SUPREME COURT OF FLORIDA

CASE NO. 07,469

Lower Case No. 93-2357CF A02
(Palm Beach Co.)

NICHOLAS LYNN HARDY,

Appellant,

va.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM
THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ISSUE I

THE TRIAL COURT ERRED IN DECLARING THE DEFENDANT COMPETENT TO STAND TRIAL.

The Defendant relies upon the arguments and citations of authority contained in his initial brief.

ISSUE II

TEE TRIAL COURT ERRED IN PERMITTING THE STATE TO EXERCISE PEREMPTORY CHALLENGES IN A RACIALLY DIBCRIMINATORY MANNER.

The State argues that the Defendant failed to raise the pretextual nature of the explanation for the peremptory challenge in a timely manner. However, in response to the State's claimed reason for exercising the peremptory challenge, counsel specifically responded that no voir dire of the juror had been conducted and nothing had been brought out about her age or education. (TR-2197). Simply because the magic word "pretext" was not uttered does not alter the fact that the Defendant clearly objected to the State's proffered reasons.

The State also argues that the Defendant has waived this issue because the objection to the State's use of its peremptory challenge in a racially discriminatory manner was not renewed when the jury was sworn. However, the jury was sworn only moments after the initial objection (TR-2196; jury accepted, TR-2201). There was no additional questioning or any other event which occurred subsequent to the objection which would have caused the Defendant to withdraw the objection. Compare, Melbourne v. State, 679 So.2d 759, 765 (Fla. 1996) ("it is entirely possible that events transpiring subsequent to the initial objection caused Melbourne to become satisfied with the jury and abandon her claim."), Joiner v. State, 618 So.2d 174, 176 (Fla. 1993) ("It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied

with the jury"). The Defendant interposed two additional objections to the State's exercise of peremptory challenges against black females. Therefore, it is clear that he was not abandoning his concern for the State's use of peremptory challenges in a racially discriminatory manner.

The purpose in requiring a timely objection is to allow the Court to correct the error. Joiner, 618 So.2d at 176. The Court had ruled on the defense objection and there was no indication she would have changed her mind moments later. The requirement of a contemporaneous objection, to place the trial judge on notice that an error may have been committed and provide her an opportunity to correct it at an early stage, was clearly met by the objection stated herein. See, Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The Defendant clearly stated the basis of his objection and stated an objection to the proposed reason (juror's immaturity) for the strike. The trial court ruled against him. Renewing the objection would have served no further purpose other than to argue with the trial court,

The proffered reasons for excusing the peremptory challenge against juror Gibson are not race neutral. The total biographical information given by juror Gibson upon which the State based its reason for exercising her was given in response to the Court's questionnaire as follows:

> MS. GIBSON: I live in West Palm Beach for 19 years.
>
> I am an instructional person.
>
> I've never been married.

I don't have any grown children.

I have never served as a juror.

I have not participated in a civil or a criminal or traffic infraction,

I don't have any relatives or friends [in law enforcement].

I have been a victim of a crime.

I'm physically fit and I am capable [to serve as a juror].

And I will follow the law.

And there is no reason [not to be a juror in this case].

R-1953.

It is not even clear that juror Gibson is 19 years of age or in the teaching profession. There is certainly no indication she is "immature", the reason proffered by the State in the trial court.[1]

The State bolstered its reason, when questioned by the trial court, by stating that she was in the teaching profession. The trial court apparently accepted the reasons proffered as race neutral (R-2198). However, it does not appear that the Court evaluated the genuineness of the reasons or whether they were, in fact, pretextual. Melbourne v. State, 679 So.2d 759 (Fla. 1996). The circumstances surrounding the strike reveal that the reasons asserted were a pretext: two other State strikes were exercised

[1] The State now argues that a legitimate reason is that juror Gibson is an age similar to the defendant's. This reason was never asserted below and should not be considered at this juncture.

against black females (making a total of three out of nine peremptory strikes used by the State were used to excuse black female jurors) and the reason proffered (teaching profession) was equally applicable to an unchallenged juror despite having a remaining peremptory challenge at the time the jury was accepted. See, State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). Further, the fact that the State asked juror Gibson no questions concerning her education, life experiences, or current employment to determine her level of "maturity" or employment in the teaching profession makes apparent the pretextual nature of the prosecutor's proffered reasons.

The use of the proffered reason of "immature" appears to be precisely what Justice Marshall was referring to when he cautioned:

> ...a prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported...[P]rosecutors' peremptories are based on their "seat of the pants instincts."...Yet "seat of the pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels...

Batson v. Kentucky, 476 U. S. 79, 106, 106 S. Ct. 2993, 1712, 1728, 90 L.Ed.2d 69 (1986). (Marshall, J., concurring) (citations omitted).

The conclusion is sad but inescapable: the peremptory strike was used in a racially discriminatory manner violating the defendant's right to an impartial trial, and the defendant and juror Gibson's[2] right to equal protection. Article 1, Section 2, 16, Fla. Constitution; Amendment V, XIV, U. S. Constitution.

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[2] "Each juror has a constitutional right to serve free of discrimination. The striking of a single African American juror for racial reasons violates the Equal Protection Clause. Joiner v. State, 618 So.2d 174, 176 (Fla. 1993).

ISSUE III

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S PRIOR STATEMENT CONCERNING CONFRONTATIONS WITH POLICE OFFICERS.

The Defendant's statement, in the course of expressing concern about what happened to Rodney King when he was beaten by police in Los Angeles, occurring several weeks prior to the homicide, that "if it ever came down to him or a cop, that it was going to be the cop", was improperly admitted.

The State argues that the statement shows the Defendant's "self-avowed intent as to how to resolve any police confrontation in which he might find himself." AB 65. This is not an accurate portrayal of the evidence, At best it is a statement of intent to resist any effort to brutalize him by a police officer. The statement in issue is not an expressed intent to kill Sgt. Hunt or any police officer, it is not an expressed intent to avoid arrest, it is not an expressed intent to use a gun, it is not an expressed hatred of police. The cases relied on by the State reveal the importance of this distinction.

In Maharj v. State, 597 So.2d 786 (Fla. 1992), the disputed evidence was a series of newspaper articles which detailed an investigation of unfavorable accusations against the defendant made by the victim. The Court held that the articles were relevant to establish the defendant's motivation and intent towards the victim. The articles were specific as to the parties involved and were tied to the crime by a witness who testified to Maharj's statements connecting the articles and the crime.

Similarly, in Gore v. State, 599 So.2d 978 (Fla. 1992), the disputed evidence concerned a statement made by the defendant that a purse belonged to a girl he had killed. The witness that testified could not specify when the statement was made so the defense argued that it was in reference to a different murder and therefore improper character evidence. However, the Court held it was admissible as there was evidence that the statement was made shortly after the murder and therefore it was sufficient to tie it to the murder in issue.

The instant case is much different. There is nothing to tie the statement concerning the police beating of Rodney King to the Defendant's actions at the time of the homicide. Rather, it was used by the State at trial and continues to be urged on appeal that the statement is relevant to show a violent attitude towards police. This is improper character evidence, with little probative value, and highly prejudicial. The trial court erred in permitting the State to introduce this evidence.

The introduction of this evidence cannot be shown to be harmless error beyond a reasonable doubt particularly as it relates to the sentencing proceeding. The State repeatedly referred to this evidence in the trial court, as they have on appeal, as evidence of the heightened premeditation necessary to sustain the aggravating circumstance of cold, calculated, and premeditated.[3] Given the absence of evidence to support this

[3] 921.141(5)(i), Florida Statutes.

aggravating circumstance, (see Issue VII), the erroneous introduction of this evidence warrants a new sentencing hearing.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S POSSESSION OF A STOLEN .22 RIFLE.

The Defendant relies upon the arguments and citations of authority contained in his initial brief.

ISSUE V

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE COLLATERAL CRIME EVIDENCE IN THE PENALTY PEASE.

The State mischaracterises the collateral crime evidence. In fact, the State continues to assert what it believed the evidence would show, but did not.[4] The evidence of the Defendant's involvement in the Speranza incident was that the defendant was seen driving the car sometime afterwards and that he told a classmate that he was either involved or committed the act.[5]

The evidence of the Defendant's involvement in the Cook incident was that Cook identified the Defendant for the first time in the courtroom two and a half years after the incident, as the individual who had threatened to shoot him and who had a .38. Cook had been unable to identify the Defendant from any photographic line up prior to trial. (TR 3287). Cook was shot; however, he did not see who shot him and .22 ammunition was removed from his leg. (TR 3288).

The State argues that this evidence was relevant to prove the Defendant's heightened premeditation to kill a police officer. Once again, the important facts are what is not present

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[4] Even the trial court remarked that the evidence was not as incriminating as it had been led to believe it would be. (TR 3306).

[5] The classmate testified he could not recall whether the defendant stated he was involved in the crime or committed the crime. (TR 3294). Apparently some other defendant actually pled to the crime. (TR 3270, 3297).

in the evidence. At no time did the Defendant ever state he would kill a police officer if apprehended for these crimes. In Griffin v. State, 639 So.2d 996 (Fla. 1994), the collateral crime evidence consisted of evidence that the defendant was involved in burglaries over the course of several days. During a burglary the day before the homicide the defendant specifically stated he would kill a police officer if stopped because he was not going back to jail. The next day, as he was leaving a burglary, a police officer started following Griffin and his accomplice. Griffin again stated he would not go back jail. Immediately upon stopping, Griffin began shooting the police officer.

In the instant case, there is no evidence that the Defendant ever indicated a fear of being caught or expressed a desire to avoid apprehension. There is no evidence that the Defendant knew law enforcement was looking for him. Although the State's theory was that the motive for shooting Sgt. Hunt was to avoid arrest for the prior crimes, there is simply no evidence to support this theory. To the extent to which there is circumstantial evidence, it is equally consistent with a murder devoid of meaning, of motivation, other than panic.

The other cases relied upon by the State to support the use of the collateral crime evidence are likewise inapposite. In Jackson v. State, 522 So.2d 806 (Fla. 1988), the collateral crime evidence was introduced in the guilt phase and consisted of a prior assault on one of the homicide victims and evidence necessary to prove that Jackson was in possession of the murder

weapon and in the place where the crime occurred. In Heinev v. State, 447 So.2d 210 (Fla. 1984), the collateral crime evidence, introduced in the guilt phase, was that the defendant had injured someone in a fight and that upon learning that the police were looking for him expressed a need to obtain money and a ride to get out of town to avoid arrest. The Court held that the evidence that the defendant was on the run and desperate was admissible to show motive. In stark contrast, the instant case contains no evidence that the Defendant was attempting to flee or avoid apprehension or that the Defendant was aware that law enforcement was looking for him.

The contention that this evidence would have been admissible in rebuttal and therefore is harmless error overlooks the essentials of trial strategy. One cannot assume that the defense would have presented the same theory or evidence of mitigation absent the need to counter this highly prejudicial evidence. The cases cited by the State merely stand for the proposition that evidence can be introduced to rebut mitigation which otherwise would be inadmissible in the State's case-in-chief. In each of the cases cited the disputed evidence was actually introduced in rebuttal. See Wuornos v. State, 644 So.2d 1012, 1014 (Fla. 1994); Johnson v. State, 660 So.2d 637, 646 (Fla. 1995); Valle v. State, 581 So.2d 40, 45 (Fla. 1991). The State cites no authority for the anticipatory rebuttal theory for harmless error where there is no showing that the defense was irrevocably committed to introducing the mitigation in issue.

The Court in Valle specifically stated that testimony concerning lack of remorse was error even if it would have been proper in rebuttal. It was deemed harmless only because of the other evidence introduced. 581 So.2d at 46.

The collateral crimes evidence had little, if any, probative value which was far outweighed by the prejudice to the defendant's right to a fair sentencing determination.

Further magnifying the prejudice was the prosecutor's improper closing argument, exhorting the jury to recommend death because of the defendant's violent character (See Initial Brief, pgs. 66-67). A new sentencing proceeding before a jury is required.

ISSUE VI

THE PROSECUTOR'S CLOSING ARGUMENT WAS SO IMPROPER TEAT IT DENIED THE DEFENDANT HIS RIGHT TO A FAIR SENTENCING DETERMINATION.

The Defendant relies upon the arguments and citations of authority contained in his initial brief.

ISSUE VII

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED, AND PREMEDITATED.

In order to support the aggravating circumstance of cold, calculated, and premeditated, the evidence must establish beyond a reasonable doubt that the Defendant planned or arranged to commit murder before the crime began. Crump v. State, 622 So.2d 963, 972 (Fla. 1993). In reviewing the cases cited by the State wherein this Court has approved this aggravator, the qualitative and quantitative difference in the evidence from the instant case is immediately apparent. In Cruse v. State, 588 So.2d 983 (Fla. 1991), this Court held that CCP was supported by special ordering a high velocity semi-automatic assault riffle and large quantities of ammunition, reloading prior to the shooting, shooting eight rounds, and stating "I want the cop to die." As to the second victim the heightened premeditation was additionally demonstrated by shooting the officer one time in the leg then pursuing him through the parking lot and firing three more shots. Finally, as to both victims, the Court noted that the murders occurred after the defendant had committed several murders, heard sirens approaching, re-entered his car, and driven to a second location, thereby allowing ample time for reflection. 588 So.2d at 992.

In Trepal v. State, 621 So.2d 1361 (Fla. 1993), the defendant carried out an elaborate plan to poison a neighbor family including obtaining the poison thallium, placing it in

Coca Cola bottles, entering the neighbors home without their knowledge, a prior threat that he would kill his neighbors, and a threat to the neighbors to move or they would die. 621 So.2d at 1364.

In Porter v. State, 564 So.2d 1060 (Fla. 1990), the defendant was convicted of two counts of first degree murder. This Court held that CCP was supported by prior threats to kill the victim, watching the home for two days prior to the murder, and telling a friend ahead of time that she would be reading about him in the paper. In Brown v. State, 565 So.2d 304 (Fla. 1990), the defendant made statements to the police that he intended to shoot the victim if she made any noise and made a statement to a psychiatrist that he had considered shooting he victim before he ever went to her home. In Swafford v. State, 533 So.2d 270 (Fla. 1988), the victim was abducted from work, sexually battered, and shot nine times. During the shooting the defendant reloaded the firearm. In Johnson v. State, 438 So.2d 774 (Fla. 1983), the defendant was convicted of murdering three people. CCP was properly found based upon the defendant's statements ahead of time that he intended to shoot people to obtain money. Likewise in Griffin v. State, 639 So.2d 966 (Fla. 1994), the defendant expressed his intention to kill a police officer before he would be arrested. In Dufour v. State, 495 So.2d 154 (Fla. 1986), the defendant announced his intention to find a homosexual, rob, and kill him. The Court held that this

evidence coupled with an execution style shooting was sufficient to support CCP.

The State relies upon the collateral crime evidence to urge the Court to find CCP based upon the Defendant's involvement in other criminal activity and his fear of apprehension. Although this is one possible interpretation of the evidence, it is not the only interpretation. The evidence is equally consistent with this being an unplanned, senseless murder committed by an eighteen year old kid who panicked. See Robertson v. State, 22 FLW S404 (July 3, 1997). The attempted suicide immediately afterwards supports this interpretation. The CCP aggravator is simply not proven beyond a reasonable doubt where the evidence to support it is susceptible to divergent interpretations. Geralds v. State, 601 So.2d 1157, 1163-64 (Fla. 1992); Besaraba v. State, 656 So.2d 441, 446 (Fla. 1995). See also Kearse v. State, 662 So.2d 677 (Fla. 1995) (trial court properly refused to find CCP despite defendant's actions in stealing officer's gun and shooting him 14 times to avoid arrest).

The error in considering CCP as an aggravating circumstance cannot be deemed harmless under the facts of this case. With the elimination of CCP only one aggravator remains: the status of the victim as a law enforcement officer. As detailed in the Initial Brief, pages 84-87, there are many mitigating factors present in this case. This Court has consistently held that one aggravating circumstance will not

support a death sentence where mitigating circumstances are present. e.g., Clark v. State, 609 So.2d 513 (Fla. 1992); McKinney v. State, 579 So.2d 80, 85 (Fla. 1991); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990); Sonser v. State, 544 So.2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So.2d 710, 723 (Fla. 1989); Rembert v. State, 445 So.2d 337 (Fla. 1984); Lovd v. State, 524 So.2d 396 (Fla. 1988); Besaraba v. State, 656 So.2d 441 (Fla. 1995).

The trial court's statement that she would impose death with either aggravating circumstance alone should not be determinative of the harmless error issue. Clearly, a mandatory death sentence for killing a police officer would be unconstitutional. Roberts v. Louisiana, 431 U. S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977). Absent the CCP aggravating circumstance, the death penalty would not be a proportionate or appropriate punishment in this case.

ISSUE VIII

TEE ADMISSION OF VICTIM IMPACT EVIDENCE RENDERED THE SENTENCING DETERMINATION A VIOLATION OF FLORIDA AND FEDERAL CONSTITUTIONAL LAW.

The Defendant relies upon the arguments and citations of authority contained in his initial brief.

ISSUE IX

THE DEATH PENALTY IN THIS CASE IS NOT PROPORTIONATE.

The State asserts that the Defendant's sentence is proportional when compared to Jackson v. State, 648 So.2d 85 (Fla. 1994), Kearse v. State, 662 So.2d 677 (Fla. 1995), Griffin v. State, 639 So.2d 966 (Fla. 1994), Hodges v. State, 595 So.2d 929 (Fla. 1992), Valle v. State, 581 So.2d 40 (Fla. 1991), Carter V. State, 576 So.2d 1291 (Fla. 1989), and Burns v. State, 609 So.2d 600 (Fla. 1992), appeal after remand 22 FLW S419 (July 10, 1997). An examination of these cases quickly reveals substantial factual differences from the instant case.

In Jackson, the defendant armed herself while engaged in conversations with police, tricked the officer in order to get him in a position where she could shoot him, shot him six times, fled, and told a friend she shot him because she wasn't going back to jail. 498 So.2d at 409. In Kearse, the defendant robbed a police officer of his gun then shot him fourteen times. Further, in both Kearse and Jackson, this Court reversed the death penalty and remanded for a new jury sentencing proceeding because of other errors.

In Griffin, the defendant was engaged in a series of crimes during which he specifically stated he intended to kill a police officer if there was any attempt to arrest him. When the police attempted to arrest him during the commission of a crime, he killed one officer and shot at another. In Hodges, the defendant murdered a complaining witness in an indecent exposure

case against him in order to prevent her from prosecuting him. In Valle, the defendant specifically stated, several minutes prior to the murder as he was arming himself, that he "would have to waste the officer," He also shot another officer. In Carter, the defendant was convicted of two counts of first degree murder, was on parole at the time of the murder, had previously been convicted of armed robbery, and committed the murders during the commission of a robbery. The sole mitigation was the defendant's deprived childhood and less than average intellectual functioning.

Finally, in Burns, this Court recently affirmed the death penalty for the killing of a police officer who had just found a trafficking amount of cocaine in the defendant's vehicle. The defendant forcibly took the officer's gun. "Despite the officers pleas, Burns shot and killed the officer." 22 FLW S419. [6] The Court likened the case to Reaves v. State, 639 So.2d 1 (Fla. 1994), where the victim police officer pled with the defendant not to shoot him but he did so anyway.

In the instant case there is an unexplained murder of a law enforcement officer by an 18 year old kid from an extremely dysfunctional family with a learning disability who shot himself in the head, destroying a large portion of his brain, leaving him docile, childlike, and unable to read or write, and partially

[6] In the first appeal these facts were further detailed: "Trooper Young told Burns, 'you can go,' and 'you don't have to do this.' According to testimony..., Burns stood over Trooper Young, who had his hands raised, held the gun in both hands, and fired one shot." 609 So.2d 600, 603 (Fla. 1992).

paralyzed. Coupled with the other mitigation and lack of additional aggravation, this case warrants the imposition of a life sentence. See also Robertson v. State, 22 FLW S404 (July 3, 1997) (death not proportionately warranted despite aggravating circumstances of heinous, atrocious, and cruel and murder during the course of a burglary where defendant was 19 years of age and had a history of mental illness. "It was an unplanned, senseless murder committed by a 19 year old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time.").

The murder in this case is a terrible crime warranting life imprisonment for this defendant. However, this is not one of the most aggravated and least mitigated of murders. A death sentence is disproportionate under the facts of this case.

CONCLUSION

For the reasons outlined and the authorities cited in the Initial Brief and herein, NICHOLAS HARDY respectfully requests this Court to reverse the judgment of guilt and remand for a new trial. Alternatively, NICHOLAS HARDY requests this Court to reverse his sentence of death with directions to impose a sentence of life imprisonment or order a new sentencing proceeding by jury and Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Randall Sutton, Assistant Attorney General, 444 Bickell Avenue, Rivergate Plaza, Suite 950, Miami, FL 33131 this 4th day of September, 1997.

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