IN THE SUPREME COURT OF FLORIDA

HARRY BUTLER,	:	
Appellant,	:	
vs.	:	Case No. SC95158
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

Appellant relies on the statement of the case and facts as presented in the initial brief with additions contained herein.

ARGUMENT

ISSUE ONE

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY CONCERNING PRIOR ACTS OF VIOLENCE ALLEGEDLY COMMITTED BY MR. BUTLER.

In the answer brief, Appellee asserts that the prosecutor's introduction of unsubstantiated prior acts of violence was proper cross-examination of three defense witnesses: Detective Marvin Green, Theodore Dallas, and Appellant. However, the repeated efforts of the prosecutor to malign Appellant's character by referring to irrelevant prior acts were beyond the scope of permissible cross-examination. Appellee argues that the prosecutor's cross-examination of Detective Marvin Green was appropriate to rebut an impression that the police unfairly targeted Appellant from the outset of the investigation. As defense counsel conceded below, the state was entitled to inquire regarding the detective's reasons for stopping and questioning Appellant. Defense counsel, on direct examination, candidly asked the detective if he had knowledge of Appellant's prior arrest for domestic violence. [V15:788-89] The state, however, used this opportunity to elicit the nature of the prior violent acts. Indicating to the jury that the prior acts were "violent" and "life threatening" was not necessary to establish a reasonable basis for the stop. [V15:792] Appropriately then, the trial court sustained defense counsel's objection to the prosecutor's questioning because

the unfair prejudice resulting from the questioning outweighed any evidentiary value that might be obtained.

The prosecutor applied the same tactic in questioning Theodore Dallas. After Dallas testified on direct examination that he could not recall any prior violent acts between Appellant and the Leslie, the prosecutor turned what should have been a path of limited inquiry into an avenue of inappropriate questioning. Appellee is correct in arguing the prosecutor could on cross-examination correct any misrepresentation by Dallas. See generally, Coxwell v. State, 361 So. 2d 148 (Fla. 1978) (Relevant facts may be elicited on cross-examination.). For instance, the prosecutor could have asked Dallas if he were aware of any prior charges brought against Appellant for domestic violence. Instead, the prosecutor--once again--introduced specifics acts of violence by noting that Appellant was accused of "pushing her [Leslie] down," "pushed her in the back," "put his foot on her throat choking her," and "struck [her]" [V15:822,825-26,827] The prosecutor went too far in cross-examining Appellant on irrelevant matters as did the prosecutor in Jackson v. State, 545 So. 2d 260 (Fla. 1989). In Jackson the defendant sought to undermine the credibility of his wife, the key state witness, by testifying that she had written him love letters while he was in jail awaiting trial. Id. at 262. The prosecutor used this opportunity on cross-examination to point out that the defendant had not been in jail awaiting trial but rather was in state prison following his conviction for the same offenses. Id. at 263. On appeal this court ruled that the prosecutor's inten-

tional admission of the defendant's prior convictions was reversible error. Id.; See also, Martin v. State, 411 So. 2d 987 (Fla. 4th DCA 1982) (Defendant's statement that police never got "anything from me" did not open the door to questioning concerning her prior convictions.).

Regarding the prosecutor's cross-examination of Appellant on collateral matters, Appellee maintains that this questioning was proper in order to show Appellant's motive and intent. Appellee reasons that if Appellant were aware that he had pending felony charges as a result of the March 11th domestic violence arrest, such knowledge would be relevant to show his motive for killing the victim. Appellee's argument, however, does not reveal why the domestic violence incident occurring in 1993 would be relevant to show Appellant's motive in 1997 or why it would be necessary to suggest to the jury that Appellant had "chok[ed] her [Leslie] to the point of unconsciousness." [V16:1073-74] These efforts by the prosecutor to introduce prior bad acts where such acts are clearly not relevant to prove motive or intent belie any suggestion that the prosecutor acted in good faith.

In addition, the prosecutor did not confine his questioning to the existence of felony charges: he asked Appellant about specific allegations of rape and kidnapping during which Leslie was allegedly "screaming." [V16:1070] Appellant concedes that some testimony concerning the March 11th domestic violence incident would be admissible to show Appellant's motive and intent, Officer Phillip Biazzo's testimony for example. But this evidence should

not include unsubstantiated allegations of serious felony offenses as were brought forth by the trial prosecutor. Furthermore, even if evidence surrounding this collateral incident has some relevancy, Appellee has not shown why the danger of unfair prejudice from the evidence outweighs any relevance.

Appellant argues that the above issue was not preserved during the trial below despite defense counsel's filing of a pre-trial motion on the issue and repeated objections during the course of the trial. [V4:657;V11:17-26;V15:795,822-24,826;V16:1070] One of the purposes of the requirement of an objection is to provide the trial court with an opportunity to correct errors. See, State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In the present case, the repeated objections and argument concerning the collateral evidence served this purpose. Although defense counsel may not have objected at every opportunity (and the opportunities were many), such objections were unnecessary when it was apparent the trial court had already ruled adversely on the matter. See generally, Spurlock v. State, 420 So. 2d 875 (Fla. 1982) (Repeated objection not required where to do so would be futile.); accord, Fleshman v. State, 736 So. 2d 1219 (Fla. 5th DCA 1999). For instance, defense counsel did not object to some of the prosecutor's references to collateral offenses after the trial court denied his general objection and denied a request to approach the bench. [V16:1070]

ISSUE TWO

THE TRIAL COURT ERRED IN PERMITTING AN UNQUALIFIED EXPERT WITNESS TO TESTIFY CONCERNING DNA EVIDENCE

Appellee stresses the scientific validity of the product rule calculation, but the validity of this calculation does not overcome the inadequacy of the DNA testimony below. An accurate product rule calculation requires accurate allele frequencies from a reliable population frequency data base. See, U.S. v. Shea, 957 F. Supp. 331 (D.N.H. 1997). The state has the burden of establishing the reliability of this data base. See, Murray v. State, 692 So. 2d 157 (1997). In the present case, the state's failed to meet this burden not because the claimed expert witness Jeannie Eberhardt used the product rule calculation but because she did not demonstrate the adequate knowledge of the data base and its formation as is required under Murray v. State, 692 So. 2d 157, and Brim v. State, 695 So. 2d 268 (Fla. 1997).

In addition, Appellee claims that any error with regard to the DNA testimony is harmless given other inculpatory evidence. This claim is not persuasive. Without the admission of the DNA evidence, the state has no physical evidence directly linking Appellant to the murder. Appellee points out other evidence of guilt. Although Appellant may have been angry at the victim and may have been in the vicinity of Leslie's apartment on the night of the murder, these facts do not establish a murder. Other evidence showing linking Appellant to the shoe that was found inside the dumpster does not strongly indicate guilt. Appellant admitted that

the shoe found in the dumpster was his, but he also testified that Dennis Tennell borrowed his shoes on the night of the murder. [V16:1059,1083] Furthermore, Martisha Kelly did not conclusively establish that the shoe was worn by Appellant on the night of the murder. She may have provided information that led to the discovery of the shoe; however, she denied telling the police the specific dumpster where the shoe could be found. [V16:1007] She knew Appellant, but she also knew Tennell.

ISSUE THREE

THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR A NEW TRIAL FOLLOWING THE DEFENSE'S DISCOVERY OF A PROBATION VIOLATION REPORT THAT WAS UNDISCLOSED BY THE STATE

Appellee makes several arguments in support of the lower court order denying Appellant's objection to the state's non-disclosure of a probation violation report. First, Appellee argues that the prosecutor was not aware of the report until the defense learned of its existence after the trial. As argued in the initial brief and unrebutted by Appellee, the state is charged with constructive knowledge of exculpatory material in the hands of other state agents. See, Gorham v. State, 597 So. 2d 782 (Fla. 1992). Consequently, the prosecutor's actual knowledge of the violation report is not necessary. Secondly, Appellee maintains that the defense had an equal opportunity to obtain the report. Although the defense had access to the report because it was a court record, this access is not tantamount to knowledge of the contents of the report. The defense had no reason to suspect Lola Young suffered from the serious hallucinations described in the report. Stated otherwise, the state had both access to the report and knowledge of its content; on the other hand, the defense, even with the exercise of reasonable diligence, could not have shared this knowledge without the state fulfilling its obligation under Brady v. Maryland, 373 U. S. 83, 87 (1963).

Appellee also claims that the exculpatory evidence contained within the violation report would not have been admissible. In

Green v. State, 688 So. 2d 301 (Fla. 1996), this court held that evidence of drug use is admissible if the usage impaired the witness's ability to observe an event. See also, Edwards v. State, 548 So. 2d 656 (Fla. 1989). Although the record does not establish whether Young's observance of Appellant was impaired by her drug-induced hallucinations, the state's non-disclosure of the violation report did not further an answer to this question. Without the exculpatory evidence withheld by the state, defense counsel had no reason to question Young regarding her drug usage or hallucinations.

ISSUE FOUR

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THE ONLY PROPOSED STATUTORY AGGRAVATOR HAD BEEN ESTABLISHED BY THE EVIDENCE

Concerning this issue, Appellant relies on the argument presented in his initial brief. This argument sets forth reasoning for holding that the misleading jury instruction is fundamental error.

ISSUE FIVE

THE TRIAL COURT ERRED IN FAILING TO CONSIDER A STATUTORY MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE DURING THE PENALTY PHASE OF THE TRIAL BELOW.

Appellant relies on the argument presented in the initial brief as to this issue.

ISSUE SIX

MR. BUTLER'S DEATH SENTENCE IS EXCESSIVE, DISPROPORTIONATE, AND IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

Appellee contends that the death sentence is proportionate in this case notwithstanding the presence of only a single aggravating factor. To support this contention, Appellee cites a number of cases where this court has upheld the death sentence even though only one aggravator had been established. Even a cursory reading of these cases reveals heinous factual circumstances that distinguish them from the domestic violence case at bar. See, Duncan v. State, 619 So. 2d 279 (Fla. 1993) (The defendant had a prior murder conviction.); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (The defendant, over an extended period, "beat, choked, starved, confined, emotionally abused and systematically tortured Lazaro," a child-victim.); Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (The defendant had a prior murder conviction.). Contrary to Appellee's contention, a comparison of these cases with the present case--as is necessary for proportionality review--supports a finding of a disproportionate death sentence. Similarly, Appellee cites Orme v. State, 677 So. 2d 258 (Fla. 1996), as an example of a case involving a lover's quarrel and strangulation, but Appellee fails to mention that the killing in that case, which this court upheld, was designed to further both a sexual assault and a robbery.

Appellant acknowledges that not every death sentence arising out of a domestic confrontation will be disproportionate. Appellee

notes Spencer v. State, 691 So. 2d 1062 (Fla. 1997), where this court stated that the death penalty is often disproportionate in domestic violence cases because the CCP aggravator is not established. This statement in Spencer is consistent with the reluctance of this court to sustain the death penalty in cases, such as the present one, involving a heated domestic confrontation. As in the cases noted in Spencer where the death sentence was held disproportionate, the CCP aggravator is not present in the instant case. Finally, even though the death sentence was upheld in Spencer, this court was quick to note the existence of two aggravating factors, HAC and a prior violent felony. Id. at 1065. This finding contrasts with the single aggravator present in Appellant's case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2002.

Respectfully submitted,

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