IN THE SUPREME COURT OF FLORIDA

MICHAEL S. STOLL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER 93,276
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL DANA MARTIN AS A REBUTTAL WITNESS.

The state argues that the purported statement that Julie Stoll made to Dana Martin was admissible as proper rebuttal and further that the statement was admissible under the excited utterance exception and the state of mind exceptions to the hearsay rule. The state is incorrect on all three assumptions.

As to the allegation that the statement is admissible to show state of mind, the state does not contend that the victim's statement was admissible to show her state of mind since it is clear that the victim's state of mind was not relevant to any issue at trial. ***Correll v. State***, 523 So.2d 562 (Fla. 1988), cert. denied 488 U.S. 871 (1988); ***Woods v. State***, 733 So.2d 980 (Fla. 1999). Rather, the state seems to argue that the statement is admissible to show the defendant's state of mind. However, statements admissible under Section 90.803 (3), Florida Statutes (1997) are only admissible to show the **declarant's state of mind**, not a third person's state of mind. The state tries to argue that since the statement of Julie to Dana Martin also included purported statements of appellant that he threatened to kill Julie that these are somehow admissible. The problem with this argument is that such statement is double hearsay. There is simply no way to prove or disprove whether in fact the statements were ever made let alone whether they are truthful. These statements can in no way be considered admissible to show the defendant's state of mind.

The state's contention that the statement of Julie was admissible as an excited utterance must fail for several reasons. First, the trial court never determined that they fit the qualifications for excited utterance. Secondly, the state never argued that the statements were admissible as excited utterances. The

state may not argue for the first time on appeal that a statement is admissible as an excited utterance when such was never argued to the trial court. ***Young v. State***, 24 Fla. L.Weekly D2112 fn.1 (Fla. 5th DCA September 10, 1999); ***State v. Allen,*** 519 So.2d 1076 (Fla. 1st DCA 1988). Finally, the state argues that the statement was admissible to rebut appellant's pretrial statements that were admitted into evidence. However, it was the state who admitted these prior statements and thus should not be permitted to rebut them. The state cannot set up a strawman just to admit highly prejudicial testimony. ***Brown v. State***, 524 So.2d 730 (Fla. 4th DCA 1988); ***Lane v. State***, 459 So.2d 1145 (Fla. 3rd DCA 1984). Notwithstanding this argument, appellant himself repudiated the first two prior statements that he gave at the police station and thus, there was nothing to rebut. The state's attempt to argue that the statement was admissible to rebut appellant's trial testimony that he thought he had a happy marriage is utterly meritless since this statement by Julie in no way rebuts what appellant's thoughts were. Indeed, appellant never even knew that Julie made such statement until it was admitted at trial. While such statement would certainly show that Julie did not think that they had a happy marriage it in no way reflects on appellant's thoughts regarding the state of his marriage. In all the cases cited by the state, the statements were either confirmed statements of the defendants made by someone who actually heard the statements

as opposed to someone who merely heard someone else repeat the purported statements. Thus, the case law cited by the state is simply inapplicable to the instant issue. The testimony of Dana Martin was inadmissible and highly prejudicial. Appellant is entitled to a new trial.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 TO THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE A PRIOR STATEMENT OF A CO-DEFENDANT AS SUBSTANTIVE EVIDENCE OF GUILT OF THE APPELLANT.

Once again appellee argues that this issue is not preserved for appeal. Obviously appellant disagrees. When the state sought to admit the statement, the sole grounds they sought to admit it was that they wanted to rebut a charge of recent fabrication. (Vol. XII, 940-947) Defense counsel specifically objected and argued that they are not claiming any recent fabrication but the trial court simply overruled the objection and permitted the testimony. Thus, despite the fact that defense counsel may have cited an incorrect statute section the specific argument and objection was made to the trial court who clearly understood it and ruled upon it. This issue is preserved for appellate review.

Turning to the merits of the issue the state argues that the prior statement of Christopher Stewart was admissible to rebut a charge of recent fabrication: namely, that Stewart's trial testimony was induced solely because of his favorable

plea agreement. However, this is simply untrue. Appellant's argument below and continued argument on appeal is that Stewart's final statement to the police which indeed was consistent with his trial testimony was in fact a fabrication which was made after appellant had given his final statement to the police implicating Stewart in the murder. Appellant argues that it was this factor that caused Stewart to finally change his testimony. Thus, there was no charge of recent fabrication but rather a charge that Stewart changed his story virtually immediately after learning that appellant had implicated him. Therefore, admission of the prior statement of Christopher Stewart served only to bolster the credibility of Stewart which is clearly an improper reason for its admission. ***Chandler v. State***, 702 So.2d 186, 197 (Fla. 1997) Appellee argues that the admission was harmless yet this fails to recognize just how important the testimony of Christopher Stewart was. Without Stewart's testimony there simply was no case against appellant for first degree murder. This was a classic swearing match between Christopher Stewart and appellant. The improper bolstering of Stewart's testimony cannot be deemed harmless.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ADMITTING AN AUTOPSY PHOTOGRAPH OVER OBJECTION WHERE THERE WAS NO RELEVANCE SHOWN TO THE PHOTOGRAPH.

Appellee argues that the autopsy photograph in question (State Exhibit #8) was properly admitted because it had relevance. However this ignores the fact that Dr. Gore through whose testimony the picture was admitted, specifically stated that the picture in question was not necessary for his determination or his testimony. Therefore, the argument that appellee makes regarding relevance is speculative and belied by the record itself. In the instant case, although appellee paid lip service to the reasons why autopsy photographs are admissible, she fails to offer proof in the record itself to support these allegations. There is simply no way to say that the photograph was relevant to the medical examiner's testimony when the medical examiner himself said it was not relevant to his testimony. Surely the medical examiner would be the person who would be in the position to best determine this factor. Additionally, appellee argues that the admission of the

photograph was relevant to a determination of the heinous atrocious and cruel factor. However, there is no showing by appellee how this photograph illustrates that. Certainly an autopsy photograph which by its very nature reveals the body after the crime has been committed and after medical personnel have worked on it would not be an reliable source of proof of this aggravating factor. As to the argument that the photograph was necessary for identification of the victim, there were more than enough photographs of the victim entered into evidence to show identification. Additionally, identification was never in question in the instant case. Simply put, the autopsy photograph admitted as State Exhibit #8 was totally irrelevant to any material issue at trial. The only purpose of such photograph was to inflame the passions of the jury and to render the entire proceeding fundamentally unfair. Appellant is entitled to a new trial.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A PRIOR STATEMENT OF THE VICTIM.

Appellee acknowledges that when the state sought to admit the police report statement of Julie Stoll into evidence defense counsel objected and the trial court overruled this objection. Later when the state sought to have Julie Stoll's mother read the police report to the jury, appellant objected to the inherently prejudicial nature of this procedure to which the trial court agreed and refused to allow the state to permit Julie Stoll's mother to read this. The document was published to the jury in the normal manner. Appellee argues that defense counsel's failure to object to this matter, concerning the publication of the exhibit, has waived this argument on appeal. Appellant asserts that appellee has taken the preservation argument to an absurd level. The issue on appeal is the admission of the police report into evidence. Once admitted into evidence there is no way that a jury can be prevented from actually seeing the document. Appellant's objection was to the admission of the exhibit. The argument on appeal is the improper admission of

this exhibit into evidence. Appellant submits that it ill serves the state of Florida to have its representative make such a blatantly frivolous argument to this Court.

Police reports are clearly hearsay. Section 90.803, Florida Statutes (1997); ***Bolin v. State,*** 24 Fla. L.Weekly S273, 276 (Fla. June 10, 1999) Additionally, the police report is a prior statement of the victim which again is generally inadmissible to corroborate or bolster any testimony at trial. ***Chandler v. State***, 702 So.2d 186 (Fla. 1997) Once again, the state argues that this police report was admissible to rebut appellant's prior statements given to the police on the day that he was arrested. The problem with this argument is these statements were specifically repudiated by appellant that night. Despite this clear repudiation and acknowledgment that the statements were false, the state sought to have them admitted into evidence. Once admitted, the state then sought to rebut them. By setting up the strawman, the state should not be permitted to then admit otherwise inadmissible and highly prejudicial evidence. See generally ***Brown v. State***, 524 So.2d 730 (Fla. 4th DCA 1988); ***Lane v. State***, 459 So.2d 1145 (Fla. 3rd DCA 1984) The police report was clearly hearsay, inadmissible under any recognized exception to the hearsay rule. The prejudicial effect of it was enormous. The only purpose that it served was to show a propensity on the part of appellant to harm his wife. The admission was not harmless and requires this Court to order a new

trial.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE DEATH SENTENCE IMPOSED UPON APPELLANT IS DISPROPORTIONATE.

Appellee argues that the trial court correctly imposed the death sentence finding that it was proportionate notwithstanding the fact that Christopher Stewart was the actual murderer. Appellee's assessment of this issue, like that of the trial court, is simply incorrect. Christopher Stewart was the primary actor in this criminal enterprise. He and he alone inflicted all of the fatal injuries. If not for Christopher Stewart, Julie Stoll would probably still be alive. The trial court's determination that appellant was more culpable has no basis in fact or law.

Christopher Stewart was not the innocent person the state attempts to portray him as. While it is true he was only nineteen years of age, Christopher Stewart had already been less than honorably discharged from the military. While he may have had a problem with alcohol, there is no evidence that alcohol played any part in Christopher Stewart's actions that day. Appellant neither provided Stewart with financial incentives to kill Julie Stoll nor did he threaten Christopher

Stewart. Stewart himself testified that he did not know why he killed Julie Stoll since he had no problem with her. He simply could have said no. Yet, despite this, and his full confession to being the actual murderer in the instant case, the trial court found that the disparate treatment given to Stewart would be afforded no weight in determining the appropriate penalty for appellant. Contrary to the state's assertion, Stewart did have another place he could have gone: he could have returned to his family. The only reason that he was no longer living with his family is because of his refusal to curtail his drinking. There appears to be no other reason preventing Stewart from going back to his family.

It is axiomatic that the death penalty is reserved for only the most aggravated and least mitigated of first-degree murders. ***Woods v. State***, 733 So.2d 980 (1999) In reviewing a sentence of death, this Court must consider the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those decisions. ***Id. at 990***. Even assuming, arguendo, that the two aggravating factors found by the trial court are valid, death is not proportionate in the instant case. Appellant presented a compelling case for mitigation not the least of which was his lack of significant criminal history. Additionally, the disparate treatment given to Christopher Stewart, the confessed murderer, must be given significant weight.

The jury recommendation in the instant case was only seven to five. In rejecting the co-defendant's disparate treatment as a mitigating factor, the trial court placed a great deal of weight on the prior attempts of the part of appellant to murder his wife. However, there was no physical evidence of these prior attempts. Rather, the only evidence of any prior attempt on the life of Julie Stoll came from the testimony of both appellant and Christopher Stewart. It is respectively submitted that each of these individuals certainly had reason to blame the other. Without any physical evidence to support these prior attempts, it is just as reasonable to assume that Christopher Stewart and not appellant made the prior attempts on the life of Julie Stoll. There certainly was no evidence of any prior poisonings. There was no evidence of a plastic bag that supposedly was placed over Julie Stoll's head in attempt to smother her. In short, there simply was no evidence beyond the bare statements of Christopher Stewart, an admitted liar and murderer to support these "facts." For the state to take someone's life on such tenuous evidence, violates every principle of due process. Appellant's death sentence cannot stand as it is simply disproportionate in light of the totality of the circumstances and in comparison to other cases which have come before this Court.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate a judgement and sentence and remand the cause for a new trial. In the alternative, appellant respectfully requests this Honorable Court to vacate his sentence of death and remand the cause for re-sentencing to life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Michael S. Stoll, #E03861, Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 5th day of October, 1999.

_____

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14 pt.

_____

MICHAEL S. BECKER
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