IN THE SUPREME COURT OF FLORIDA

CASE NO: 86,363

TONEY DERON DAVIS,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 92-13193-CF
DIVISION: "CR-E"

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In its Answer Brief, the State takes great pains to point out that the prosecution filed two, "Williams Rule", notices regarding other incidents of child abuse allegedly committed by Davis; in fact, the State even attempts to recite facts of the alleged prior occurrences. Answer Brief at p. 1-2. Then, the State admits that the prosecution withdrew both notices. Answer Brief at p. 3.

This is the State's transparent attempt to interject unproven, irrelevant, immaterial, and inflammatory allegations into the record on this appeal. The State seeks to use facts not in the record, and certainly never proven, to convince this Court that Davis is a child abuser and to divert the Court's attention from the actual legal issues in this appeal. The State's entire presentation on this point should be wholly disregarded.

ARGUMENT - ISSUE I

THE TRIAL COURT ERRED IN NOT FOLLOWING THE DICTATES OF NELSON AND FARETTA WHEN DAVIS MOVED TO DISCHARGE HIS COURT-APPOINTED COUNSEL BEFORE TRIAL COMMENCED

The State's main argument is that Davis never moved to discharge his counsel. This assertion is quite simply unfair as it ignores the plain meaning of the exchange between Davis and the trial Court with regard to Davis' dissatisfaction with his court-appointed trial counsel. Davis said, "I don't feel I'm being adequately represented..." (T-59). He then said, "I would like to request the court--" (T-59). At this point, the trial Court cut off Davis' sentence, interrupting him with the question, "Have you talked to Mr. Adams about this?" (T-59). Later, the trial Court clearly informs Davis that it intends to hold a Nelson hearing but needs to have his trial counsel, Mr. Adams present. The trial Court then says to Mr. Davis: "If you want somebody else then, you can discuss it at that time..." (T-59-60).

One can see the trial Court's interpretation of Davis' plain words prior to his being interrupted by the trial Court's own response. The State in its Answer Brief seeks to use semantics, focusing on words and punctuation rather than addressing what actually occurred, to convince this Court that Davis did not ask for substitute court-appointed counsel and therefore was not entitled to a Nelson hearing. One cannot look at the transcript in a vacuum because that ignores what actually occurred. To allow the State to obscure Davis' invocation of a valuable right in a death case by capitalizing on the fact that the trial Court interrupted Davis in mid-sentence would be an egregious violation of Davis' due process rights and the entire concept of fundamental fairness. The State's semantic argument also sets aside common sense. What actually happened during the above cited interchange

between the Appellant and the trial Court is that Davis was asking for substitute counsel and thereby invoking his right to a Nelson inquiry. The trial judge and everybody else in the courtroom knew it and responded accordingly, It is disingenuous for the State to distort what actually occurred and its argument is a "whitewash tactic" and a thinly veiled escape attempt.

In addition, it must be noted that Davis' actual words, "adequately represented," echo the words of other defendants in case law examining the adequacy of Nelson inquiries. See, Matthews v. State, 584 So. 2d 1105 (2d DCA 1991); Perkins v. State, 585 So. 2d 390, 391 (1st DCA 1991); Brooks v. State, 555 So. 2d 929, 930, fn. 2 (3d DCA 1990).

The Brooks case clearly illustrates the point that the trial Court may not avoid its responsibility to conduct a full and proper Nelson inquiry by merely interrupting the complaining defendant, In Brooks, the trial Court "did not give full consideration" to the defendant's complaints and "even prevented Brooks from explaining the reason for his request." Id. at 930. The appellate Court in Brooks reversed, finding that the trial Court improperly gave the defendant's complaints short shrift. Id. at 931. It should be noted that the trial Court asked Brooks only one question at the hearing. In the case at bar, the trial Court asked Davis only one question and did not afford him the opportunity to fully explain the reasons for his complaints.

Similarly, in Scull v. State, 533 So. 2d 1137 (Fla. 1988), the trial Court kept interrupting the defendant, Said this Honorable Court:

> During this proceeding in which Scull appeared without his counsel, Scull was not given the opportunity by the trial judge to explain why he objected to his present trial counsel. Rather, each time Scull tried to explain his objections, the trial judge

> interrupted him. At no time during the proceeding did the judge inquire into Scull's allegations of conflict of interest. We do not believe this is the proper way to conduct an inquiry into the reasons for requesting new representation. It is difficult for a defendant to understand legal proceedings against him when they are in a different language. It is more difficult when the defendant is given little chance to make himself heard. Therefore, we believe the inquiry made into Scull's request to have a new attorney appointed was legally inadequate.

Id. at 1140. The same thing happened to Davis here; therefore, his convictions must be reversed.

ARGUMENT - ISSUE II

> THE TRIAL COURT ERRED IN DENYING DAVIS' MOTION FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS IN THAT THE STATE'S EVIDENCE WAS ALL CIRCUMSTANTIAL AND IT WAS NOT INCONSISTENT WITH EVERY REASONABLE HYPOTHESIS OF INNOCENCE

The State's primary argument is that the defendant's testimony at trial was inconsistent with prior statements he made to police, and that he concocted his defense after hearing the State's evidence at trial. The State is focusing on the trial as a whole, including the defense presentation of evidence.

That is not the issue on appeal here. The issue is that the trial Court erred in denying Davis' JOA motion at the end of the State's case in chief. It is to the State's case the motion was directed, and it is to the State's proof in its case-in-chief this Court must look to determine whether the evidence was sufficient.

ARGUMENT - ISSUE III

THE EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT CALEASHA CUNNINGHAM WAS ALIVE WHEN VAGINAL PENETRATION OCCURRED, REQUIRING A REVERSAL OF DAVIS' SEXUAL BATTERY CONVICTION

The State argues that Davis failed to preserve this issue for appeal. On the contrary, Davis raised this issue at the trial level by asserting that there was insufficient evidence to support the sexual battery conviction. Therefore, this Court should consider this issue.

ARGUMENT - ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE AT PENALTY PHASE THAT DID NOT MEET THE STATUTORY AND LEGAL REQUIREMENTS FOR ADMISSIBILITY

The State notes that in the victim impact statement admitted at penalty phase, there was no mention of the loss to the community resulting from the child's death. Answer Brief at p. 52, fn. 13. That is exactly Davis' point on appeal here; the victim impact evidence failed to comport with the statutory requirement and instead was grossly inflammatory and irrelevant. There are boundaries to what can be presented as victim impact evidence, and the statement here went far overboard. Furthermore, the State has made no showing that the erroneous admission of this victim impact statement was harmless beyond a reasonable doubt, which is the State's burden on appeal. Cicarelli v. State, 531 So. 2d 129, 131 (Fla. 1988).

ARGUMENT - ISSUE V

THE TRIAL COURT ERRED IN CONSIDERING AND FINDING THE STATUTORY AGGRAVATING FACTOR HEINOUS, ATROCIOUS AND CRUEL, ON WHICH THE JURY WAS SPECIFICALLY NOT INSTRUCTED AND ON WHICH THE STATE PRESENTED NO EVIDENCE OR ARGUMENT TO THE JURY DURING THE PENALTY PHASE

The State in its Answer Brief contends that, as in Hoffman v. State, 474 So. 2d 1178, 1182 (Fla. 1995), the consideration by the trial Court of aggravation not presented to the jury did not work to Davis' disadvantage. Answer Brief at p. 57. The difference between Hoffman and the instant case is that here, due to the prosecution's last minute interjection of heinous, atrocious and cruel arguments at sentencing, Davis was ambushed. For defense counsel to be surprised at the eleventh hour in this death case, by the interjection of a proposed aggravating circumstance, is to deprive the defendant of due process at sentencing by denying him a meaningful opportunity to rebut the evidence and to defend and argue against the factor. The State had every opportunity to raise and argue HAC during penalty phase, but instead chose to launch a sneak attack. This offends fundamental due process and principles of fairness, particularly when viewed in conjunction with the improper victim impact evidence presented at penalty phase, as discussed in Issue Four above.

ARGUMENT - ISSUE VI

THE TRIAL COURT ERRED IN FINDING THAT THE STATUTORY AGGRAVATOR OF HEINOUS, ATROCIOUS AND CRUEL WAS PROVED BEYOND A REASONABLE DOUBT

The State goes on to argue that the heinous, atrocious and cruel factor was proven beyond a reasonable doubt, even going so far as to suggest that the child was subjected to

30 minutes of "torture." Answer Brief at p 64-65. The State uses the trial testimony of next-door neighbor Janet Cotton to support its contention that the child was tortured for an extended period beyond a reasonable doubt. Id.

The problem with the State's argument is that it vastly overstates the probative value of the witness' testimony and examination of the transcript clearly demonstrates that Cotton's testimony was vague and uncertain, far from proof of extreme torture beyond a reasonable doubt. Although Cotton testified that she heard crying, she could not identify the crying child or even tell if it was a boy or a girl, (T-522). She made a vague reference to hearing "thumping" and "banging", but could not identify the source of the noises. (T-518). She claimed to recognize Davis' voice (even though she hardly knew him) saying, "sit down." This does not add up to proof beyond a reasonable doubt that the child was tortured for an extended period before her death.

Further facts weakening the State's torture argument came in the form of expert medical testimony. The first doctor to examine the child observed head injuries and bruising, but no vaginal bleeding. (T-611-612, 616-617). The medical examiner saw no evidence of vaginal injury and reported that the cause of death was blunt trauma to the head. (T-842).

On the whole, the evidence presented at trial was not consistent with the type of extended, extreme torture that was proven in the cases the State cites in its Answer Brief wherein the finding of heinous, atrocious and cruel was upheld. The evidence simply does not rise to the level of proof beyond a reasonable doubt with regard to HAC.

Finally, the State asserts that if the finding of HAC was improper, the error was harmless because another statutory aggravator was found. Given the lack of any time-line evidence to show when a sexual battery occurred, and the absence of vaginal injury during the autopsy, the weight of the remaining aggravator is not strong enough to trump Davis' mitigation The State has not met its burden of showing that the HAC error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, Davis' case must be remanded for a new sentencing hearing.

ARGUMENT - ISSUE VII

THE TRIAL COURT ERRED IN FINDING THAT THE STATUTORY AGGRAVATOR OF MURDER COMMITTED DURING THE COMMISSION OF A SEXUAL BATTERY WAS PROVEN BEYOND A REASONABLE DOUBT

The State contends that sufficient evidence was presented to prove beyond a reasonable doubt that the homicide was committed during the course of a sexual battery. Again, the State stretches and overstates Janet Cotton's testimony with regard to the noises she heard. Absolutely no evidence was presented, lay or expert, to establish a time line of events. No one could even testify that death occurred after the sexual battery as opposed to before it. The absence of any such evidence precludes the finding that "during the course of' was proved beyond a reasonable doubt.

This error was not harmless, given that the proof of the other aggravating factor, HAC, was weak at best, as discussed in Issue Six above.

ARGUMENT - ISSUE VIII

THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATION OUTWEIGHED THE MITIGATION AND THEREFORE IMPROPERLY SENTENCED DAVIS TO DEATH

With regard to the debate over proportionality, the defendant has cited numerous cases, and the State has cited numerous cases. The defendant relies upon the arguments presented in his merit brief and implores this Court to do the comparison review necessary in a case involving a life-or-death decision.

CONCLUSION

As to Issues I and II, Appellant Toney Deron Davis prays for reversal of all three convictions and remand with appropriate instructions to the Court below.

As to Issue III, Appellant prays for reversal of his sexual battery conviction and remand with appropriate instructions to the court below.

As to Issues IV, V, VI, VII, and VII, Appellant prays for vacation of his sentence and remand to the court below for a full re-sentencing hearing.

Respectfully Submitted,

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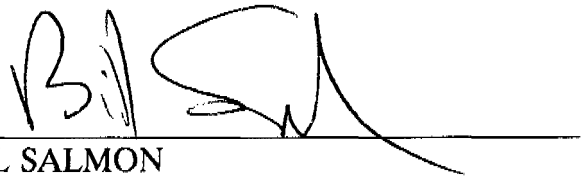
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merit Brief of the Appellant has been furnished this 19th day of February, 1997 by U.S. Mail to: MARK S. DUNN, Counsel for Appellee, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399- 1050.

By: 

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