IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA)	
)	
Appellant/Cross-Appellee,)	CASE NO. 94,989
)	
vs.)	
)	Circuit Court No. CR80-5117
FREDDIE LEE WILLIAMS,)	
)	
Appellee/Cross-Appellant.)	
_____)	

APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CROSS-APPELLANT'S REPLY BRIEF

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ARGUMENT

ISSUE:
WHETHER THE LOWER COURT ERRED IN DENYING, AS FACIALLY INSUFFICIENT, CLAIM I OF CROSS-APPELLANT'S MOTION FOR POST CONVICTION RELIEF WHICH ALLEGED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE GUILT PHASE OF HIS CAPITAL TRIAL?

Cross-Appellant's initial brief organizes the eight sub-issues of claim I of Mr. Williams's 3.850 motion into three broad allegations of ineffective assistance of counsel. First, defense counsel's rejection before the jury of Mr. Williams's claims of innocence and presentation of an incompatible avenue of defense; Second, defense counsel's failure to adequately investigate and present the defense of voluntary intoxication; and Third, defense counsel's failure to object to the prosecution's misleading definitions and examples of premeditation. In its Answer Brief, the State makes several assertions regarding each of these broad allegations that require reply.

1. Defense counsel's rejection before the jury of Mr. Williams's claims of innocence and presentation of an incompatible avenue of defense.

In its Answer brief, the State asserts that defense counsel did not reject the defendant's claims of innocence and did not concede the Defendant's guilt. (Answer brief at 13, 15). The State contends, instead, that defense counsel was merely arguing

that if the jury decided that the Defendant committed the crime, they should next consider the degree of the crime. (Answer brief at 13).

The State is correct that defense counsel did urge the jury that if they determined that the Defendant committed the crime, that they should consider whether the crime proven was that of a lesser included offense. However, during the course of this argument, defense counsel undeniably rejected the Defendant's claims of innocence and ultimately conceded the Defendant's guilt. Defense counsel indicated to the jury that he did not believe the Defendant's claims of innocence by, first, failing to argue or devote any time during closing argument to the Defendant's version of events; second, by employing language designed to distance defense counsel from his client's version of events; and third, by actually conceding the Defendant's guilt.

During the trial in this cause, the Defendant testified and maintained his innocence. (Vol. 7, R 1263-1265). He testified that on the night of Mary Robinson's death that he had left a gun on the dresser in the bedroom at home when he went out and that when he returned, Mary Robinson staggered toward him, already shot. He called the police and an ambulance. Williams v. State, 437 So.2d 133, 134 (Fla. 1983). However, despite the Defendant's testimony, virtually none of the defense attorney's closing argument was devoted to the actual innocence of the Defendant. Any

argument by defense counsel that the jury could consider the Defendant's claims of innocence was quickly followed by language amounting to a disclaimer, such as "I am not attempting to insult your intelligence." (Vol. 7, R 1334).

Furthermore, the specific language employed by defense counsel in closing argument indicated to the jury that counsel clearly did not believe his own client. Defense counsel stated, "I ask you not to be vindictive, not to be upset, and not to be mad at Freddie Lee Williams for lying to you, but consider instead what motive he would have for lying" and "No matter how many lies he may have told you, he doesn't have to prove anything. The state does." (Vol. 7, R 1264). The fact that such statements may have been preceded by qualifying language such as "If you believe that Freddie Lee Williams was not telling the truth," is of no consequence in light of the extremely strong language used by defense counsel indicating that the Defendant had been lying. The language employed by counsel could only convey a lack of belief in the Defendant's testimony. When defense counsel's closing argument is read as a whole, it is evident that defense counsel was not advocating the Defendant's version of events, but was instead proceeding under his own theory of defense -- that the Defendant committed the offense and that it was not premeditated.

Finally, defense counsel rejected the Defendant's claims of innocence by actually conceding before the jury that the Defendant

was the perpetrator. During the beginning of closing argument, defense counsel attempted to qualify his argument with such language as "if you believe the defendant committed the crime." However, in the end, counsel abandoned this effort. Defense counsel concluded closing argument by stating:

> I submit what happened in that scuffle, Freddie Lee Williams was there and he was trying to help her. *He shot the gun off. Maybe it was to scare her. Maybe it was to hurt her. She was wounded very badly.* He was there trying to help her. If he had wanted to kill her, he would have shot her again and again and again, but he didn't. (Vol. 7, 1339)[emphasis added].

This unqualified concession that the Defendant shot the gun which killed the victim, along with previous qualified concessions of the Defendant's guilt, nullified Mr. Williams's fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995). Nixon v. Singletary, 25 Fla.L.Weekly S59, 4-5 (Fla. Jan. 27, 2000).

Additionally, the State in its answer brief contends that the presentation of an alternative theory of defense was a "tactical decision" on the part of defense counsel which cannot support an ineffective assistance of counsel claim. (Answer brief at 13-15). However, defense counsel's failure to adequately investigate the Defendant's claims of innocence prior to rejecting them at trial (as alleged in Defendant's 3.850 motion) indicates that this was

not an informed, strategic decision on the part of counsel. Where there is little or no investigation, the court may conclude that the omission [or act] was a substantial oversight, rather than a legitimate trial strategy. LeCroy v. State, 727 So.2d 236, 243 (Fla. 1998), citing Rose v. State, 675 So.2d 567, 572-573 (Fla. 1996)(finding counsel's penalty phase performance deficient because it was "neither informed nor strategic," involved "a strategy which even he believed to be ill-conceived," and entailed "no investigation of options or meaningful choice.")

Moreover, even if this could be construed as a tactical decision, it was not one that defense counsel was permitted to make. Recently, this Honorable Court recognized that in certain situations, counsel for defense may make a tactical decision to admit guilt in an effort to persuade the jury to spare a defendant's life. Nixon, 25 Fla.L.Weekly S59, at 4-5. This Court noted, however, that the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. Id. In Nixon, as in the instant case, counsel for the defendant conceded the defendant's guilt before the jury in opening and closing statements. This Court held that such a concession of guilt amounted to a guilty plea before the jury. The Court stated:

> Although an attorney has the right to make tactical decisions regarding trial strategy, see Faretta v. California, 422 U.S. 806, 820 (1975), the determination to plead guilty

> or not guilty is a matter left completely to the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983)("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal...."); Brookhart v. Janis, 384 U.S. 1 (1966)(stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent.)

Nixon v. Singletary, 25 Fla.L.Weekly S59, at 5. Because this Court found that counsel's comments were the functional equivalent of a guilty plea, the court concluded that Nixon's claim must prevail at the evidentiary hearing below if the testimony established that there was not an affirmative, explicit acceptance by defendant of counsel's strategy. The Court further found that such a concession of guilt without the defendant's express permission was *per se* ineffective assistance of counsel and that no showing of prejudice under Strickland was required. Id. at 3-6; *citing* United States v. Cronic, 466 U.S. 668 (1984).

In the instant case, it is apparent from the Defendant's claims of innocence before the jury that he did not expect his defense counsel to concede that he was the perpetrator. Thus, under the circumstances, defense counsel's concession of his guilt before the jury amounts to *per se* ineffective assistance of counsel and no showing under the prejudice prong of Strickland is required.

Consequently, the lower court's denial of the Defendant's claim in this regard as facially insufficient was error.

2. Defense counsel's failure to adequately investigate and present the defense of voluntary intoxication.

Claim I of the Defendant's amended 3.850 motion alleges that defense counsel was ineffective for failing to adequately investigate and present the defense of voluntary intoxication. The motion specifically alleges that while arguing during closing that there was no premeditation, defense counsel argued to the jury that alcohol played a large part in the dispute between Mr. Williams and Mary Robinson. (Vol. 7, 1254-1258). Furthermore, several times during closing argument, defense counsel referred to the fact that the Defendant had been drinking and was intoxicated or drunk. (Vol. 7, R 1257-1258). In doing so, counsel effectively raised a voluntary intoxication defense by implying to the jury that intoxication may have negated the Defendant's ability to form a premeditated design to kill the decedent. (Vol. 7, R 1256-1258). Additionally, the Defendant's 3.850 motion further alleged that despite counsel's assertions of this defense at trial, defense counsel failed to do the proper investigation regarding Mr. Williams's drinking habits and history which was necessary to properly mount this defense. Defense counsel never requested any mental health evaluations of the Defendant, including psychological or psychiatric testing or consultation concerning the Defendant's

drinking habits. And no testimony was developed through lay or expert witnesses concerning the effects of alcohol upon the Defendant. (Vol. 7, R 1255). Moreover despite defense counsel's awareness of substantial evidence in the record that Mr. Williams was drunk at or around the time of the homicide, defense counsel failed to request a jury instruction on voluntary intoxication. (Vol. 7, 1254-1255).

In its answer brief, the State only responds to a portion of the Defendant's argument regarding counsel's failure to investigate and present a voluntary intoxication defense. The State merely argues that a voluntary intoxication instruction was not warranted under the evidence adduced at trial. The State wholly fails to address the argument regarding counsel's insufficient investigation of the defense of involuntary intoxication. In doing so, it is important to note that the State distorts the issue involved in this claim. The issue is not whether an involuntary intoxication instruction was warranted during the trial in this case.[1] Rather, the narrow issue presented in this appeal is whether the Defendant's 3.850 motion was sufficient to state a claim of ineffective assistance of counsel such that it should not have been summarily denied.

The Defendant's amended 3.850 motion sufficiently stated a

[1] Although the Defendant asserts that an involuntary intoxication instruction was warranted in this case.

claim for post-conviction relief where it specifically alleged that defense counsel was aware of substantial evidence in the record that Mr. Williams was drinking at the time of the incident; that defense counsel even argued to the jury that the Defendant was drunk; that defense counsel had presented a defense of lack of premeditation which included argument that the Defendant was intoxicated; that defense counsel failed to properly investigate the defense of voluntary intoxication by requesting mental health evaluations of the Defendant or by consulting lay or exert witnesses regarding the Defendant's drinking habits or the effect of alcohol on him; and, finally that defense counsel failed to request a jury instruction on voluntary intoxication. (The motion also contained as an appendix, a report by psychiatrist, Dr. Harry Krop, detailing Mr. Williams's history as an abusive drinker.) In light of these thorough and specific allegations, a prima facie claim for ineffective assistance of counsel was made with regard to this issue. The lower court erred in denying the motion as facially insufficient.

Interestingly, the State recognizes in its answer brief that the lower court's order regarding this issue was "less than comprehensive." However, the State argues in its brief that remand for a hearing is unnecessary as "the record refutes the Defendant's allegation regardless of whether or not the trial court's order lacked a thorough analysis of this issue". (Answer brief at 23, n.

7). In its attempt to illustrate this, the State cites to the transcript of the trial from the record on appeal (which was not included in the instant post-conviction record) in order to "refute" the Defendant's allegations. However, a trial court's failure to attach portions of the record refuting allegations of a post-conviction motion cannot be remedied on appeal by the State's attempt to furnish material refuting the petitioner's claim. McClain v. State, 629 So.2d 320 (Fla. 1st DCA 1993); Thames v. State, 454 SO.2d 1061(Fla. 1st DCA 1984). Moreover, even if such citations could correct the deficiency in the lower court's order, no citations to the record would be sufficient to refute the Defendant's claim in the instant case. Because the entire thrust of the Defendant's claim is that counsel failed to properly investigate the defense of involuntary intoxication in order to properly present this defense, an evidentiary hearing is necessary to resolve this claim.

3. Defense counsel's failure to object to the prosecution's misleading definitions and examples of premeditation.

The State argues in its answer brief that while the lower court did not find this allegation of error to be procedurally barred, it should have been raised on direct appeal. Kelley v. State, 569 So.2d 754, 756 (Fla. 1990). However, this issue could not be raised on direct appeal because counsel failed to object and preserve this issue. Where it is clear that an issue was not

preserved for appeal and the court could have affirmed for that reason, “such failure may be sufficient to constitute the ineffective assistance of counsel pursuant to a rule 3.850 motion.” Mannolini v. State, 2000 WL 763764 (Fla. 4th DCA June 14, 2000). Here the prosecutor defined premeditation as merely consciously doing something, leaving out the essential element of reflection. (Vol. 7, R 1262-1263). In Waters v. State, the Fifth District Court of Appeal held that allowing a prosecutor to define premeditation as “killing after consciously deciding to do so” and “operation of the mind” was error requiring reversal for new trial where these definitions failed to include reflection, the integral second requirement for premeditation. Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986). Consequently, failure to object to such reversible error is sufficient to state a claim of ineffective assistance of counsel. The lower court erred in denying Appellant’s claim as being facially insufficient.

4. Cumulative error and prejudice.

In its answer brief the State complains about the Defendant’s reliance upon the findings of facts contained in the lower court’s order regarding the denial of the Defendant’s 3.850 motion. The State argues, “.. . the trial court’s order on penalty phase mitigation was rendered after the evidentiary hearing and after the present claim was summarily denied. Appellant’s tactic of citing evidence developed on a separate claim well after summary denial of

the instant claim is questionable." (Answer brief at 23). However, there is nothing improper about the Defendant's "tactic." The trial court's order on penalty phase mitigation is merely the continuation of the court's previous order on the Defendant's 3.850 motion. Consequently, it is appropriately part of this post-conviction record on appeal. Fla.R.App.P. 9.140(g). Moreover, the Defendant's 3.850 motion for post-conviction relief alleged prejudice on each individual claim as well as cumulatively on all claims.[2] The penalty-phase claims raised in the Defendant's 3.850 motion are included within this argument concerning cumulative prejudice. Consequently, the lower court's rulings and findings of fact concerning the penalty-phase proceedings are relevant and necessary in the proper assessment of prejudice regarding the issues raised in this appeal.

CONCLUSION

Based upon the above-stated reasons argument and authorities, Cross-Appellant respectfully requests this Honorable Court to reverse the lower court's denial of Claim I, as being facially

[2] The motion states: "AS A RESULT OF NOT ONLY EACH INDIVIDUAL CLAIM HEREINBEFORE PRESENTED, BUT BECAUSE OF THE AGGREGATE PREJUDICIAL AFFECT OF THE ABOVE CLAIMS CONSIDERED TOGETHER, DEFENDANT IS ENTITLED TO POST-CONVICTION RELIEF AS REQUESTED."

insufficient and either remand the Claim for an evidentiary hearing or grant Mr. Williams a new trial.

CERTIFICATE OF FONT

I hereby certify that the font used in this brief is twelve-point Courier New, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the Honorable Robert Butterworth, Attorney General, by U.S. mail, to Assistant Attorney General, Scott A. Browne, 2002 N. Lois Ave., Suite 700, Westwood Center, Tampa, Florida 33607-2366 and to Freddie Lee Williams, on this 28th day of June, 2000.

Respectfully submitted,

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