IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,249

FILED
SID J. WHITE
MAR 18 1998
CLERK, SUPREME COURT
By Chief Deputy Clerk

MARSHALL LEE GORE,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL, FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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NOTICE OF ADOPTION

The appellant respectfully adapts the Introduction, Statement of the Case, Statement of the Facts and Summary of the Argument as set forth in his initial brief.

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ARGUMENT

I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF COLLATERAL CRIMES WHERE THE SIMILAR FACT EVIDENCE WAS NOT STRIKINGLY SIMILAR AND SHARED NO UNIQUE CHARACTERISTICS, WHERE THIS EVIDENCE BECAME THE FEATURED THEME OF THE STATE'S PROSECUTION AND WHERE THE PROBATIVE VALUE OF THIS EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT

The state has not argued that the defense distinctions between the alleged offenses involving Tina Corolis and Robyn Novick and that involving Susan Roarke were incorrect, to wit: Tina and Robyn had different professions than Susan (SR. 10), Susan was last seen going to meet a date (SR. 11), that Robyn was going with "Antonio" to participate in a cocaine transaction (SR. 11), that Susan Roarke's jewelry was pawned (SR. 12), that there was no evidence of Robyn or Susan being raped while Tina had been raped (SR. 12), that Tina was the only victim as to Mr. Gore having a knife (SR. 14), that Tina "is the only case where her son is kidnapped" (SR. 13). The state does not argue that the testimony of Tina Corolis as to her rape, a primary dissimilarity as found by the trial court (noted in the state's brief at p. 8), did not improperly prejudice this jury against Mr. Gore.

The state does not disagree that there was no evidence that Robyn Novick was raped. The state does not argue that there was

any evidence that Mr. Gore met Robyn Novick for a date or asked her for a ride+ The state does not argue that Robyn Novick had a son who was allegedly taken by Mr. Gore.

The appellant must again respectfully submit that the dissimularties of the incidents involving Robyn Novick were such that it was error for the Corolis and Roarke incidents to be introduced as substantive evidence at Mr. Gore's trial.

The rape of Tina Corolis had nothing to do with the murder of Robyn Novick. The kidnapping of Tina Corolis's son had nothing to do with the murder of Robyn Novick. Robyn Novick was not proven to have bean raped. Robyn Novick did not have a son who was kidnapped. The admission of this totally irrelevant and wholly unnecessary "other crimes"evidence improperly and irretrievably prejudiced this jury *against* appellant. See, Sexton v. State, 697 So.2d 833 (Fla. 1997); Farrell v. State, 682 So.2d 204 (Fla. 5th DCA 1996). It cannot be forgotten that the prosecution's presentment of testimony concerning the taking of Tina Corolis's child and what Hr. Gore did with the child (T. 1143-4) violated the trial court's ruling as to that issue (SR. 21). See, Long v. State, 689 So.2d 1055 (Fla. 1997). It also cannot be forgotten that the state's case against Mr. Gore was based upon circumstantial evidence?. The state's improper elicitation of collateral crimes requires reversal. See, Williams v. State, 692 So.2d1014(Fla. 4th DCA 1997).

The state has not denied that there are 162 page6 of witness testimony as to the death of Robyn Novick. That, state has not denied that there are 152 pages of testimony as to the Roarke and Colaris crimes. The state has not denied that almost as much evidence was introduced concerning the collateral crimes as the crime charged. The state has not denied that during its cross-examination of Mr. Gore (T. 1142-1162), the prosecutor questioned Mr. Gore almost exclusively as to the collateral crimes (Roarke and Colaris) cases. The stats has not denied that during its closing argument (T. 1168-1188; 1227-1237); the prosecution referred repeatedly to the collateral crimes cases,

Mr. Gore again submits that the admission of such extensive evidence as to collateral crimes constitutes reversible error. See, Stevenson v. State, 695 So.2d 687 (Fla. 1997).

Appellant's conviction must be Reversed.

II

THE EVIDENCE WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THE DEFENDANT OF F TRYT DEGREE MURDER

The state has not denied that there were no eyewitnesses to Ms. Novick's death. The state has not denied that no witness or evidence placed Mr. Gore with Ms. Navick either immediately before or immediately after her death. The state candidly admits (p. 16 of state brief) that it's key identification witness, could only say that a man resembling Hr. Gore was seen in Ms. Novick's car. The state did not say that the witness, Ms. Williams, testified that she had been drinking (T. 447), that the man's "features weren't that clear" (T. 446), and that she was unable to make a positive identification of the man whom she saw with Ms. Novick.

The state's "identification" evidence consists mostly of similar fact evidence (p. 17 of state's brief). Again, Mr. Gore submits that sparse evidence the state presented was insufficient to prove beyond a reasonable doubt that he was the person who killed Robyn Novick.

As to the sufficiency of the evidence to prove premeditation, the state does not deny that there was no suggestion that Marshall Core "exhibited, mentioned or even possessed an intent to kill the victim at any time prior to the actual homicide". The state does not suggest that there was any evidence to show that Mr. Gore "made

special arrangements to obtain a murder weapon in advance of the homicide", The state's argument as to its proof of premeditation appears to rely on its collateral crimes evidence (p. 18-19 of state brief) rather than any evidence that it was able to produce directly relating to Robyn Novick.

Appellant would again submit that the state's evidence was insufficient to prove premeditation, beyond and to the exclusion of a reasonable doubt.

As previously argued, the appellant would again submit that the state's evidence, as to felony-murder, was insufficient to prove that Ms. Novick's death occurred "in the perpetration of, or in an attempt to perpetrate a robbery" as charged in the indictment (See, Point III).

Appellant again submits that his conviction for murder must be Reversed, or, at the least, reduced to Second Degree Murder.

III

THE EVIDENCE WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THE DEFENDANT OF ROBBERY

The state does not allege that there are any eyewitnesses to this offense, The state does not allege that Mr. Core confessed. The state does not deny that Mr. Gore was not proven or Seen to have been with Ms. Novick at the time of her death (when the robbery allegedly occurred). The state presented no evidence that Ms. Navick did not give or loan her car to Mr. Gore. The state did not dispute that Ms. Novick's property may have been taken from her after her death, as an afterthought when it could not have been taken by "force, violence, assault, or putting in fear".

Mr. Gore's conviction for Robbery must be Reversed.

IV

THE CONDUCT OF THE PROSECUTION IN THE INSTANT CASE WAS SUCH AS TO DEPRIVE APPELLANT OF A FAIR TRIAL

The state acknowledges that the trial court ruled that any mention as to the kidnapping of Tina Corolis's son was "off limits" (p. 25 of state brief). See, SR III 156. The prosecution then cross-examined Mr. Gore to reveal that Ms. Corolis's son was "locked in an abandoned house in Georgia, naked in 30 degree weather" (p. 26 of state brief). This questioning violated the trial court's ruling that the prosecution "exclude any reference to the fact that the defendant travels after the taking of the child and left here.. That clearly would be prejudicial and outweighs any probative value" (SR. III 156). See, also, Long v. State, 689 So.2d 1055 (Fla. 1997): Halsell V. State, 672 So.2d 869 (Fla. 3d DCA 1996).

Not content to stop at violating the trial court's pretrial order, the state was unable to control its urge to insinuate that Mr. Gore had sex with 13-year-old girls (T. 1153, 1154). The state admits that "The questioning about having sex with a thirteen-year-old girl is troubling" (p. 31 of state brief), The prosecution pressed on to question Mr. *Gore* about Maria Dominquez, another criminal case not mentioned in its "other crimes" evidence (Se@, Paint I).

Mr. Gore again submits that it was error for the state, for no apparent reason other than to prejudice Mr. Gore before the jury, to refer to crimes/incidents involving Casanova and Dominguez. See, Turchiaro v. State, 697 So.2d 925 (Fla. 2d DCA 1997); State v. Michaels, 454 So.2d 560 (Fla. 1984).

As to the prosecutor's inflammatory comments exhibiting his personal opinion of and animosity towards Mr. Gore (T. 1159, 1162), the state calls the prosecutor's comments "inartful" and alleges that *Mr. Gore* "goaded" him into those improper comments. No one "made the prosecutor do it". For whatever reason, the prosecutor couldn't exercise the required self-control necessary in this first degree murder case and made improper comments, no once, but over and over. He committed reversible error.

In Bass v. State, 547 So.2d 680 (Fla. 1st DCA 1989), the Court found it was error for the state to argue "If you want to tell Jimmy Wayne Bass he lied, there is only one verdict guilty. The man is guilty."

In Clewis v. State, 605 So.2d 974 (Fla. 3d DCA 1992), the Court reversed for a similar comment stating "it is legally incorrect to ask the jury to decide, as the test for reasonable doubt, who is the liar as between the accused and a police officer".

In Northhard v. State, 675 So.2d 652 (Fla. 4th DCA 1996), the Court reversed for a similar comment finding "This argument was

impermissible because it improperly asked the jury to determine who was lying as the teat for deciding if appellant was not guilty".

In the instant case, the state argued:

> If you believe he did not tell the truth, that he made up a story, that's it, he's guilty of First Degree Murder --
>
> (T. 1170)

and,

> If you believe his story, he's not guilty. If you believe he's lying to you, he's guilty. It's that simple.
>
> (T. 1236)

Pursuant to Bass, Clewis, and Northard, Mr. Gore's convictions must be Reversed.

With reference to the prosecution's improper comments about Mr. Gore's demeanor (T. 1175, 1182), the state acknowledges that "Commenting on a defendant's demeanor when he or she is not on the stand is improper".

As to disregarding the trial court's pre-trial ruling (T. 1230)) the state does not argue that the comment did not violate the pretrial ruling (p. 42-43 of state brief). The state argues that this comment was "a fair comment on the evidence". The state appears to argue that because it improperly brought this subject matter up during cross-examination of Mr. Gore (T. 1143-44), it

could now comment on this subject matter during closing argument. Such tortured reasoning cannot save the error of the prosecution's actions.

As to the prosecution's vilification of Mr. Gore (T. 1228), the state does not dispute that the comment was improper.

Again, Mr. Gore argues that the actions, comments and argument of the state went beyond the bounds both set by the court's pretrial order and of acceptability in a capital murder prosecution, Mr. Gore's convictions must be Reversed.

V

THE TRIAL COURT ERRED BY INTRODUCING INTO EVIDENCE GRUESOME PREJUDICIAL AND UNNECESSARY COLLATERAL CRIMES PHOTOS

The appellant would rely upon his previous argument as to this issue.

VI

THE TRIAL COURT ERRED BY FAILING TO ADMIT EVIDENCE THE DEFENDANT SOUGHT TO ADMIT WHERE A DEFENDANT SHOULD BE ENTITLED TO INTRODUCE RELEVANT EVIDENCE WHICH WILL TEND TO SUPPORT HIS DEFENSE

The appellant would rely upon his previous argument as to this issue.

VII

THE APPELLANT MUST BE RESENTENCED DUE TO THE INVALIDITY OF THE AGGRAVATING FACTORS OF MURDER DURING A ROBBERY OR FOR PECUNIARY GAIN

The appellant would rely upon his previous argument as to this issue.

VIII

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER REFUSING A PLEA OFFER AND EXERCISING HIS RIGHT TO A TRIAL BY JURY

The state does not dispute that a plea offer of life concurrent to other sentences was made before trial. The state acknowledges that the trial court did not reject that plea, but affirmatively asked Mr. Gore if he wished to accept it (T. 216).

The state does not dispute that only a trial separated the rejected plea offer and the Death Sentence meted out to Mr. Gore.

The state does not dispute that it is improper to sentence a defendant to a greater sentence solely because he refused to accept a plea bargain and proceeds to trial.

If Mr. Gore had accepted the plea, he would have been sentenced to Life. Only because he rejected that plea and chose to exercise his Sixth Amendment Right to a Trial by Jury was he sentenced to Death. The animosity with which the prosecution acted (Point IV) was submittedly due to Mr. Gore's rejection of its plea offer of Life.

Mr. Gore must be resentenced to Life.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the appellant Respectfully submits, that his Convictions must be Reversed, Sentences Vacated and this Cause Remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at The Capitol, Tallahassee, Florida 32399-1050, on this 16 day of March, 1998,

Respectfully submitted,

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