IN THE SUPREME COURT OF FLORIDA

JOHNNIE L. NORTON, :

Appellant, :

vs. : Case No. 88,803

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, Johnnie L. Norton, will rely upon his initial brief in reply to Appellee's arguments as to Issue VI.

STATEMENT OF THE CASE AND FACTS

Appellee twice refers to a tire track found on the back of the victim's right "leg." (Answer Brief of Appellee, pp. 1, 5) For the sake of clarification, Appellant notes that the track was found on Lillie Thornton's pant leg, and that the associate medical examiner determined that a tire had passed over Thornton's leg after she was already dead, not before. (Vol. VI, pp. 293, 308; Vol. VII, pp. 351, 448-449; Vol. IX, pp. 682-685)

On page 4 of its brief, Appellee claims that the shell casing found in Appellant's car was compared to ammunition components removed from Lillie Thornton's skull and "both were determined to be 380 caliber, manufactured by Federal Cartridge Company, and probably from a jacketed hollow point hydroshock bullet with a center post weighing 9 grains." However, as discussed in Appellant's initial brief at page 43, the State failed to establish that the bullet fragments examined by its firearms expert, Dominic Denio, were the fragments removed from Thornton's skull. The ammunition components examined by Denio were admitted as State's Exhibit Number 3, but there was no testimony that established that this exhibit contained the fragments that the Associate Medical Examiner, Dr. Robert Pfalzgraf, gave to Detective Bell of the Tampa Police Department after removing them from Lillie Thornton.

On page 6 of its brief, Appellee states that the passenger seat in Appellant's Subaru "had been cut and removed and replaced with something obviously different (T. 468)." Gary McCullough, a crime lab analyst with the Florida Department of Law Enforcement, testified that "certain areas of the passenger seat had been cut and removed and obviously different than what it was originally in at one time." (Vol. VII, p. 468) Appellant does not read this testimony as indicating that the passenger seat had been replaced with anything, but only that it was not in its original condition.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT IT WAS APPELLANT WHO KILLED LILLIE THORNTON.

On page 14 of its brief, Appellee states that "a casing matching the bullet components that killed Lillie [Thornton] was found in [Appellant's] back seat[.]" As discussed above, the prosecution failed to tie the bullet components examined by its expert with those removed from Lillie Thornton. Furthermore, to say that the components examined by Dominic Denio "matched" the casing found in Appellant's Subaru is inaccurate. Denio testified that they were of the same caliber and manufacture, but he could not establish with certainty that the fragments he looked at came from the casing found in the Subaru where the firearm that fired the bullet was not available for testing.

On page 15 of its brief, Appellee refers to Appellant's defense at trial as being "internally inconsistent." However, whatever the supposed deficiencies in the defense case, the State bore the burden of proving that it was Appellant who killed Lillie Thornton, which it failed to do; Appellant was not required to prove anything.

With regard to the testimony of Kim McDonald, who supposedly saw Appellant and Lillie Thornton together on the night before her body was found, and whose testimony is discussed on page 15 of Appellee's brief, this Court should note that McDonald did not even

know what night it was that she saw the two people together; all she could say was that it was a week day. (Vol. VI, p. 337)

ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED MURDER.

On page 19 of its brief, Appellee makes this assertion: "Lillie [Thornton] was...shot without provocation, and at seemingly close range since she and the appellant were within the confines of appellant's car." This statement is rife with speculation totally unsupported by the evidence. To begin with, no evidence exists as to what preceded the shooting, and so no proof was adduced that the killing was "without provocation." With regard to the shooting having been at "seemingly close range," the associate medical examiner ruled this out when he testified that there was no stippling of the wound, and the gun was probably at least 18 inches away and level with Thornton's head when it was fired. (Vol. VII, pp. 454-457) With regard to whether Thornton was shot in the car, the State's own expert conducted a test in the Subaru for the presence of vaporous lead, which would be indicative of an atmosphere of a gunshot, with negative results. (Vol. VII, pp. 416-418, 424-425) Thus, Appellee's conclusions enjoy no support in the record.

The two cases cited on page 19 of Appellee's brief, Williams v. State, 437 So. 2d 133 (Fla. 1983) and Hamblen v. State, 527 So.

2d 800 (Fla. 1988) provide no support for Appellee's argument that premeditation was proven below. Williams involved not merely a single gunshot, as in the instant case, but several other significant factors which this Court found indicative of premeditation, such as: (1) on the night of the shooting the victim received a number of telephone calls from Williams which were upsetting to her; (2) there was evidence of a prior stormy relationship between Williams and the victim; and (3) Williams borrowed a pistol prior to the shooting and then complained to a friend that the victim was washing up after being with another man. Similarly, there are at least two important differences between Hamblen and the instant case. In Hamblen there were two shots fired, although the first one missed the victim, and Hamblen claimed that his gun had discharged accidentally. And the victim was killed when Hamblen became angry with her for triggering a silent alarm. Appellee states that "[t]he fact that these cases involved evidence of anger or possible provocation not present in the instant case is not significant..." (Answer Brief of Appellee, p. 19) On the contrary, it is extremely significant. The anger and provocation led to the premeditated intent to kill in Williams and Hamblen, and allowed the jury to identify at least the approximate time when the premeditated intent to kill was formed. In Weaver v. State, 220 So. 2d 53, 59 (Fla. 2d DCA), cert. den., 225 So. 2d 913 (Fla. 1969), the court noted that the "point of time at which the specific intent to kill is inferentially formed cannot be left to guesswork and speculation." The juries in Williams and Hamblen had

facts to work with, and did not have to rely upon guesswork and speculation. Appellant's jurors had no such facts before them.

On pages 19-20 of its brief, Appellee cites Larry v. State, 104 So. 2d 352, 354 (Fla. 1958) for the proposition that several "traditional factors" may be considered in determining the existence of premeditation, including "the accused's actions before and after the homicide." In fact, however, Larry says nothing about this particular factor.

Contrary to Appellee's argument at page 20 of its brief, the fact that there was no evidence of anything that would have provoked anger in Appellant prior to the homicide or of prior difficulties between Appellant and Lillie Thornton militates against a finding of premeditation; (unlike in Williams and Hamblen) there was no proof of any reason for the killing, no evidence of anything that could have provided the impetus for Appellant to form an intent to kill Thornton.

Recently, in Coolen v. State, 22 Fla. L. Weekly S292 (Fla. May 22, 1997), this Court had occasion to address the issue of premeditation in the context of a killing by stabbing. Even though the victim suffered some six stab wounds, this Court determined that the State had failed to prove that Michael Thomas Coolen had the premeditated intent to kill the victim when he inflicted them, and reversed his conviction for first degree murder and vacated his sentence of death, and remanded with instructions to enter a judgment for second degree murder.

As this Court said when reversing a conviction for first degree murder in Jenkins v. State, 120 Fla. 26, 161 So. 840 (1935), "the evidence of premeditated design ought to be supported by something more than guess work and suspicion." Nothing more than that was presented at Appellant's trial, and he was entitled to a judgment of acquittal as to first degree murder.

ISSUE III

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER STATE WITNESS DETECTIVE RICK CHILDERS COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT HIS TRIAL.

With regard to Appellee's argument that Appellant's issue has not been preserved for appellate review, the remarks of the court in Carr v. State, 561 So. 2d 617, 619 (Fla. 5th DCA 1990) are instructive:

> The purpose of requiring contemporaneous objection is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue. [Citation omitted.] When objection is made to unsolicited comments of a witness, the immediacy of the objection is not as critical as when the objection is to a question. Neither the questioner nor the other counsel can anticipate such voluntary statements from the question. Thus, courts have long recognized that objections to unsolicited comments are timely if made within a reasonable time. [Footnote omitted.]

Contrary to Appellee's argument, Detective Childers' comment that defense counsel would "have to ask" Appellant about why he was buying carpet cleaner was not invited, and was not a reasonable response to defense counsel's question, particularly coming from an

experienced law enforcement officer who, as counsel noted, should know better than to make a comment on Appellant's failure to testify. (A simple "I don't know" would have sufficed quite well as answer to the question posed.) Childers' testimony was an unsolicited comment, and Appellant made his motion for mistrial within a reasonable time, right after Childers finished testifying. The purpose of the contemporaneous objection rule was served, as Appellant "place[d] the trial judge on notice that error may have been committed, and provide[d] him an opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). It is not as though Appellant completely failed to raise this issue at the trial level, and is seeking to raise it for the very first time on appeal.

As for whether Childers' testimony actually constituted a comment on Appellant's failure to take the stand, Appellee states at page 25 of its brief that "Childers was not suggesting that the appellant should testify..." This was exactly what Childers seemed to be suggesting, that defense counsel should call Appellant as a witness and ask him about the carpet cleaner. At least, Childers' remark was susceptible to that interpretation, and may have been so construed by Appellant's jury, which is all that is required.

The error in allowing Childers' remark to go uncorrected cannot be considered harmless. It came near the end of the State's case, not long before Appellant began presenting his own witnesses, which did not include Appellant himself. The jury may have been left wondering why Appellant relied upon other witnesses to present

his case, and did not take the stand himself, particularly after Childers highlighted this fact with his improper answer, with the result that the jury's verdict was tainted by an impermissible factor.

ISSUE IV

THE STATE SHOULD NOT HAVE ASKED IMPROPER QUESTIONS OF DETECTIVE RICK CHILDERS WHICH CALLED FOR HEARSAY, UNDERMINING APPELLANT'S EFFORTS TO PRESENT HIS DEFENSE.

Appellee argues on page 30 of its brief that is was not improper for the prosecutor to raise the inference that Appellant's brother, Trumell, would not verify his alibi, because "[t]he same inference could be drawn from the fact that the defense did not present Trumell as a defense witness." However, it would have been unreasonable for the jury to draw such an inference from the failure of the defense to call Trumell as a witness, as he had apparently taken off for parts unknown, and was not available to testify for either side.

The State's reliance upon Jackson v. State, 522 So. 2d 802 (Fla. 1988) (Answer Brief of Appellee, p. 31) is misplaced. Here, unlike in Jackson, the improper questioning occurred during the State's case, not the defense case, the State was not "attempting to show a specific bias" on the part of any witness, and the questioning did go the heart of the defense, that is, it went to Appellant's alibi.

ISSUE V

THE COURT BELOW ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING AFTER THE DEFENSE CALLED HIS ATTENTION TO A DISCOVERY VIOLATION COMMITTED BY THE STATE.

Apparently, Appellee is contending in its brief that Appellant's issue has not been preserved for review by this Court because defense counsel did not use some form of "magic words" in calling the attention of the trial court to the State's discovery violation. However, no such "magic words" are required in order to trigger the need for a full Richardson inquiry. Copeland v. State, 566 So. 2d 856 (Fla. 1st DCA 1990). The burden was upon the trial judge to initiate a Richardson hearing when the defense raised the discovery violation. Brazell v. State, 570 So. 2d 919 (Fla. 1990).

ISSUE VII

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL REGARDING THE ROSA WARMACK INCIDENT THAT WAS IRRELEVANT AND PREJUDICIAL.

Appellee claims on page 42 of its brief that there was no standing or contemporaneous objection lodged by defense counsel as to Rosa Warmack's father describing her as appearing to have been mangled by lions, and no objection to Detective Gladys Alarcon's testimony that Appellant forced Warmack to have sex with him. However, the remark about looking like she was mangled by a lion was included in Appellant's motion in limine, which the court denied. (Vol. II, pp. 320-321) And, before penalty phase testimony

began, counsel did receive a standing objection "about sexual battery being applicable background information." (Vol. XII, p. 1060)

On page 43 of its brief, Appellee argues that "the testimony that the victim [Rosa Warmack] had mental limitations that would have been apparent to the appellant shows something about his character." Where is the testimony that any mental limitations Warmack had "would have been apparent to appellant"? There is none. It must be remembered, after all, that Appellant himself has an IQ of only 85, which is low average compared to the general population. (Vol. XII, p. 1120)

Apparently, Appellee would place no limits whatsoever on testimony pertaining to the details of prior convictions for violent felonies. However, as discussed in Appellant's initial brief, this Court has indicated that there are limits on such testimony, as indeed there must be if defendants are to be sentenced fairly in capital cases, and the State exceeded those bounds in the instant case.

ISSUE VIII

THE COURT BELOW ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On page 49 of its brief, Appellee points out an ambiguity in the trial court's sentencing order. Although the court found no

mitigating circumstances, "he concluded that the one aggravating circumstance outweighed the mitigating circumstances, and imposed the sentence of death." How could the aggravating circumstance "outweigh" the mitigation if there was none? The court's order suggests that the court found something in mitigation, but there is a vagueness which precludes adequate discussion and review by this Court.

Appellee claims on page 49 of its brief that none of the specific factors in mitigation urged by Appellant on appeal was "ever identified for or argued to the trial judge." However, factors such as Appellant's family background and potential for rehabilitation certainly were argued at the penalty phase. (Vol. XII, pp. 1146-1160) As they had been previously identified for judge and jury, there was no need for counsel to reiterate them for the judge alone prior to sentencing.

On page 52 of its brief, Appellee asserts that "[t]here was no allegation below that the state's exhibits did not prove prior convictions[.]" This is incorrect. As noted in Appellant's initial brief, defense counsel specifically objected to the adequacy of State's Exhibit Number 56 (which related to an aggravated battery charge) to prove a conviction of a violent felony. (Vol. XII, pp. 1092-1093) This exhibit was not a judgment and sentence at all, but consisted of an information and what appear to be notes made by the court clerk. (Vol. XIV, pp. 69-71) It was inadequate to prove anything.

Also on page 52, Appellee takes Appellant to task for allegedly relegating certain points to footnotes. However, the substance of these arguments is contained in the body of the brief itself; the footnotes merely discuss the fact that they can serve as independent bases for this Court to vacate Appellant's sentence of death, apart from their inclusion in the discussion of proportionality. At any rate, whether these matters are raised in footnotes or otherwise is essentially irrelevant. The Court should consider them regardless of the manner in which counsel for Appellant has chosen to present them.

CONCLUSION

Based upon the forgoing facts, arguments, and citations of authority, your Appellant, Johnnie L. Norton, renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 13th day of August, 1997.

Respectfully submitted,

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