IN THE SUPREME COURT OF FLORIDA

RYAN J. URBIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89,433

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant files this reply brief in response to Points IA(1-3, 5, 7, 8, 10-12) & B, and III. Appellant will rely on the arguments presented in the Initial Brief as to the remaining points.

ARGUMENT

Point I

THE PROSECUTOR'S PENALTY-PHASE ARGUMENT WAS FILLED WITH IMPROPER AND INFLAMMATORY REMARKS, WHICH TAINTED THE JURY'S RECOMMENDATION AND RENDERED THE ENTIRE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.

A. The Improprieties

1. **Inflammatory, Vengence-Provoking Rhetoric**

In his initial brief, appellant argued the prosecutor

crossed the line between fair and improper comment by his excessive use of inflammatory terms such as "execute," "brutal," "vicious." Appellant further contended such terms were not justified by the evidence because this was not a uniquely vicious first-degree murder nor was it an execution-type killing since the shooting occurred during a scuffle in response to the victim's resistance to the robbery.

The state has cited a number of cases to support its assertion that the inflammatory rhetoric was proper, or, if improper, harmless error. See Answer Brief at 9. The state's cases are wholly inapposite, however, either because the term used reasonably characterized the evidence or the comment was singular and therefore harmless. See Davis v. State, 22 Fla. L. Weekly S331 (Fla. June 5, 1997)(prosecutor's characterization of murder as "brutal" and "vicious" not error where Davis kidnapped eleven-year-old girl from her bed, raped, beat, and strangled her to death, and left her body in a dumpster); Bonifay v. State, 680 So. 2d 413 (Fla. 1996)(prosecutor's singular use of word "exterminate" harmless error in contract killing planned over several days and where Bonifay responded to victim's pleas not to kill him because he had a wife and children by telling victim to "shut the fuck up," to "fuck his kids," and shooting him twice

more); Jones v. State, 652 So. 2d 346 (Fla. 1995)(prosecutor's use of word "assasination" once to describe killing in which defendant stabbed unaware victim in the back held a reasonable characterization of the murder and even if not reasonable, not so prejudicial to warrant a mistrial), cert. denied, 116 S.Ct. 202 (1996); Burr v. State, 466 So. 2d 1051 (Fla.)(prosecutor's statement that Burr "executes" people harmless where Burr had shot three others during robberies and position of victim's body, indicating victim was shot in back of head while kneeling down, supported conclusion murder was committed in manner of execution), cert. denied, 474 U.S. 879 (1985).

Even in Bonifay, where the terminology used fairly characterized the killing, this Court cautioned prosecutors against the use of purely emotional rhetoric and terminology:

> [W]e do find that the use of the "exterminate" or any similar term which tends to dehumanize a capital defendant to be improper. We condemn such argument and caution prosecutors against arguments using such terms.

680 So. 2d at 418 n.10.

Unlike the cases relied on by the state, the emotional rhetoric used by the prosecutor here did not consist of a singular remark and did not reasonably characterize the evidence.

The improper--and highly inflammatory--argument in the present case consisted of a running diatribe that went on for several pages of the transcript. The argument was improper and prejudicial.

2. **Mischaracterization of Evidence**

In his initial brief, appellant argued the following argument improperly inflamed the jury and mischaracterized the evidence:

> "While on the ground, Jason turned to the defendant and he raised his left hand. And when he raised that left hand, I submit to you that was a futile, pitiful gesture of defense. It was a statement by Jason Hicks, that raised left hand was a statement by Jason Hicks as loud as any word ever came out of his mouth, "Don't hurt me. Take my money, take my jewelry. Don't hurt me." And the defendant fired that bullet right through that left hand, right through the left palm. The bullet tore into Jason's chest. It burned through his heart, through his lungs. . . . Jason fell to the pavement. He was dying at that point. Life and blood quickly drained from his body as he fell to the pavement." T 1121.

The state has responded the prosecutor was merely "submitting his view of the evidence." If so, the prosecutor's "view" was pure fantasy. The evidence showed one of the bullets went through Hicks's left hand. There was no evidence Hicks turned and raised his left hand in a defensive gesture. The

evidence showed the exact opposite, that Hicks died fighting his attacker. This "argument" was an obvious attempt to appeal to the jurors' sympathy and was patently improper. Garron v. State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985).

3. Trivializing Jury's Responsibility

The state has conceded the prosecutor's comment that determining the sentence "[i]s not a difficult process" was inartful but contends the error was not fundamental. Standing alone, this comment might not constitute fundamental error. The prosecutor's argument in the present case, however, was rife with improper comments. This comment, along with the other improper comments, rendered the jury's advisory verdict unreliable.

5. Misstatement of Law Regarding Mercy

The prosecutor incorrectly told the jury it was required to recommend death if the aggravating factors outweighed the mitigating factors. See Henyard v. State, 689 So. 2d 239, 250 (Fla. 1996), petition for cert. filed, (June 9, 1997)(No. 96-9391). The state does not concede error but says if there was error, it was harmless because the prosecutor made the statement only once, whereas the prosecutor made the statement three times in Henyard. In Henyard, however, where the Court found the error

harmless, the statements were made during jury selection. Here, the statement was made during closing argument, and the instructions were not reasonably likely to cure the error.

7. Denigration of Legitimate Mitigating Circumstances

During closing argument, the prosecutor repeatedly told the jurors the mitigators "did not apply" and were nothing but "excuses" trumped up by Urbin to escape responsibility for his actions. Appellant argued in his initial brief the prosecutor's denigration of legitimate mitigating circumstances, clearly established by competent evidence, was reversible error.

In response, the state has contended the word "excuses" is proper, citing Webster's Dictionary, i.e, mitigate means "to make partial excuses for." Answer Brief at 13.

Mitigation is a legal term of art, however, particularly in death sentencing, and in a legal context, mitigation is <u>not</u> an excuse:

> Mitigating Circumstances. <u>Such as do not constitute a justification or excuse for the offense</u> in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

<u>Black's Law Dictionary</u> at 1002.

> Extenuation. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

Id. at 584.

The state further contends "the prosecutor did not attack the principles of mitigating circumstances, he merely argued that Urbin's evidence did not ameliorate the enormity of his guilt." Answer Brief at 14. However, attacking the principles of mitigating circumstances was precisely what the prosecutor did here. The prosecutor did not argue the mitigation was entitled to little weight or was outweighed by the aggravation. He told the jury straight-out the mitigation did not apply, that impaired capacity, youth, dysfunctional upbringing were ploys: "[T]he defendant is trying to manipulate you to swallow their excuses and to help this defendant evade full responsibility."

This Court condemned this type of argument in Garron, as explained in Pardo v. State, 563 So. 2d 77 (Fla. 1990). In Pardo, the prosecutor twice said Pardo was trying to "escape" justice or criminal liability. The trial court sustained the defendant's objections to both comments, admonished the jury not to consider argument of counsel as evidence, and admonished the prosecutor not to use the word "escape," but refused to grant a mistrial. On appeal, this Court agreed the remarks did not require a mistrial:

> The circumstances of the instance case are

> entirely different from Garron, in which the prosecutor repeatedly pointed to the insanity defense as a devious legal ploy. The remarks in this case were extremely brief, and the prosecutor drew no logical connection between Pardo's attempts to "escape" guilt and the validity of the insanity defense itself.

563 So. 2d at 79 (footnote ommitted).

The present case is much closer to Garron than to Pardo. The prosecutor's remarks here were not brief. The prosecutor referred to the mitigating circumstances as "excuses" eight times and told the jurors Urbin was using the mitigating evidence to "escape," "evade," "avoid," or "get out from under" responsibility for the crime five times. The prosecutor told the jury none of the mitigating evidence applied. In so doing, the prosecutor was attacking the validity of the concept of mitigation. The prosecutor in the present case did exactly what the prosecutor did in Garron: He pointed to legitimate mitigation as a devious legal ploy. The prosecutor's argument was patently incorrect, manipulative, misleading, highly prejudicial, and grounds for reversal.

8. Improper Attack on Defense Witness

The state contends the prosecutor's characterization of Urbin's mother as the "mistress of excuses" was relevant to assisting the jury in determining her credibility. Appellant

fails to see how attempting to disparage Mrs. Urbin's character by calling her names was attacking her credibility. In fact, the prosecutor did not challenge Mrs. Urbin's credibility.

10. Implying Life Sentence Could Result in Urbin's Release

The state contends appellant's reliance on Singer v. State, 109 So. 2d 7 (Fla. 1959), is misplaced. However, in Singer, this Court said:

> [T]he processes of government affecting the post conviction treatment of those involved as defendants in criminal proceedings are not the proper subject of arguments by either the State or the defendant, unless it be a subject properly in evidence before the jury.

109 So. 2d at 27-28.

11. Implying Life Recommendation Would be Irresponsible

In his initial brief, appellant argued it was error for the prosecutor to tell the jurors he was concerned they "may be tempted to take the easy way out," and might "not want to fully carry out [their] responsibility and [instead] just vote for life," under the United States Supreme Court's decision in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), and under Florida caselaw.

The state has responded this comment was "merely a rephrasing of the weighing instructions." Answer Brief at 11.

Appellant has found nothing in the instructions that tells the jurors voting for life is taking the easy way out or would be shirking their responsibility.

12. Inflammatory Victim Impact Argument

The state contends the prosecutor's repeated references to Jason Hicks and his family was fair comment because the purpose of a sentencing proceeding is to engage in a character analysis of the defendant. Answer Brief at 18. How is the good character of the victim (or anyone else, for that matter) relevant to the defendant's character? The victim's character sheds no light on the defendant's character. These arguments were intended to induce the jurors to base their sentencing decision on the good character of the victim, not on the character and culpability of Ryan Urbin, and thus were improper.

B. The Prejudice

Appellant and the state apparently agree on the standard of review for granting a new trial based on prosecutorial misconduct. In Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982), this Court said, "A new trial should be granted when it is `reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done.'" (quoting Darden v. State,

329 So. 2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704 (1977)). Where no objection was made, or objections were sustained and curative instructions given, a new trial nonetheless is required where the comments were "so prejudicial as to vitiate the entire trial." State v. Murray, 443 So. 2d 955, 956 (Fla. 1984); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984).

The state has cited a number of cases to support its position that a new trial is not warranted here. Answer Brief at 8. Unlike the cases relied on by the state, however, the prosecutor's closing argument here did not involve one or two brief comments. Like the argument condemned in Newlon v. Armontrout, 693 F. Supp. 799, 808 (W.D. Wyo. 1988), aff'd, 885 F.2d 1328 (8th Cir. 1989), the jury in the present case "was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing phase." Improper argument and comment appear on all but three or four of the thirty-page transcript of the penalty phase closing argument.

The prosecutor's denigration of the mitigation was particularly prejudicial. While the trial judge found two

statutory mitigating factors and five nonstatutory mitigators, the jurors repeatedly were told the entire case for mitigation amounted to nothing more than "excuses." This error alone vitiated the jury's advisory recommendation.

This was not all though. The argument was filled with inflammatory rhetoric about the crime and the defendant; blatant appeals to sympathy for the victim; misstatements of law; mischaractizations of the evidence; and coercive tactics such as telling the jury the prosecutor had already determining this was a death-worthy case, that future laws could result in Urbin's release, and that the jury had a duty to recommend death.

No curative instruction could have destroyed the influence of these arguments. Appellant is entitled to a new penalty trial.

Point III

THE IMPOSITION OF THE DEATH PENALTY IS DISPROPORTIONATE FOR THIS FELONY MURDER WHERE RYAN URBIN WAS SEVENTEEN YEARS OLD AT THE TIME OF THE OFFENSE, THE AGGRAVATING CIRCUMSTANCES ARE NEITHER NUMEROUS NOR COMPELLING, AND THE MITIGATING CIRCUMSTANCES ARE SUBSTANTIAL.

None of the cases cited by the state is comparable. The cases cited by the state involve either CCP murders, torturous murders, double murders, older defendants, or involve little or

no mitigation. See Bonifay (contract, execution-style murder by 17-year-old); LeCroy v. State, 533 So. 2d 757 (Fla. 1988)(double murder by 17-year-old), cert. denied, 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989); Shellito v. State, 22 Fla. L. Weekly S554 (Fla. Sept. 11, 1997)(little mitigation found by trial court); Moore v. State, 22 Fla. L. Weekly S619 (Fla. Oct. 2, 1997)(only mitigation was defendant's age of 19, which was given slight weight); Sliney v. State, 22 Fla. L. Weekly S476 (Fla. July 17, 1997)("particularly brutal" murder by 19-year-old with no significant prior history who was good prisoner); Mendoza v. State, 22 Fla. L. Weekly S655 (Fla. 1997)(no mitigation); Pope v. State, 679 So. 2d 710 (Fla. 1996)(premeditated murder for pecuniary gain), cert. denied, 117 S. Ct. 975 (1997). The present case, in contrast, was neither premeditated nor torturous, and involved substantial mitigation.

On page 36 of its Answer Brief, the state asserts the trial court found "that none of Urbin's mitigators were entitled to much weight." To the contrary, the only mitigator the court gave little weight was the absence of Urbin's father in his life. The court gave some weight to two statutory mitigators--age and impaired capacity--and five nonstatutory mitigators--drug and alcohol abuse, mother dysfunctional and in prison during Urbin's

adolescence, dyslexia, and employment history.

As for appellant's age, the state asserts, quoting Echols v. State, 484 So. 2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871 (1986), that "age is simply a fact, every murderer has one." This dicta was inaccurate then and remains so. Age has always been more than a fact in a death penalty case. The "chronological age of a minor is itself a relevant mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. 104, 116 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The state has not responded to appellant's argument that the application of the death penalty on Urbin is disproportionate and unconstitutional because of the extreme rarity of the imposition of the death penalty on juveniles in Florida and the even greater rarity of actual executions of juveniles. As appellant pointed out in his initial brief, no juvenile has been executed in Florida in over 40 years. Furthermore, the only two juvenile death sentences that have been affirmed by this Court and still remain in force involve much more egregious crimes than the present one. See Bonifay (contract killing); LeCroy (double murder).

The present case is neither the most aggravated nor the least mitigated of capital murders. This Court should vacate the

death sentence and remand for imposition of life imprisonment without the possibility of parole.

CONCLUSION

Appellant asks this Honorable Court for the following relief: Point I, reverse for a new penalty proceeding; Point II, remand for resentencing; Point III, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Assistant Attorney General Barbara J. Yates, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, RYAN J. URBIN, #136597, Florida State Prison, Post Office Box 181, Starke, Florida 32091, on this 31st day of December, 1997.

Nada M. Carey