IN THE SUPREME COURT OF FLORIDA

FEB 10 1997

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EDDIE LEE SEXTON,

Appellant,

vs. Case No. 86,132

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant will be responding to Issues I and III. Appellant will rely upon the arguments and authorities in the Initial Brief for Issues II and IV.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts will be relied upon as set forth in Appellant's Initial Brief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ADMITTING COLLATERAL CRIME EVIDENCE.

Appellant is pleased to accept the State's concession that the collateral crime evidence was not admissible as traditional Williams Rule evidence.

However, no matter what term is given to the objected to evidence -- Williams rule, collateral crime, or "dissimilar fact", the analysis as to admissibility is the same. The initial threshold is relevancy, followed by a weighing of the probative value of the evidence against the prejudicial impact of it's admission, and then an analysis of whether or not the evidence becomes an impermissible feature of the trial if it is admitted.

Contrary to the State's assertions, these issues were sufficiently preserved by objection in the trial court. The defense's Motion in Limine (Vol. 11, R218-219), specifically sought to exclude the "prolonged nature of certain relationships between the defendant and family members" and the murder of the baby, Skipper Good. Given that defense counsel was attempting to shield his client from the press, it is understandable that he would not give fuel to the media fire by putting into print each and every explicit and lurid detail when he had been granted an en camera hearing on the motion (the State attorney did, then, include all these details in their response). (Vol. 11, R351-359) The trial court

chose to not to rule pretrial, instead telling counsel that he would address the admissibility of each of the facts at trial.

When the first witness, Pixie, began to testify about objectionable matters, defense counsel objected. (Vol. XII, R1035-1041) The objection specifically referenced the motions in limine and the State's response. (Vol. XTI, R1036) The trial court certainly understood what was being objected to. When defense counsel and the State began to get into the specifics, the trial court stopped them, stating he had read the motions and memorandums and they could go on infinitum, something he did not intend to do. (Vol. XII, R1039) The trial court granted Appellant a continuing objection to this type of testimony and told defense counsel that he wanted to ensure that counsel knew that he had protected the record. (Vol. XII, R1041-1042) Nothing in the record indicates that this objection was limited only to Pixie's testimony and did not extend to the other children as well or covered only certain portions of the objectionable evidence.

Neither did defense counsel fail to object to all of the collateral evidence on relevancy grounds. The memorandum to the motion in limine contested the probative value, or relevance, of the collateral or dissimilar fact evidence and argued that there was an absence of specific relevancy of these facts to the case being tried. (Vol. 11, R220,222) The death of the baby was specifically objected to as irrelevant. (Vol. 11, R258) During the trial when the continuing objection was granted, counsel stated he was relying on all the grounds and case law cited in the motions in

limine. He did not, as the State suggests, limit his objection. Appellant contends that the additional objections made during other witnesses' testimony, such as Christopher, Michelle, and Zurbey, cited further grounds that were unique to that witness's testimony besides the relevancy, probative/prejudicial, and the feature of the case objections that had already been ruled on. They were not, as suggested by the State, the sole objections. (State's Brief, p. 13, 15-16)

During the trial itself, defense counsel objected again to Pixie testifying about the paternity of her children. (Val. XII, R1059) Defense counsel reiterated that he believed he had a standing objection not only to the sexual abuse of all the children, but also to the testimony dealing with the deaths of FBI agents, the training of the children to kill, and all the testimony that was admitted concerning any involvement with the people from Human Resources and Appellant's intentions regarding them. (Vol. XII, R1062) Again, the objection was overruled. (Vol. XII, R1064)

Defense counsel specifically objected to the relevancy of the videotape made by Appellant which discussed the events in Ohio. (Vol. XIII, R1122) The relevancy of the tape and the content of the evidence it contained was debated by the State, trial judge, and defense counsel. (Vol. XIII, R1123-1126,1128)

It is Appellant's contention that the record is preserved as to all the collateral crime evidence, both as to it's relevancy, the prejudicial impact of the testimony, and as to it's becoming a feature of the trial. The trial court made it clear that the

evidence would be admitted and granted a continuing objection to defense counsel, even telling him specifically that the record was preserved.

An objection must be sufficiently specific so as to apprise the trial judge of error and to preserve the record for intelligent review on appeal. Bohannon v. State, **546** So. 2d 1081, rev. denied, **557** So. 2d 35 (Fla. 1990); Wenzel v. State, 459 So. 2d 1086 (Fla. 2d DCA 1984). Under these facts there should be no dispute as to preservation. The trial court knew exactly what was being objected to and how much was being objected to. His comments and rulings make that abundantly clear. There is no doubt as to what is before this Court and certainly no question that the record provides sufficient objections so as to allow this Court to intelligently review the issues before it.

The State argues that the cases of Heiney v. State, 447 So. 2d 210 (Fla.), cert denied, **469** So. 2d **U.S.** 920 **(1984)** and Fotopoulos v. State, **608** So. 2d 784 (Fla.), cert. denied, 508 U.S. 924 (1993) support their position that the collateral evidence was admissible in this case to provide the entire, context of the crimes charged. A closer analysis of the facts of these cases shows that they are distinguishable from this case.

In Heiney the collateral crime, the aggravated battery, **happened** the day before and was the direct reason for the defendant's flight. His desire to avoid apprehension on the battery (and what he thought could be murder charges) was the reason he immediately committed a robbery and murder in Florida. This Court acknowledged

that other evidence relating to Heiney's lifestyle with one of the witnesses was a closer question, but found its admission harmless. In this case, much of the collateral crime evidence such as the Satanism, punishment methods, "weddings", sexual abuse, and general descriptions of life in the Sexton home occurred years before the crime and years before Joel Good was even known to the family. It is far to remote in time to be considered part of the res *gestae*. Unlike Heinev, the majority of the collateral crime evidence did not have any direct bearing on the murder and was remote in time.

Fotopoulos was not, as the State suggests, a case which turned on the issue of whether certain collateral evidence was relevant or not, whether prejudicial impact outweighed probative value, or whether such evidence became a feature of the trial. The words *res gestae* do not appear in the opinion. Instead, the primary issue in Fotopoulos was whether or not a motion for severance should have been granted. In determining that the motion was properly denied, the opinion simply states that even if severed, the evidence would have been admissible to show context and cites to Heinev and several other cases.

The facts in Fotopoulos are also distinguishable from this case. The first murder in Fotopoulos, that of Kevin Ramsey, was committed in mid-to-late October 1989. The defendant used that murder as means of extortion against his girlfriend, Hunt, whom he had videotaped committing the crime at his direction, to get her to hire someone to kill his wife. Fotopoulos was also an active participant in the first homicide; he shot Ramsey in the head, On

November 4, 1989, a hit man hired by Hunt shot Fotopoulos's wife. Fotopoulos then shot and killed the hit man, Chase. Fotosoulos does not involve collateral crime evidence that occurred years before the homicide. It did not address collateral crime evidence that was committed against other persons unrelated to the deceased or Hunt. It dealt with two homicides that were inextricably linked and occurred within days of each other. Neither Heinev nor Fotopoulus stands for the proposition that acts occurring years before the crime for which the defendant is on trial can be manipulated by the State to put a crime in "context". Appellant submits that there must be a limit as to how far back in time and how far flung such evidence may be. That limit was crossed in this case. Appellant submits that the State was allowed to admit far too many unnecessary details relating to sexual, physical, and mental abuse of the children, the death of Skipper Good, the standoff in Ohio, and the flight from Ohio. The evidence was far too remote in time to form a part of the res *gestae*. Nor was the depth and detail of the testimony necessary to put this case in context.

Other cases cited by the State are not applicable to this case either. For example, Buenoano v. State, 527 So. 2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), did not deal with "dissimilar fact" evidence. In that case, the evidence of the prior homicides was admitted under the traditional Williams Rule, fingerprint similarity standards. Likewise, Wournos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, __U.S.__, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), was a case in which the evidence of the six

other homicides was admitted to establish a pattern and similarities among the homicides and to specifically rebut the defendant's claim of self-defense and her level of intent. The State has already conceded that this basis of admissibility is not appropriate to this case.

The State claims that the collateral crime evidence did not become a feature of the trial in this case. The State provides a count of pages to support this conclusion and disputes counsel's calculations of record pages, which must be noted were referred to as approximate in the Initial Brief. The State's own calculations are inaccurate, but even their final totals support Appellant's position regarding the amount of pages dedicated to the collateral crimes.

The State's count of pages is not correct. For example, the State claims that during Charles' testimony, evidence of collateral matters was contained on only one page. (State's Brief, p.24) The record reflects that collateral matters were testified about by Charles on pages 1610, 1611, 1612; and 1624.[1]

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[1] *On page 1610 Charles states that his father made the decisions in the family, that the children would get their ass beat if they stepped out of line, and that Willie was not beat in Florida. On page 1611 Charles testifies* that *animal rituals were performed by he, Matthew, and Willie outside Appellant's presence. He states he can't recall if he told the police that his father was present. On* pages *1611 and 1612 Charles states he may have seen his father have intercourse with, his sister, Pixie, outside by a tree and that he may have told the police that he saw them having sex on the living room floor, but he couldn't remember for sure. On page 1624 Charles begins to testify about some money Appellant allegedly promised him after he testified.*

Christopher Sexton's testimony begins on page 1267. Beginning on page 1269 Christopher begins to talk about his childhood. This testimony continues until page 1271, at which point the jury is removed and a proffer and argument consumes the record until page 1279. Christopher then resumes testifying about collateral matters from pages 1280 to half way down on page 1290. Christopher then described the morning of the murder of Joel Good and the burial on half of page 1290 through page 1294. An objection and bench conference occur from page 1294 through page 1299. Christopher resumes testifying about the instant crime for 6 lines. On cross, 5 pages (1300-1305) are spent on collateral matters, 4 pages on the instant crime (1308-1312), 3 pages on Pixie and Joel's relationship and Appellant's relationship with Joel (1305-1308), and 1 1/2 pages on Willie. Counsel counts, then, 14 1/2 pages on direct relating to collateral matters and 4 pages on direct relating to the instant offense. When cross is added in, there are 19 pages on collateral, 8 on the instant offense, and 4 or 5 on Pixie and Willie. Thus, Appellant's statement that roughly half of Christopher's testimony went to collateral matters was correct.

The State asserts that there are 282 pages of testimony relating to the crime: 108 pages to collateral offenses, 85 pages concerning Pixie and other bad acts committed by the siblings, and 48 pages of transcript of the tape, which was included in defense counsel's objections as collateral evidence. (State's brief, p. 24-25)

Using these figures, if the 48 pages of tape transcript is added to the 108 pages of collateral evidence, you have a total of 156 pages of evidence that was objected to by defense counsel as evidence of collateral matters. Thus, using the page numbers supplied by the State, out of a total 364 pages of evidence relating to Appellant (that of the instant offense and the collateral evidence), exactly half would be 182 pages. Thus, the 156 pages of collateral evidence admitted at trial supports counsel's claim that roughly half of the evidence at trial which related to Appellant was collateral crime evidence.

Whether or not collateral crime evidence becomes an impermissible feature of the trial is not simply a counting of pages. Although sheer quantity is important, the qualitative aspect of the evidence must also be considered carefully. As argued in the Initial Brief, it would be hard to conceive of any type of evidence that could be more brutal or horrifying than that which was admitted in this trial. The State's assertion that the collateral evidence wasn't all that bad or all that detailed is wrong. (State's brief, p.21, 27-28) For example, even though Pixie did not say exactly how many times Appellant had intercourse with her or describe each of them in intimate detail, the jury was told that the acts started at age thirteen and continued until the present. She testified that she bore two children by her father. Matthew Sexton testified that on one occasion he saw Appellant having intercourse with Pixie in the living room while their mother held her down. One must wonder just how much more detail the State

would like to see in the record. Other children offered their own horrific tales of weddings, consummations by Appellant, and violence for failing to perform sexual acts. (Vol. XVI, R1324,1387-1389) This grossly inflammatory testimony was not necessary to show how Appellant dominated Willie, it had nothing to do with Willie. It did have a great deal to do with depriving Appellant of a fair trial.

The State seems to take the position that Appellant should just be glad that the State only used a little bit of this type of evidence. (State's brief, p.29-30) To support this theory, the State has submitted a footnote which contains additional collateral matters that were contained in the prosecutor's Response to the Motion in Limine. Appellant strongly takes issue with this footnote and the Attorney General's implication that the State simply chose not to present this evidence as some type of favor to Appellant. -Nothing in the record suggests that this was the case. There is nothing in the record to indicate that the State had a witness who would testify to these additional acts, nor does the document attribute them to any witness. In all likelihood there was no witness that would testify to the additional matters contained in the footnote and that is why they were not presented to the jury. These acts are not evidence in this case and should have not have been presented to this Court in the light they were by the State. It is but another attempt by the government to impermissibly prejudice Appellant and distract the Court from the legal issues in this case.

A review of the record leaves but one conclusion -- that the collateral crime or dissimilar fact evidence should not have been admitted to the degree it was in this case. It was of incalculable prejudice, it dominated the trial both qualitatively and quantitatively, and much of it had no relevance. It should have been excluded, and because it was not, Appellant was denied his Constitutional rights to due process and a fair trial under the 5th and 14th Amendments, as well as Article I, Sections 9 and 16 of the Florida Constitution.

ISSUE III

WHETHER THE SENTENCE OF DEATH IS PROPORTIONAL.

The State, not surprisingly, disputes Appellant's contention that the death sentence is not proportional. The State's brief cites to three cases, claiming that these cases demonstrate that this case, when compared to other capital cases, warrants a death sentence. These cases, however, are distinguishable from Appellant's and support Appellant's position that his sentence is not in line with the law.

Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924 (1993), is factually distinguishable from Appellant's case. Fotopoulos received two death sentences -- one for the killing a man who had been blackmailing Fotopoulos and a second man that Fotopoulos had hired to kill his wife. The first murder was videotaped. The second murder involved Fotopoulos ordering his

accomplice in the first murder to hire a hit man to kill his wife. During the attempted murder of the wife, Fotopoulos killed the hit man to make the attempt on the wife look like a burglary. The instant case does not involve a double homicide, nor was it orchestrated to the high level that occurred in Fotopoulos.

Appellant's case contains more mitigation than found in Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, 506 U.S. 803 (1992). Apparently, the mitigation in Hodges was only that Hodge had close family relationships, employment history, and some lack in his childhood and educational history. There is no mention in Hodges of any type of mental mitigation, which was present in this case, nor is there any mention of any positive contributions Hodges made to others, which is also present in the this case.

Appellant has already addressed and distinguished the case of Larzelere v. State, 676 So. 2d 394 (Fla. 1996), in the Initial Brief. Again, there are significant differences between the mitigation found in this case and Larzelere. Larzelere is also distinguishable from Appellant's case in that the co-defendant in that case was acquitted by a jury of any charges arising from the homicide. Thus, the co-defendant had been exonerated as a matter of law, not because of lenity by the State or trial judge.

The State's assertion that this Court cannot examine the relative culpability of the co-defendants as part of its proportionality analysis because it was not adequately presented in the trial

court is without merit and fails to recognize what proportionality review entails.

Proportionality review is an independent function that is carried out by this Court. It is not the duty or function of the trial court to engage in proportionality review. Such review compares the sentence of death to other cases in which a death sentence has been approved or disapproved. In conducting proportionality review, this Court examines the entire record, it is not limited or dependent upon the trial court's findings. It is well-established that the relative culpability of co-defendants is a factor which is appropriately considered in proportionality review. Cardona v. State, 641 So. 2d 361 (Fla. 1994).

The State's claim that Pixie's role in the homicide cannot be considered because she was not prosecuted for the murder is without, merit. The State cites to Melendez v. State, 612 So. 2d 1366 (Fla. 1992), cert denied, 510 U.S. 934 (1993), for this proposition. Although Melendez dealt with an accomplice situation, the opinion reflects that the State had never charged the alleged accomplice and fails to mention if he was he ever offered immunity in exchange for prosecution. That is not what occurred in the instant case. The State offered Pixie *immunity* from prosecution if she would testify against Appellant. There'is nothing in Melendez to suggest that the alleged accomplice had any role at all in the homicide -- it could very well be that the only person who suggested there was an accomplice was the defendant. That was not the scenario in this case. The evidence at trial strongly implicated Pixie.

Melendez appears to be an aberration. For example, in O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989), this Court held that the disparate sentencing of individuals involved in the same offense may be considered in determining an appropriate sentence. In O'Callaghan one co-defendant was being sentenced for second degree murder, one had been granted immunity, and one had never been charged. This Court reversed because the jury was not given this information when recommending sentence. The opinion did not limit the defense to only presenting as mitigation the jail sentence of the one other co-defendant.

Neither does Appellant suggest, as the State seems to believe, that the prosecutor should not be able to plea bargain with whom he chooses. Appellant does not and did not argue this proposition in the Initial Brief. The State is free to bargain with whomever it chooses and clearly that choice does not violate the principle of proportionality. Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986). However, just as the State is entitled to bargain with whomever they choose, defendants must be able to point to those bargains d-uring proportionality analysis and utilize them as mitigation. To deny a defendant this factor in mitigation violates the principle 'of Lockett v. Ohio, 438 U.S. 586 (1978). Lockett holds that the State, as a matter of law, cannot preclude the defendant's use of mitigation. The State cannot, under Lockett, plea bargain with or grant immunity to equally or more culpable co-defendants to thwart a defendant's use of that factor as mitigation. Just as the State is allowed to plea bargain

with whomever it chooses, Appellant is entitled to argue the effect of that bargain and present it to the Court for consideration as mitigation and as part of proportionality review.

The State's Brief cites to numerous cases which it claims support their argument that the death sentence is proportional in this case. (State's Brief, p.40) Each of these cases is distinguishable from Appellant's.

For example, Hoffman v. State, 474 So. 2d 1178 (Fla. 1985), did not involve equally culpable co-defendants. In Eutzy v. State, 458 So. 2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985), the facts did not establish that the defendant's companion, who testified for the State, was even a principal in the first degree, let alone equally culpable. The companion was not present at the homicide and did not know the defendant had armed himself with her gun. Again in Thompson v. State, 553 So. 2d 153 (Fla. 1989), cert. denied, 495 U.S. 940 (1990), the facts differ from this case. In Thompson the defendant was the actual killer, he inflicted the fatal wound. The record reflected that the defendant was in charge and the other participants were merely subordinates.

The cases cited by the State for the proposition that this Court has upheld death sentences when the defendant is not the actual killer and the actual killer receives life are also not applicable in this case. (State's brief, p.41) The first case cited, Ferrell v. State, 653 So. 2d 367 (Fla. 1985), does not even involve co-defendants. The opinion reflects that Ferrell killed his live-in girlfriend. There is no co-defendant. The opinion

does not even address proportionality, in fact the case was remanded for a new sentencing order because the order failed to meet the required standards. Ferrell has no relevance to this case at all.

In Heath v. State, 648 So. 2d 660 (Fla. 1994), cert. denied, __U.S.__, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995), the trial court had exhaustively compared the culpability of the defendant and the co-defendant, his brother. This Court reviewed the evidence and concluded that Heath was more culpable; therefore, disparate sentences were warranted. The evidence had established that it was Heath's idea to abduct the victim and rob him. Heath ordered his brother to shoot the victim, which the brother did when the victim lunged at him. Heath then physically attacked the wounded man, kicking him and trying to slit his throat. He would have succeeded, but the knife was too dull. Heath then had his brother shoot the victim again. In this case Appellant was not the actual killer, Willie was, and the evidence suggests as well that Pixie was equally culpable.

Likewise, in Smith v. State, 365 So. 2d 704 (Fla. 1978), 444 U.S. 885 (1979), the defendant was a active participant in the killing.

The State also cites to Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 383 U.S. 1020 (1988). Factually, Craig differs significantly from this case. In Craig the defendant and a man named Schmidt met with Eubanks, the defendant's employer and another man named Farmer. The defendant had been stealing cattle

from Eubanks. The defendant told Schmidt that Eubanks and Farmer would have to be killed or they would go to jail. Schmidt shot Farmer; and the defendant shot and killed Eubanks. The defendant came to Schmidt and, when he realized that Farmer was alive, the defendant ordered Schmidt to shoot him again. Thus, Craig was both the actual killer of one man and the dominant force behind a second homicide. The instant case involves a single killing.

Neither is the example of a dead co-defendant given for comparative purposes on page 40 of the State's brief analogous to this situation. Quite honestly, if a co-defendant were killed in the course of a crime, he would have already suffered the State's worst penalty. The State would just be saved the expense of killing him through the judicial process. The dead co-defendant has received the ultimate punishment as well. This is not the situation here, where the actual killer is likely to escape punishment due to mental illness.

As the Initial Brief points out, Pixie had a strong desire and motive to kill Joel. She solicited her brother to kill Joel on the morning of the murder.(R1617) Pixie was the last person who talked to Willie before the murder and she bragged about her facilitation of it to her siblings. (R1344,1620-1621,1657) Pixie's own admissions establish her responsibility for Joel's death. Pixie's culpability is at least equal to that of Appellant, if not more so. Thus, it is entirely proper that the disparate treatment between Appellant, Pixie, and Willie must be considered in determining the proportionality of the death sentence in this case. Because Pixie

is an equally culpable co-defendant who received immunity and Willie is the actual killer who may never stand trial, a death sentence imposed upon Appellant violates due process.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL- 33607, (813) 873-4739, on this 7th day of February, 1997.

Respectfully submitted,

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