence which points an accurate picture of the events surrounding the crimes charged." Griffin, 639 So. 2d at 970. In determining that most of the evidence offered by the State was properly admitted, this Court noted that all the events happened on the same night of the crime, except for the gun robbery. Although the gun robbery happened almost three years before, there was testimony that Griffin was the person who stole the gun. The events in Wainwright's case happened over a series of days. The criminal acts other than those committed in Florida were discrete ones **and** not "inseparable from the crimes charged."

Allowing the evidence to come in during the guilt phase had the pernicious effect of laying the groundwork for the sentence of death ultimately imposed. While most, if not all, of this evidence

would have been admissible during a penalty phase, its premature inclusion must be considered harmful.

In *Coolen* *v. State*, ____ So. 2d ____, 22 Fla. L. Weekly S 292, 293 (Fla. 5/22/97), the State introduced evidence that Coolen had threatened the victim's wife's son earlier that evening with a knife. This Court held that this "testimony was necessary to establish the entire context out of which the crime arose." The murder occurred within hours of this threat and the murder occurred with a knife. This is entirely different than what happened in Mr. Wainwright's case. His case is more like Steverson v. *State*, ____ ***So.* 2d** ____, 22 Fla. L. Weekly S 345 (Fla. 6/12/97).

Steverson was convicted for the first-degree murder of Bobby Lucas. Four days after Lucas was killed, Steverson shot at, but did not kill, a police officer. Steverson was tried and convicted for the attempted murder of the police officer. *Steverson* ***v. State,*** **677** So. 2d 398 (Fla. 2nd DCA 1996). The State then sought to introduce evidence about the shooting of the police officer as "inextricably intertwined with the testimony of the State witnesses; and the collateral crime showed a consciousness of guilt."

This Court reversed Steverson's murder conviction.

> While Steverson does not dispute that the fact of the Rall shooting may have some limited relevancy and perhaps have been admissible to explain Steverson's apprehension, he contends, and we agree, that there was no justification for the admission of extensive details of this event offered by four different witnesses, all of whom focused most of their testimony on the police officer's injuries and recovery. Steverson contends that this testimony simply had no place in his trial for the murder of Bobby Lucas, and this evidence

> served only to confuse the jury--distracting them from the case at hand--and essentially retry Steverson for the shooting of a police officer rather than focusing the jury's attention on this case. Just as we concluded in *Henry*, we conclude here that it is likely that the twelve photographs of Rall's injuries alone were so unnecessary and inflammatory that they could have unfairly prejudiced the jury against Steverson. *See Henry* v. ***State,*** 574 So. 2d at 75, Further, as in *Henry*, while "some reference" to the police officer's shooting would have been permissible, there is absolutely no justification for admitting the extensive evidence received here. Moreover, we certainly cannot say that the error in admitting this unfairly prejudicial evidence of the shooting of a police officer was harmless beyond a reasonable doubt. *State* v. *DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

So it was for Mr. Wainwright.

ISSUE VIII:

THE TRIAL COURT ERRED IN ALLOWING WAINWRIGHT'S STATEMENT TO THE POLICE THAT HE HAD AIDS.

The State argues that this issue was not preserved for appellate review or in the alternative that any error was de minimis. The State is wrong. *James v. State*, ____ So. 2d ____, 22 Fla. L. Weekly S 223, 225 (Fla. 4/24/97).

Defense counsel objected to the AIDS line of questioning in a timely manner and therefore, this issue has been properly preserved for review. Section 924.051(1)(b), Florida Statutes (1996 Supp.), defines preserved as

> . . . an objection to evidence was timely raised before, and ruled on by, the trial court, and that the . . . objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.

Defense counsel made the correct objection, relevancy, and the trial court overruled the objection. As the objection was overruled, no further action was necessary to preserve the issue for appellate review. *See Wilson* v. ***State,*** **549** So. 2d 702, 703 (Fla. 1st DCA 1989).

The only possible purpose for this testimony was an impermissible one. The State wanted to infect: the jury with fear and hatred of someone with the AIDS virus. The State has not argued that this testimony had any relevance to the charges against Mr. Wainwright. This is because the State cannot articulate any

reason. As noted in its brief the State brought up the issue not once, but twice. (SVI 2111-2112)

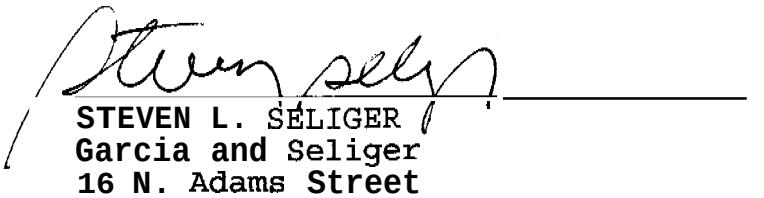
ISSUE IX:

THE TRIAL COURT ERRED IN THE NONCAPITAL SENTENCINGS.

The State concedes the errors raised by Mr. Wainwright as to the non-capital sentences imposed by the trial court.

CONCLUSION

For the reasons argued in his initial brief, Mr. Wainwright requests this Court to reverse his conviction for first-degree murder and remand for a new trial and to remand to the trial court to correct the noncapital sentences.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail this 8th day of July, 1997, to the following:

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