IN THE SUPREME COURT OF FLORIDA

KEN ELDON LOTT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER: 86,108

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Lott relies on the argument and authority set forth in the Initial Brief of Appellant in reference to the following points on appeal:

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

POINT V

LOTT'S DEATH SENTENCE IS DISPROPORTIONATE IN CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE TRIAL COURT IMPROPERLY WEIGHED THE MITIGATING CIRCUMSTANCES.

POINT VI

THE INTRODUCTION OF PREJUDICIAL AND UNNECESSARY PHOTOGRAPHS OF THE VICTIM DENIED KEN LOTT HIS RIGHT TO A FAIR TRIAL.

POINT VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IRRELEVANT, PREJUDICIAL EVIDENCE OF NONSTATUTORY AGGRAVATING FACTORS.

POINT IX

THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUE OF THE UNIQUENESS OF THE VICTIM AND WENT BEYOND THE NARROW APPLICATION OF THE STATUTORY SCHEME.

POINT X

THE TRIAL COURT ERRED BY NOT ORDERING SANCTIONS WHERE THE STATE VIOLATED THE RULE OF SEQUESTRATION.

POINT XI

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING THE TESTIMONY OF A DEFENSE WITNESS, THEREBY VIOLATING THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The defense proffered the testimony of James Whitman, brother of star state witness Robert Whitman for the purpose of proving that Robert Whitman's reputation for truthfulness in the community was bad. (TR940) The trial court, over defense objection, excluded the testimony of James Whitman concerning the reputation of his brother Robert Whitman for truthfulness.

The state argued in their answer brief that the exclusion of Whitman's testimony was proper because "the machinations of a family feud where unsuccessfully passed off as reputation evidence." (Page 35) That James Whitman's testimony would simply be his own biased opinions of his brother. The state further argued that Whitman's opinions were based upon a "narrow community" of equally biased family members.

The appellant concedes that the record supports the contention that the Whitman brothers were not on good terms. However, witness bias is not grounds to exclude reputation evidence. The state's assertion that Whitman's opinion were

based upon a narrow community belies the facts. Whitman had sufficient knowledge of his brother's reputation for truthfulness:

> Q. Do you feel you can honestly say that your familiar with his reputation, even though you may not be able to remember specific people that you talked to.
>
> A. Absolutely.
>
> Q. Is that clear to you?
>
> A. Yes, sir.
>
> Q. And what is his reputation -- in what community is it, first of all?
>
> A. In Deland.
>
> Q. How long have you lived there?
>
> A. 42 years.
>
> Q. All right. And that's the community that Robert's essentially been raised in?
>
> A. Yes. We were raised there.
>
> Q. What is Robert Whitman's reputation for truthfulness in his community of Deland?
>
> A. He has a hard time telling the truth, sometimes telling a lie will --
>
> STATE: I have to object.....
>
> (TR942,943)

The trial court further questioned James Whitman during the proffer:

> Q. How do you know that the community thinks he is a liar?
>
> A. Well, we have -- how do I know the community thinks he's a liar?
>
> Q. Right. What do you base it on?
>
> A. My -- and there again my family, my personal experiences, my experiences that I have spoken to certain individuals in the community.
>
> (TR973,974)

To be sure, the above proffer satisfied the basic requirement that the proponent of a reputation witness lay a proper foundation that the witness has knowledge of the reputation in the community. The proffer could have been better in detailing the class of people in the community. The lack of specifics is cured by the common sense notion that two brothers that are life long residents in a small town living in the same neighborhood would know the reputation that each other has in the community for truthfulness.

The Gamble[1] case cited by both the appellant and the

[1] Gamble v. State, 492 So.2d 1132 (Fla. 5th DCA 1986).

appellee provides that the inability to recall specific names and times of conversations with members of the "community" should not be a sufficient basis for exclusion of reputation evidence. Rather, such inability should affect the weight of the testimony. Likewise, any bias of a witness should not exclude the witness, but rather should go to the weight that the fact finder gives such evidence.

The state argues that if it was error to exclude Whitman's testimony, the error was harmless. The state reasons that the error was harmless since the appellant's mother was able to testify to the truthfulness of Robert Whitman, and that Robert Whitman's previous felonies were disclosed to the jury. The state ignores the issue that the testimony of appellant's alleged confession to James Whitman was likely the most powerful evidence introduced in this case. Moreover, the state ignores the comparative impact of the state witnesses' own brother, who has no stake in this case whatsoever, taking the stand and telling the jury that his brother is a liar. Appellant was entitled to present the foregoing testimony, and the erroneous exclusion of the testimony bearing directly on the credibility of the state's star witness was reversible error in this case.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN EXCLUDING A STATEMENT MADE BY APPELLANT THAT PRIOR TO THE MURDER OF ROSE CONNORS, APPELLANT HAD PROVIDED LAWN MAINTENANCE AND HANDYMAN SERVICES TO CONNORS.

The state admits that exculpatory statements of a party is admissible against the party making the statement. The state, however, argues that a party cannot offer evidence of his or her own statements under this exception citing Christopher v. State, 583 So.2d 642,645 (Fla. 1991). Appellant contends that the determining factor of whether defendant's statements to his mother as an admission should be permitted is whether in the context of their introduction the evidence is reliable. Appellant agrees that a defendant cannot put on his entire case through the hearsay statements made to another because the state is denied the right to cross-exam the defendant. However, where the admission is limited in scope on a seeming collateral matter at the time the statement or statements were made, such admission has the color of reliability that allows the admission of that statement as an exception to the hearsay rule.

The error is not cured by the testimony of Whitman

because Coleman's testimony was more detailed and provided the inference that the defendant had reasonable justification to be a the victim's home weeks before the murder. The circumstantial evidence of appellant's palm prints being found in the victim's home without explanation was devastating evidence of appellant's guilt. Therefore, evidence that would have provided a reasonable explanation as to how the appellant's palm prints could have been in the victim's house was essential to the defense. This evidence would have provided an explanation to the jury for the fingerprint evidence that was found at the victim's home, which would bolstered the hypothesis of innocence. See Jaramillo v. State,417 So.2d 257 (Fla. 1982). Based upon the quantum of evidence that was presented by the state in this case, it can not be said that the exclusion of Coleman's testimony can be harmless beyond a reasonable doubt.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

The state argues that this aggravating factor was properly found because of the alleged confession to Robert Whitman that the victim begged for her life before she was executed. Robert Whitman is a liar and the jury was not given the opportunity to know that because the trial court excluded the testimony of Whitman's own brother who knows best. (See Point II) Whitman's testimony aside, there was no direct evidence presented on how Rose Connors was murdered.

At trial, the medical examiner testified that Connors had blunt force injury to the temporal area and a broken larynx. The head injury and pressure to the neck rendered the victim unconscious. The medical examiner further testified that based upon the collection of blood, the deadly wounds were inflicted while the victim was on the bed, and that once the bleeding started there was little motion of the victim's body. This all supports the inference that the victim was likely unconscious at the time the fatal attack was administered. Where the victim is

unaware of the fatal attack because of unconsciousness, the fatal attack itself is not relevant to support this aggravating factor. See Rhodes v. State, 547 So.2d 1201 (Fla. 1989) and Herzog v. State, 439 So.2d 1372 (Fla. 1983).

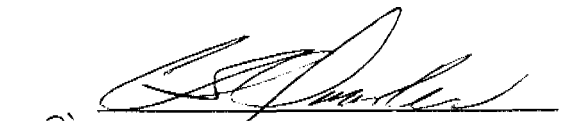
In the instant case, timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant respectfully requests this Court to reverse Appellant's conviction and discharge him from Florida custody as to Points I, II and III; order a new penalty phase as to Points IV, VII, VIII, IX and XI; order a new trial as to Points V, VI and X.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal, and mailed to Mr. Ken Eldon Lott, #026985 (A-1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 4th day of September, 1996.

FOR: GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER