IN THE SUPREME COURT OF FLORIDA

ERNEST WHITFIELD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 86,775

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

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

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STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant takes issue only with Appellee's assertion on page 4 of his brief that "the witness-[Peggy LaRue] did not see any drugs that morning", citing record page 946. While this is technically accurate, it is misleading as to the overall thrust of state witness LaRue's testimony. She testified that when Whitfield came to her door shortly after the homicide, she hesitated to let him in because her observations of Whitfield's eyes and his manner of speech led her to conclude that "he looked like he'd been using some drugs" (R937-8). LaRue had previous experience of being around him when he had used drugs (R938). When she saw him that morning, she thought that he had been using crack cocaine (R947).

ARGUMENT

ISSUE I

APPELLANT DID NOT MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT DURING JURY SELECTION AND TO PARTICIPATE IN CHALLENGING THE JURORS.

Although Appellee characterizes Whitfield's behavior as "persistent intransigence" (Brief. page 19), the record shows no misconduct on Appellant's part that would warrant his removal from the courtroom. At the beginning of the second day of trial, Appellant asked that his court-appointed lawyers be removed from his case because of personal conflict between him and the lawyers (R470-1). More specifically, he complained that his attorneys had not adequately prepared for trial and were telling him that he would get a death sentence if he continued to insist on a speedy trial and would not accept the State's plea offer of consecutive life sentences (R471-4, 484-5). He accused his attorneys of "hostility" (R475).

Defense counsel Williams basically confirmed Appellant's allegations. He said that usually he took a year to prepare for a first-degree murder trial (R475). He didn't have all of the records he needed to establish mitigating evidence and asked for more time to prepare (R476-8). Counsel asked for a week's recess between guilt and penalty phase as a way of "salvaging competent representation", but acknowledged that Appellant did not want any delay (R480).

The court ruled:

> You're going to get these two lawyers or you're going to represent yourself after I go through an inquiry. And before you decide to discharge these two lawyers, I'm going to go through a whole inquiry with you.

(R486). Then, the judge asked defense counsel what purpose was served by telling his client that he was going to get a death sentence when Whitfield had rejected the State's plea offer and negotiations were over (R487-90). The judge said, "there's no need to apply a heavy hand" and asked whether Appellant still wanted to discharge counsel (R490). When Whitfield replied "yes", the judge asked for a copy of Nelson[1] to make certain all procedural requirements were followed (R490-1).

When the judge attempted to make the inquiries required by Nelson and Faretta[2], Appellant remained mute (R491-6). Before resuming jury selection, the judge addressed Whitfield:

> So the option is yours. You can sit there silently or you can discuss it with me and allow me to do what I have to do.

(R497). Appellant chose to sit silently while voir dire continued (R498-521). However, defense counsel became agitated because Whitfield turned his back and would not participate in the proceedings (R521). He asked that Appellant be examined for

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[1] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

[2] Faretta v. California, 422 U.S. 806 (1975).

competency (R522). The judge also became exasperated:

> I think he's just playing shenanigans with the Court, and he refuses to cooperate, and with all the rights he was afforded, and I was about to do everything I could. This is his choice, and this is the way the trial is going to be conducted.

(R523). Jury selection continued until lunch time, when defense counsel again requested a competency examination (R582). The judge agreed to allow the evaluation, but noted that it was Appellant's choice "to turn his back on the court and not to communicate" (R583-4).

After the lunch recess, defense counsel told the judge that the examining psychologist found Whitfield competent but insistent in his desire to have his counsel discharged (R591). The court addressed Appellant, who stated that he had previously explained his reasons for wanting counsel discharged and had his request denied (R594-5). Upon the court's urging, Whitfield reiterated and specified more grounds for discharge of counsel (R595-600). The court then asked defense counsel to respond to the complaints[3], and stated:

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[3]This section of the record (R600-03) should be read to appreciate that the hostility between Whitfield and his counsel was certainly not one-sided. For instance, counsel responded to Whitfield's complaint about not finding a witness he wanted to call, Estella Brooks [Pierre]:

> So, I've deposed this Estella Brooks. And, in fact, there's really nothing -- there was nothing really to be gained in terms of helping him from talking to Estella Brooks.

(R603). As the trial developedd, Estella Brooks Pierre was the only defense witness besides Dr. Regnier in the guilt or innocence phase and at least the second most important defense witness overall.

> Mr. Whitfield, I can't control their attitude and how they relate to you. I mean, sometimes people don't relate well together.

(R603). The court ruled that he would not appoint other counsel to represent Appellant (R604, 611).

Appellant then requested the judge to make the Faretta inquiry necessary before he could be permitted to represent himself (R614). The judge ruled that Appellant was not competent to represent himself and that he must be represented by his current counsel (R619). Whitfield then asked to be taken back to his cell, saying "They can go'on'without me" (R620). The court stated, "Well, as long as you behave, you're going to sit there" and gave Appellant permission to turn his chair away from the proceedings (R622). Defense counsel objected to the jury seeing Whitfield "in this position" and asked that he be removed from the courtroom (R626). The judge asked Whitfield to choose between remaining or going back to his cell (R627). When Appellant did not respond, the judge declared, "Take him back to his cell" (R627). As Appellant was being led away, he said, "I'm not coming back" (R627).

Although the jury was instructed per defense counsel's request that Appellant "has chosen to voluntarily absent himself" (R629), the record supports the interpretation that Whitfield was actually removed because his defense counsel were infuriated by his silent symbolic protest. Appellant had earlier said that he didn't want to participate in the proceedings, but at the moment when he was removed, he declined to answer whether he preferred

to remain in the courtroom or leave (R627). To be sure, Whitfield was not a "happy camper but a criminal defendant does not have to be happy about his trial in order to be present. It is enough that he not disrupt the proceedings.

In any case, Appellee's comparison of the case at bar to such cases as Kilgore v. State, 22 Fla. L. Weekly S105 (Fla. March 6, 1997) and Nixon v. State, 572 So. 2d 1336 (Fla. 1990) is misdirected. During a recess in voir dire, Nixon disrobed to his underwear and refused to return to the courtroom. 572 So. 2d at 1341. He threatened to disrupt the proceedings if forced to attend. 572 So. 2d at 1342. In Kilgore, the trial judge questioned the defendant extensively before concluding that the defendant's waiver of presence during jury selection "satisfied all constitutional standards". 22 Fla. L. Weekly at S106. Unlike Kilsore, Whitfield was never told that he would be giving up the right to participate in the exercise of peremptory strikes when the jury was chosen.

Appellee's suggestion that Whitfield's assertion that, if allowed to participate, he wouldn't have allowed so many women on the jury demonstrates an unconstitutional intent to discriminate based on gender (Brief of Appellee, page 26, fn.6) is simply spurious. The jury panel selected was unbalanced, ten women to two men (R1455). If the defense had not excused several qualified male jurors by peremptory strike, the jury would have been better balanced. Declining to exercise peremptory strikes on qualified jurors has not been ruled unconstitutional.

Finally, Appellee asserts:

> Appellant may obtain no relief under Coney v. State, 653 So.2d 1009 (Fla. 1995), since Coney was overruled in Boyett v. State, ___ So. 2d ___, 21 Florida Law Weekly S535 (1996).

Brief of Appellee, page 26. This is simply not so. In the first place, Whitfield was tried while Coney was controlling authority. Cf., Anderson v. State, 22 Fla. L. Weekly D736 (Fla. 5th DCA March 21, 1997). Secondly, Bovett reaffirms the requirement that a defendant be physically present in the courtroom and have a meaningful opportunity to be heard when peremptory strikes are exercised. Whitfield was not in the courtroom and was not offered a chance to be heard.[4] He did not ratify the peremptory strikes that were exercised outside his presence. As in Matthews v. State, 22 Fla. L. Weekly D296 (Fla. 4th DCA January 29, 1997), the trial judge made no effort to certify that Whitfield understood and waived his right to participate in the exercise of peremptory challenges. Accordingly, this Court should vacate his convictions and sentences and remand for a new trial.

[4]At the time that Whitfield was taken from the courtroom, both the prosecutor and defense counsel seemed to be aware that a further inquiry on the record would be necessary before the jury was actually selected (R628). However, there was apparently no follow up on this.

ISSUE II

THE TRIAL JUDGE ERRED BY ALLOWING THE PRIOR INCIDENT AT THE VICTIM'S HOUSE TO COME INTO EVIDENCE BECAUSE ANY PROBATIVE VALUE WAS GREATLY OUTWEIGHED BY PREJUDICE TO APPELLANT WITH REGARD TO THE JURY'S PENALTY RECOMMENDATION.

Appellee relies primarily on Pittman v. State, 646 So. 2d 167 (Fla. 1994) for the proposition that prior threats directed against the victims or a member of the victims' family are relevant in a homicide prosecution. However, Pittman also cautions that

> such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice.

646 So. 2d at 171, quoting from Bryan v. State, 533 So. 2d 744 at 746 (Fla. 1988).

In Pittman, the threats had substantial probative value because the defendant testified that he had nothing to do with the homicides. He also offered evidence that his ex-wife and her new husband had a motive to commit the crimes. By contrast, at bar, Whitfield confessed to the homicide of Claretha Reynolds. The only fact in issue was whether the killing was premeditated or whether Whitfield's drug use established a reasonable doubt concerning his ability to premeditate. On this question, a threat to kill the victim and her -two friends two weeks ago has little probative value. Convincing evidence of Whitfield's ability to form a premeditated intent to kill could only come from the many witnesses who observed him within a short time

before or after the homicide. Accordingly, compared to Pittman, the threat evidence had little probative value.

However, the incident where the threat was made was very prejudicial to Whitfield with respect to the jury's penalty recommendation because it also showed an attempted robbery which was never charged by the State. It gave more ammunition to the prosecutor's portrayal of Whitfield as someone who preyed on women. These were undoubtedly the real reasons why the State wanted Brooks to testify about the incident two weeks previous to the homicide at Claretha's house, not the weak link to premeditation. Therefore, the trial judge should have ruled that the probative value of the testimony was outweighed by its potential for prejudice. 990.403, Fla. Stat. (1995).

Other cases where this Court has required a new penalty trial after erroneous admission of collateral crime evidence in the guilt or innocence phase of a 'capital proceeding include Lawrence v. State, 614 So. 2d 1092 (Fla. 1993) and Castro v. State, 547 so. 2d 111 (Fla. 1989). In both, this Court explained:

> Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other.

614 So. 2d at 1096-7, quoting from 547 So. 2d at 115. At bar, this Court should recognize that the harmful character of the prior uncharged attempted robbery (also a "crime against women") coupled with the bare majority 7-5 death recommendation of the

jury means that the error is not harmless as to Whitfield's sentence of death.

ISSUE III

THE JURY'S PENALTY RECOMMENDATION WAS TAINTED BECAUSE THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE IRRELEVANT EVIDENCE AND TO ENGAGE IN IMPROPER ARGUMENT DURING THE PENALTY TRIAL.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IV

THE TRIAL COURT'S INADEQUATE RESPONSE TO THE PENALTY JURY'S QUESTION RESULTED IN A DEATH RECOMMENDATION WHICH DOES NOT MEET CONSTITUTIONAL REQUISITES FOR DUE PROCESS AND EIGHTH AMENDMENT RELIABILITY.

Appellee initially claims that this issue is procedurally barred because Appellant agreed to accept the court's response to the jury question. Brief of Appellee, page 51-2. However, it is evident that defense counsel was forced to accept a compromise because the judge refused to answer the jury question with a simple "yes", as defense counsel initially proposed (R1703-6). Rereading the instruction to the jury was viewed as more acceptable than the prosecutor's proposed response that the jury should rely on their recollection (R1703-8). It is also clear that the

trial judge knew that he was not granting the full relief requested by the defense:

> Ms. Scott: We renew our request that you reread that paragraph.
> The Court: I'm going to read the paragraph.
> Ms. Scott: Okay.
> The Court: But that's all I'm going to do.
> Ms. Scott: Yes, sir.
> The Court: Okay. Bring the jury out. I'm going to tell them I can't any further -- I can't further tell --
> Mr. Williams: No, your Honor, I would request that you just read the instruction.
> The Court: Okay.

(R1708) (e.s.).

For this reason, Appellee's citation of McPhee v. State, 254 So. 2d 406 (Fla. 1st DCA 1971) is not germane. In McPhee, defense counsel's request was granted by the trial court. On appeal, McPhee contended that the judge committed fundamental error by agreeing to the defense request and made an argument that had not been raised in the trial court. That is not the situation at bar. Appellant informed the trial court how the jury question should be answered, with a fall-back request that would be preferable to the prosecutor's position. The fact that the judge granted half a loaf does not bar Appellant from seeking on appeal the full loaf he is entitled to.

Turning to the merits, as early as Burnette v. State, 157 So. 2d 65 (Fla. 1963), this Court recognized that a trial judge's response to a jury question about the possibility of parole in a capital proceeding would likely affect the jury's decision whether to recommend a death sentence. Despite the defendant's lack of objection to the trial court's accurate response to the

jury about a life sentenced prisoner's eligibility for parole in Burnette, this Court found prejudicial error requiring a new trial.

Juror misperception about parole eligibility for criminal defendants sentenced to life imprisonment has been the subject of several studies and law review articles. See, J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaninqful Alternative Sentence, 26 Loyola L.A. L. Rev. 327 (1993); Anthony Paduano & Clive A. Stafford Smith, Deadly Errors: Juror Misperceptions Concernins Parole in the Imposition of the Death Penalty, 18 Columbia H.R. L. Rev. 211 (1987). One study conducted in Sacramento, California, found that 77.8% of potential venirepersons believed that a defendant sentenced to "life without parole" was either very likely or somewhat likely to be released. James R. Ramos, Edward Bronson & Joel Sannes-Pond, Fatal Misconception: Convincing Capital Jurors that LWOP Means Forever, 21 CACJ Forum, No. 2, 42 at 43 (1994).

The importance that capital jurors attach to parole eligibility when deciding whether a death sentence is appropriate cannot be underestimated. In Simmons v. South Carolina, 512 U.S. __, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), the Court's opinion acknowledges a South Carolina survey which showed that 75% of the participants indicated that "the amount of time that the convicted murderer actually would have to spend in prison would be an 'extremely important' or a 'very important' factor in choosing between life and death". 129 L. Ed. 2d at 140. This

Court has also recognized in Jones v. State, 569 So. 2d 1234 at 1239-40 (Fla. 1990), that a capital defendant must be allowed to present evidence and argument about his potential sentence as a possible mitigating circumstance of the offense.

Although Appellee argues that the question posed by the jury was "unanswerable since no one can foresee the future" (Brief of Appellee, page 52), a similar argument about "hypothetical future developments" was termed by the Simmons court as having "little force". 129 L. Ed. 2d at 144. The Eighth Amendment's requirement of reliability in capital sentencing means that a jury should not be left to speculate about parole possibilities when State law provides for a sentence of life imprisonment without eligibility for parole. Id., see esp. concurring opinion of Justice Souter. Because six members of Appellant's sentencing jury indicated that they did not understand the meaning of "life in prison without parole", the trial court should have clarified that it meant that Whitfield would never be released on parole if sentenced to life imprisonment.

ISSUE V

THE SENTENCING JUDGE UNREASONABLY FAILED TO FIND AND WEIGH PROVEN MITIGATING CIRCUMSTANCES AND ERRED BY GIVING GREAT WEIGHT TO THE JURY-'S DEATH RECOMMENDATION BECAUSE THE VOTE WAS A BARE 7-5 MAJORITY.

Appellant will rely upon his argument as presented in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 2d day of April, 1997.

Respectfully submitted,

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