IN THE SUPREME COURT OF FLORIDA

EDDIE WAYNE DAVIS, :

Appellant, :

vs. Case No. 86,135

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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IMINARY STATEMENT

Appellant will rely upon his initial brief in reply to the arguments contained in the Answer Brief of the Appellee as to Issues IV, VII, IX, and X.

ARGUMENT

ISSUE I

THE LOWER COURT ERRED IN REFUSING TO SUPPRESS THE STATEMENTS APPELLANT MADE TO LAW ENFORCEMENT AUTHORITIES, WHICH WERE OBTAINED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL, HIS PRIVILEGE NOT TO INCRIMINATE HIMSELF, AND HIS RIGHT TO DUE PROCESS OF LAW.

With regard to the question of whether Appellant was in custody during the early stages of his encounter with law enforcement at the sheriff's substation on March 18, 1994, Appellant would first note that the court below did not make a specific finding in this regard, apparently because of his erroneous assumption that there was "no issue concerning the initial interview" because Appellant "made no incriminating statements..." (supplemental Record on Appeal, p. 3) The court did note that Appellant "went voluntarily with police to the station, unaware that they had a warrant for his arrest." (Supplemental Record on Appeal, p. 3) Appellant may, however, have been merely acquiescing to the apparent authority of the police, which would negate the supposed voluntariness of his appearance at the substation. *See* State v. Richardson, 575 So. 2d 274 (Fla. 4th DCA 1991); Shelton v. State, 549 So. 2d 236 (Fla. 3d DCA 1989); United States v. Edmonson 791 F. 2d 1512 (11th Cir. 1986) (suspect does not consent to being arrested when said consent is prompted by a show of official authority); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824, 832, footnote 6 (1979) ("request to come to police station 'may easily carry an implication of obligation while the

appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen"' [quoting from ALI, Model Code of Pre-arraignment Procedure § 2.01(3) and commentary, p 91 (Tent Draft No. 1, 1966)3). Furthermore, the police apparently did not inform Appellant at any time that he was free to refuse their request to go to the substation, nor did they tell him after he arrived there that he was free to go at any time (which, obviously, he was not; he was going to be served with the warrant the authorities had already obtained). See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Bailey v. State, 319 So. 2d 22 (Fla. 1975); Acosta v. State, 519 So. 2d 658 (Fla. 1st DCA 1988). If, under all the circumstances, Appellant, as a reasonable person, would have believed he was not free to leave, then he was seized and in custody within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. Bostick v. State, 554 So. 2d 1153 (Fla. 1989); Hill v. State, 561 So. 2d 1245 (Fla. 2d DCA 1990). In this regard, it is significant that Appellant sought to invoke his right to counsel, and that this invocation was honored (initially and momentarily) by the police, thus indicating that both Appellant and the deputies viewed the encounter as an in-custody interrogation.

Appellee's brief discussion of Craig v. Singletary, 9 Fla. L. Weekly Fed. C1041 (11th Circ. April 19, 1996) is incomplete at best, and ignores the fact that Craig dealt with two separate confessions. The first statement was given before Craig was placed

under arrest; in fact, unlike here, the police even specifically told him that he was not under arrest. It was suppressed due to law enforcement's violation of Craig's right to counsel, not due to illegality of the (subsequent)arrest. With regard to the addendum confession, it was suppressed even though Craig, not law enforcement, reinitiated contact with the authorities.

In his initial brief, Appellant referred to the fact that he had executed a written "Notification of Exercise of Rights" at his first appearance hearing. This document, dated March **19, 1994,** appears in the Supplemental Record on Appeal on page 1. Through examination of the circuit court file in this matter, undersigned counsel has discovered that Appellant executed not merely one, but four documents exercising his rights. In addition to the one dated March **19, 1994,** there are others bearing dates of April *8*, 1994, September 7, **1994,** and December **13,** 1994. Undersigned counsel intends to move this Court to supplement the record with these items. They are evidence of Appellant's desire to assert his constitutional rights at all times pertinent to this case and not submit to police questioning.

~~State v. Guthrie~~, 666 So. 2d 562 (Fla. 2d DCA **1995)** is particularly instructive with regard to the efficacy of a written exercise of rights such as that executed multiple times by Appellant. Guthrie was arrested for grand theft auto and an out-of-state warrant. At his first appearance hearing, he signed an invocation of constitutional rights form. About seven hours later, two detectives appeared at the jail to talk to him about allega-

tions of child sexual abuse. Despite the fact that Guthrie agreed to talk to the detectives, and signed a waiver of Miranda rights at the sheriff's office, the Second District Court of Appeal affirmed the lower court's order suppressing his confession, based on the written invocation of his right to counsel in the unrelated matters, rejecting the State's argument that Guthrie could not invoke his rights prior to interrogation.

Glover v. State, 677 So. 2d 374 (Fla. 4th DCA 1996) is instructive on the question of what constitutes the functional equivalent of interrogation. Glover was arrested and

> placed in an interrogation room for over an hour and a half without the benefit of Miranda warnings. [Footnote omitted.] Although he repeatedly inquired as to why he had been arrested, his questions went unanswered by the police officers present. Even as appellant became increasingly agitated, the police officers refused to inform him of the allegations against him.

When the deputies entered the interrogation room, Glover began speaking right away and incriminated himself. Under these circumstances, the appellate held that the deputies had engaged in conduct that "rose to the level of interrogation or its functional equivalent." 677 So. 2d at 376. Compare Glover with Appellant's situation in which he was left to cool his heels in a holding cell, and Major Judd then approached him .andspoke to him. Glover stands for the proposition that there need not be *any* words exchanged in order for the police to engage in interrogation or its functional equivalent; in this case there were not only the circumstances of Appellant being placed in the holding cell after being confronted

with incriminating information (the DNA report), but Major Judd approaching Appellant, telling him that he was disappointed in him, and then asking Appellant to repeat what he had said when Appellant said something that Judd did not hear or could not understand, thus leading Appellant to incriminate himself in violation of his earlier invocation of his right to a lawyer.

ISSUE II

THE COURT BELOW ERRED IN ALLOWING APPELLANT'S JURY TO HEAR A TAPE RECORDING OF THE 911 CALL BEVERLY SCHULTZ MADE WHEN SHE DISCOVERED THAT HER DAUGHTER WAS MISSING.

Appellee seeks to justify admission of the 911 tape, in part, by claiming that it went to Beverly Schultz' state of mind, and that her state of mind was somehow relevant in this case. (Answer Brief of the Appellee, pp. 33-35.) However, whether or not Schultz in fact procured the attack upon her daughter would not have affected Appellant's culpability for his own actions in any way, shape, or form. Therefore, even assuming, arguendo, that the tape refuted any contention that Schultz had induced Appellant to attack Kimberly Waters by showing "Schultz' panic upon discovering her child missing" (Answer Brief of the Appellee, page 35), this simply was not pertinent to the issue of Appellant's guilt or innocence.

On page 36 of its brief, the State cites Garcia v. State, 492 So. 2d 360 (Fla. 1986) in support of its argument that the tape was properly admitted as an "excited utterance," and says that in Garcia the surviving victim's statements made while still at the

scene of the crime which were consistent with her later testimony were admissible as an excited utterance. Actually, however, in Garcia this Court noted that the victim's statement "was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies, and was not the result of any premeditated design. As a contemporaneous utterance, it was admissible under the res gestae rule." 492 So. 2d 365. Thus, the Court ruled it admissible as a spontaneous statement, part of the res gestae, not as an excited utterance pursuant to section 90.803(2) of the current Florida Evidence Code.

On page **37** of its brief, Appellee characterizes as "preposterous" Appellant's alleged "assertion that the tape was not admissible as an excited utterance because Schultz had already searched the neighborhood for her child[.]" Appellant made no such argument. Rather, Appellant's argument addressed the inadmissibility of the tape under the hearsay exception for spontaneous statements, **not** excited utterances. [The "primary difference between the two [is that] an excited utterance need not be spontaneous with the event. [Citation omitted.]" Perry v. State, **675** So. 2d **976, 979** (Fla. 4th **DCA 1996)**] While the prosecutor below made a weak effort to argue that the tape was admissible as a spontaneous statement, he made no attempt whatsoever to justify its admission as an excited utterance. Therefore, the trial court had no opportunity to rule on whether it was admissible as an excited utterance. [See Perry, 675 So. 2d at **979** (whether necessary state of mind exists in person making statement to

justify its admission as spontaneous statement or excited utterance is question of fact for trial court to determine preliminarily) and Lyles v. State, 412 So. 2d 458, 460 (Fla. 2d DCA 1982) (burden is upon State to lay proper predicate for admission of testimony as a spontaneous statement or excited utterance.)]

Nor was the tape properly admissible as an excited utterance. In State v. Jano, 524 So. 2d 66, 661 (Fla. 1988), this Court noted that

> [t]he excited utterance exception is not a new theory of Florida evidence but rather one of a group of exceptions subsumed under the old term of "res gestae." [Citations omitted.] The essential elements necessary to fall within the excited utterance exception are that (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must be made while the person is under the stress of excitement caused by the event. [Citation omitted.]

Surely the 911 tape cannot be considered part of the res gestae here where Schultz did not witness the offenses perpetrated against her daughter, and a considerable period of time passed between her discovery that Kimberly was missing and her call. See Perry in which statements made 30-45 minutes after the incident were properly ruled inadmissible by the trial court; they did not qualify as spontaneous statements or excited utterances. Contrast the instant case with Rogers v. State, 660 So. 2d 237, 240 (Fla. 1995) in which statements made eight to ten minutes or so after a murder were properly admitted as excited utterances where the

declarant was "hysterical," "collapsed" at one point, and "paced and remained very excited as she recounted the events."

Appellee also claims that the evidence in question was "relevant to establish circumstances of the crime, including when Kimberly was discovered missing." (Answer Brief of the Appellee, page 37) However, this was accomplished through the testimony of Beverly Schultz; it was unnecessary and improper to bolster her testimony by introducing her prior consistent statements. Rodriquez v. State, 609 So. 2d 493 (Fla. 1992); Jackson v. State, 498 So. 2d 906 (Fla. 1986); Parker v. State, 476 So. 2d 137 (Fla. 1985).

Appellee's attempt to somehow equate the 911 tape with photographs is unavailing. Obviously, unlike the tape, photographs are not hearsay. And photographs, which serve objectively to depict the scenes pictured therein, can in no way be analogized to the type of spoken, recorded hearsay admitted in this case.

Finally, it should be noted that there were two voices on the 911 tape recording: that of Beverly Schultz and that of the anonymous operator who took the call (and who did not testify at Appellant's trial). The State's theories that the recording was admissible as a spontaneous statement or excited utterance do not deal with the second voice on the tape; they relate only to Schultz' portion of the conversation, and cannot therefore justify admission of the tape in its entirety.

ISSUE III

APPELLANT'S RIGHT TO A FAIR TRIAL WAS VITIATED BY THE STATE'S INJECTION INTO THE GUILT PHASE OF IRRELEVANT MATTERS AND IMPROPER ARGUMENT, AND BY EMOTIONAL DISPLAYS BY STATE WITNESSES WHICH THE PROSECUTOR EXPLOITED.

On page 41 of the State's brief, in footnote 4, counsel for Appellee refers to the fact that in his initial brief, Appellant says that "defense counsel asked to have the panel struck." Counsel far Appellee states that she can "find no such request beyond the general request for a mistrial. (T621-22)" If counsel will read pages 619-620 of the transcript of Appellant's trial, she will find the defense request to have the jury panel stricken following the prosecutor's improper voir dire of prospective juror Skinner. Immediately after a recess that took place soon after the voir dire questioning at issue here, counsel for the defense, Robert Norgard, said to the court .(T619-620--emphasis supplied):

> Your Honor, I've had a chance to reflect over the break on the matter that took place just before we did take our break, and it's my position, in addition to irrelevance, that the issue he [the assistant state attorney] brought up, the probative value, if any, would be substantially outweighed by unfair prejudice, confusion of the issues, and the other criteria under 90.403.
>
> Further, although I think Mr. Aguero may feel he can get it into evidence, the specific matter of a special learning disability is something that can't be based on hearsay. For example, if her mother's told her child is specially learning disabled, that's something she was told, that was hearsay.
>
> It's something that would require expert testimony to establish, since that calls for an opinion and a level of expertise. And, to my knowledge, the State has absolutely not a

> single witness listed who could meet the evidentiary criteria even to get it in, if the Court determines it to be relevant.
>
> It would also violate Mr. Davis' rights to due process, right to a fair and impartial jury, right to a fair trial to bring these things out. And so at this point, given all those considerations, I would move to strike the panel.

The court denied the motion to strike the panel. (T 620)

On page 44 of its brief, Appellee cites Burns v. State, 609 So. 2d 600 (Fla. 1992) for the proposition that "victim's wife crying during trial did not require new trial." In Burns, however, the victim's wife was merely in the audience when she was crying; the jury may not even have **seen** this. At Appellant's trial, however, Kimberly Waters' mother, Beverly Schultz, displayed emotion on the witness stand; the jury obviously noticed this. The prejudicial impact of Schultz' display at trial becomes even more evident when considered in conjunction with the emotionalism she displayed during the 911 call she made after she discovered her daughter missing. (Please ***see*** Issue 11.)

In cases such as Welty v. State, 402 So. 2d 1159 (Fla. 1981) and Jones v. State, ***569*** So. 2d 1234 (Fla. 1990), this Court has recognizedthe potential for improperly evokingthe sympathy of the jury or prejudicing the defendant when a relative of the deceased is permitted to testify in a murder trial. (Hence "the well-established rule in Florida that a member of the deceased victim's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification. [Citations omitted.]" Welty, 402 So. 2d at 1162.)

The potential for these considerations to taint the trial became manifested below when Schultz cried during her testimony.

With regard to the prosecutor's reference in his closing argument to Detective Storie, Appellee argues that this was "to illustrate that Davis had the presence of mind to cover up the evidence of his crime." (Answer Brief of the Appellee, p. 45) What Appellee does not and cannot explain is how the fact that Detective Storie became upset during his trial testimony was relevant to the point the prosecutor was trying to make.

As for the assistant state attorney's remarks that this was a "vicious, brutal case committed by a vicious, brutal person," Appellee asserts that no harm was done when the trial court denied Appellant's request to give an immediate curative instruction because the court subsequently instructed the jury that the case must not be decided for or against anyone because they felt sorry for anyone or were angry at anyone, and that feelings or prejudice, bias or sympathy should not be discussed or play any role in the verdict. (Answer Brief of the Appellee, pp. 47-48) These general standard instructions, given as part of the complete package of instructions when the jury was charged, could hardly have alleviated the taint of the offending remarks in the same way that a curative instruction might have done if delivered immediately after the improper comments.

In addition to the cases cited in Appellant's initial brief concerning the prosecutor's improper closing argument, please see McPherson v. State, 576 So. 2d 1357 (Fla. 3d DCA 1991) (reversible

error for prosecutor to refer to defendant in closing argument as a "madman" and to make disparaging remarks about defense counsel) and Gomez v. State, 415 So. 2d 822 (Fla. 3d DCA 1982) (improper remarks included reference to defendant and codefendant as "assassins").

A criminal defendant [particularly one who is on trial for his life in a first-degree murder case] is entitled to "as dispassionate a trial as possible" without the "interjection of matters not germane to the issue of guilt." Welty, 402 So. 2d 1162. Appellant did not receive such a trial below, and he must be granted a new one.

ISSUE V

THE TRIAL COURT ERRED IN SUBJECTING APPELLANT TO A COMPELLED MENTAL HEALTH EXAMINATION BY A PROSECUTION EXPERT.

With regard for the lack of any compelling necessity for the State's mental health expert witness to conduct a personal examination of the Appellant in order to provide testimony is rebuttal to Appellant's penalty phase evidence regarding the "mental mitigators," in addition to the authorities cited in Appellant's initial brief, please see Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), in which the Supreme Court of the United States ruled that use of hypothetical questions is a perfectly acceptable way to present psychological testimony; it was not necessary for the State's expert to personally examine the defendant in order to testify. The same is true

here; the prosecution below could have presented expert testimony without Appellant submitting to a compelled examination by Dr. Merin.

ISSUE VI

THE PENALTY RECOMMENDATION OF APPELLANT'S JURY WAS TAINTED BY THE PROSECUTOR'S IMPROPER ARGUMENT, CROSS-EXAMINATION OF WITNESSES, AND INTRODUCTION OF IRRELEVANT EVIDENCE, AND BY THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANT TO PRESENT RELEVANT TESTIMONY IN HIS DEFENSE.

On page 81 of its brief, Appellee says that the trial court offered to allow defense counsel to frame his questions to Dr. McClane to get before the jury the explanation as to why defense counsel had initially prohibited the witness from asking Appellant about the offenses in question. However, it seems highly unlikely that Dr. McClane knew, understood, and could articulate for the jury the legal reasons for the defense position in this regard. To ask the witness about this would have been asking him to speculate about what was in the mind of another person, and might have been a very slippery slope indeed. Only defense counsel was in a position to tell the jury the reasons for his actions. Only he could have testified in a way that would have let the jury understand that the defense was not trying to hide anything from Dr. McClane or from the jury.

ISSUE VIII

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST, AND THIS FACTOR WAS SUBMITTED TO APPELLANT'S JURY UPON AN INADEQUATE INSTRUCTION.

On page 84 of its brief, Appellee argues that "[w]here a victim is transported from one area to another, and no other reasonable motive is suggested, a trial court may properly find that the murder was committed to avoid a lawful arrest." In the instant case, Kimberly Waters was ."transported" only a relatively short distance, on foot. She was not driven by automobile to some distant and isolated location where it would be difficult for her to be found. Furthermore, during the "transportation" of Kimberly, the evidence clearly indicates that Appellant was confused and uncertain as to what course of action to take. This was his "motive," rather than an intent to avoid arrest.

As for the adequacy of the jury instruction on this aggravator, Appellee says on page 85 of its brief that

> "[i]n Whitton v. State, 649 So. 2d 861, 864 (Fla. 1994), this Court rejected this argument finding that the 'avoiding arrest factor, unlike the heinous, atrocious, or cruel factor, does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor. Accordingly, Espinosa v. Florida, __ U.S. ____, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and its progeny does [sic] not require a limiting instruction in order to make this aggravator constitutionally sound.

The quote from Whitton merely appears in a footnote on page 867 of the opinion, not page 864 as Appellee indicates. In the Whitton

footnote, the Court was not specifically addressing the adequacy of the jury instruction itself, but was addressing Whitton's claim that the aggravating circumstance was unconstitutional.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Eddie Wayne Davis, renews his prayer for the relief requested in his initial brief, and asks for such and other further relief as may be appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 18th day of December, 1996.

Respectfully submitted,

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