

IN THE SUPREME COURT OF FLORIDA

LEO EDWARD PERRY, JR.,

Appellant,

vs.

CASE NO. SC96499

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Leo Edward Perry, Jr., relies on his Initial Brief to reply to the State's Answer Brief with the following additions concerning Issue III. The Appendix attached to this brief will be referenced with "App." .

STATEMENT OF FONT SIZE

This brief has been prepared using courier new, 12 point, a font which is not proportionally spaced.

ARGUMENT

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE DEFENDANT'S EX-WIFE AS A STATE WITNESS AND TO ELICIT ON DIRECT EXAMINATION TESTIMONY OF IRRELEVANT, SPECIFIC, UNCHARGED ACTS OF VIOLENCE WHICH CONSTITUTED EVIDENCE OF NONSTATUTORY AGGRAVATION.

Evidence Not Admissible To Prove CCP

The State contends that the testimony of Melissa Perry about the conversation she had with Leo Perry, sometime before February 1991, about knives and that a small knife could kill someone with a cut to the jugular vein was relevant to prove the crime committed in 1997, was cold, calculated and premeditated. (Answer Brief at 20) Initially, the State never asserted this theory for admission of the evidence at trial.¹ (T7:1283-1284, 1293-1294) This argument is also without merit because the conversation was six years before the crime in this case and was about Melissa's fear of large knives, not any intended method or

¹The State's only basis for asserting the admissibility of this evidence was that the defense opened the door to evidence of violence during it's guilt phase presentation. (T7:1283-1284) The defense objected on relevancy grounds. (T7:1289, 1293) During the State's closing penalty phase argument, the prosecutor argued this evidence was probative to prove CCP which prompted a defense objection and motion for mistrial. (T8:1481-1482)

plan to kill. (T7:1293-1294) The conversation was irrelevant since it was both remote in time and remote in subject matter.

In Kormondy v. State, 703 So. 2d 454 (Fla. 1997), the trial court allowed the State to introduce evidence that the defendant, after his arrest and while in jail, threatened to kill the surviving victim from the crime because she could identify him. The theory for admission was that this post-arrest threat to kill was probative of the aggravating circumstance of avoiding arrest and witness elimination. This Court held the evidence was erroneously admitted because its probative value was too remote and speculative:

First, the State attempts to distinguish Kormondy's alleged statement on the ground that it was specific as to Cecilia McAdams and Willie Long whereas Derrick's alleged statement [Derrick v. State, 581 So.2d 31 (Fla. 1991)]indicated a general intent to kill again. The specific nature of Kormondy's alleged statement, the State argues, makes it relevant to the avoid arrest aggravating factor. We disagree. In the circumstances attending this case, we cannot find that a statement allegedly made in jail (after the relevant criminal episode) as to a future intent to kill sheds any light on Kormondy's intent at the time of the crime. Indeed, Mrs. McAdams was not killed when her husband was shot. Further, Kormondy did not kill Long, despite having opportunities, after having confessed to him. His sentiment about future killings seems to have arisen after capture. It is simply too prejudicial to allow such speculative evidence to prove Kormondy's intent at the time of the shooting....

Kormondy, 703 So.2d at 462-463.

The evidence the State introduced in the instant case was even more remote and speculative than the evidence introduced in Kormondy. First, the evidence was remote in subject matter. In a casual conversation with his wife, Leo Perry merely told her that she should not fear large knives any more than small ones because a small knife could kill someone quickly by cutting the jugular vein. (T7:1293-1294) Perry never said he had killed or intended to kill anyone using that method or any other method. His comment about cutting the jugular vein was merely a statement recognizing a commonly known fact about human anatomy. Second, the evidence was remote in time. This casual conversation occurred six years before the crime in this case. (T7:1296) Assuming for argument that Perry had said he intended to kill someone during that conversation with his wife, such a statement made six years before the crime is hardly probative of a state of mind at the time of the crime.²

The State relies on Trease v. State, 25 Fla. L. Weekly S622 (Fla. Aug.17, 2000) and Marquard v. State, 641 So. 2d 54 (Fla. 1994), in which this Court held that, under the facts of those cases, evidence of the defendants' knowledge of martial arts was

² In Hardy v. State, 716 So. 2d 761 (Fla. 1998), this Court held a general threat to kill a police officer, if confronted, made several weeks before defendant killed an officer who stopped him insufficient to support a CCP finding.

admissible in guilt phase. (Answer Brief at 20) These cases are distinguishable and offer no support to the State. In Trease, the holding was nothing more than a bare statement in a footnote. Trease, 25 Fla. L. Weekly at S625 n.5. In Marquard, this Court found no abuse of discretion in the trial court's admitting into evidence in the guilt phase testimony about a discussion between Marquard and the co-perpetrator of the homicide, Abshire, in which they planned and discussed the murder. These discussions included comments from Marquard about how to do a "silent kill" by stabbing someone right into the heart from behind or from the front and cutting the throat. The victim had been taken by surprise from behind, stabbed in the neck and in between the fifth and sixth ribs. Marquard, 641 So.2d at 57. In contrast, the facts of the instant case are much different. One, the discussion Perry had with his wife had nothing to do with planning a murder or discussing a method to carry out a planned murder. The discussion between Marquard and Abshire was part of the planning of the murder for which Marquard was on trial. Two, the discussion Perry had with his wife occurred six years before the homicide of Johnston. Marquard and Abshire discussed the plan to kill their victim shortly before the murder the two of them carried it out in the manner planned. Three, the discussion in Marquard was admitted

in the guilt phase as probative evidence of guilt based on Marquard's specific knowledge of the military-trained method of killing used on the victim. In the instant case, the evidence was admitted in Perry's penalty phase where the issue of guilt was no longer in question. Four, the method of killing Marquard and Abshire discussed was based on very specific, military-style, training and almost scientific in the placement of wounds. Perry's conversation with his wife merely stated a commonly known fact that someone can die from a cut jugular vein.

Evidence Not Admissible Because Defense Opened The Door

The State contends that the conversation about knives and the testimony about a fight Leo Perry had with a friend were admissible because Perry opened the door to such evidence during the guilt phase by testimony that he lacked a history of violence. (Answer Brief at 18-20) The State's Answer Brief makes this assertion without providing any references to the record. (Answer Brief at 18, 20) However, a review of the record reveals that the defense did not place Perry's character for nonviolence in issue during the guilt phase. Perry's testimony related to circumstances surrounding the offense. (T5:799-893) Perry testified that he never intended to harm Johnston or to

rob him of his property. (T5:876-877, 892-893, 962) On cross-examination, the prosecutor asked Perry a hypothetical question about whether someone might intentionally kill to avoid being caught, and Perry, in his response, said that he did not intend to kill Johnston and that he had never been involved in a crime where he intended to kill anyone. (T5:944) As he did in his statement to the police which was admitted in the State's case (T3:461), Perry said he used the boot knife he carried for protection in this offense. (T5:856-858,923) Perry said that, before this incident, he had never before had to use a knife or other weapon to protect himself. (T5:955) In response to the prosecutor's questioning on cross-examination, Perry said that he had five convictions for crimes involving dishonesty or false statement. (T5:909) Perry had two felony convictions for grand theft and receiving stolen property and three misdemeanor convictions for petit theft charges, according to discussions between the court and counsel held outside the presence of the jury. (T5:905-908) This testimony did not open the door to the evidence of the fight or the conversation about knives. The State's position has no support in the record.

Finally, the State asserts the evidence is admissible to rebut the statutory mitigating circumstance of no significant history of prior criminal activity. Sec. 921.141 (6)(a) Fla.

Stat.³ First, this was not a basis the State asserted as grounds to admit the evidence. (T7:1283-1284, 1288-1294) Second, the defense had not yet made a decision to assert reliance on this mitigator at the time the evidence was admitted as later discussions about jury instructions reveal. (T7:1288-1294, 1361; T8:1372, 1377) In fact, the prosecutor, during the instruction conference, specifically questioned defense counsel if the defense intended to rely on this mitigating factor. (T8:1376-1377)(App.) This demonstrates that the prosecutor was not relying on the rebuttal theory for admission of the evidence earlier in the case. (T8:1376-1377)(App.) Indeed, the erroneous admission of this prejudicial evidence may have prompted the defense to choose to include the instruction on this mitigating circumstance to ameliorate the impact of the evidence. (See, discussion in Initial Brief at 56-57) Furthermore, waiving reliance on the mitigating circumstance in order to preclude the introduction of such prejudicial evidence was no longer an option for the defense. See, Maggard v. State, 399 So.2d 973 (Fla. 1981).

³ Perry is assuming the State intended to refer to statutory mitigating circumstance that the defendant had no significant history of prior criminal activity as defined in this statute. The Answer Brief, without statutory reference, mentions "...the statutory mitigator of no prior violent criminal activity" and "...the statutory mitigation of no prior violent felony conviction." (Answer Brief at 20-21)

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Leo Edward Perry, Jr., asks this Court to reverse his judgment and sentence and direct that he be discharged on the first degree murder and a judgment for second degree murder be entered. If this Court does not reverse the first degree murder conviction, Perry asks this Court to reverse his death sentence and remand for entry of a sentence of life imprisonment. Alternatively, Perry asks that his death sentence be reversed, and he be afforded a new penalty phase proceeding with a new jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Barbara J. Yates, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, Leo E. Perry, Jr., #P06489, Florida State Prison, Post Office Box 181, Starke, Florida 32091-0181, on this ____ day of October, 2000.

W. C. McLAIN