

IN THE SUPREME COURT OF FLORIDA

MARLIN LARICE JOSEPH,

CASE NO.: SC20-1741

Appellant,

LOWER CASE NO.:
2017CF012413AXXXMB
15th Judicial Circuit

vs.

STATE OF FLORIDA,

Appellee.

_____ /

REPLY BRIEF OF APPELLANT

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ISSUE I

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT/APPELLANT'S MOTION TO EXCLUDE WITNESSES, AS TO THE FIREARM WITNESSES.

Appellant, MARLIN LARICE JOSEPH, stands by his Initial Brief, supplementing with the following.

Appellant properly, and timely, filed his motion to exclude the testimony of Omar Felix, the State's firearms expert (r. 527-28). His motion was filed on the same day the State, in a very untimely fashion, provided him their ballistics evidence; which happened to be the day immediately before the commencement of jury trial for these capital death penalty felonies. Contrary to Appellee's inference in her Answer Brief, when else could Appellant have filed this motion? The fact that the trial was due to start the very next day, only highlighted the State's tardiness in providing this significant discovery.

Ballistics evidence was a significant and substantial factor in this trial, as the State sought to infer, and, more than that, verify that only one gun was used in the killing of these two people. The otherwise qualified

firearms expert that the Appellant had already procured was not, in fact, a tool mark expert (t. 1090-93). The need for that specific expertise set only became apparent and known only the day before trial commenced. It could be done no sooner. Appellee may have misapprehended the nature of this issue that arose in this untimely fashion, and with no wrongdoing on the part of Appellant.

The motion to exclude the untimely discovery and witness came on for hearing the morning of February 20, 2020, prior to the first witness being sworn (t. 1082, 1088-90, 1149).

When Appellant explained the motion and situation, the Court extraordinarily inquired whether Appellant's counsel might want to use Mr. Felix, the State's own expert (t. 1091). Appellant replied no (t. 1091). He also vouchsafed that J.A.C. did not have tool mark experts, as he had so inquired (t. 1091).

The trial court, after further discussion and argument, then went on to find that the State had committed a discovery violation. Despite Appellant's argument as to why a defense expert was necessary, the trial court found

the violation to be inadvertent (t. 1102) and not prejudicial (t. 1110), even though Appellant explained that the theory of his defense would be subject to change with the significant addition of an appropriate expert (t. 1110). At no fault of Appellant, his previously obtained expert was not qualified to testify as to this late and significant evidence and testimony. Appellant was thoroughly prepared for trial as to the evidence as it existed through the day before trial. But he needed to either have this witness excluded, or the Court to fashion another fair remedy.

However, the trial court denied exclusion since, as the trial court stated, "as from what I've heard, this only corroborates what ---". She was then interrupted by the State: "We anticipate." (t. 1110). The trial judge was, in effect, prejudging the issue based on one party's anticipated testimony.

The trial court did authorize Appellant to keep looking for an appropriate expert, but granted no continuance nor fashioned any other remedy of any sort.

Trial began (t. 1115). When Mr. Felix was testifying on cross, the following occurred:

Q. Well, you said it's a long list of criteria. How long?

- A. Well, it's not a long list of criteria. The criteria is rather long criteria describing what it is. It's something called sufficient agreement, and the sufficient agreement has to do with how much you see under the microscope to determine whether two tool marks come from the same source.
- Q. Now, I'm not an expert in this by any stretch, and I didn't stay at a Holiday Inn Express last night, so I've read an article, something about a database and I think I asked you -- when we talked last time. What is the database we talked about? And that's different from the analysis that you did, is that correct?
- A. Correct. What the database that we're talking about is, it's a database called NIBIN. Now, NIBIN is just an acronym, N-I-B-I-N. And that acronym stands for the National Integrated Ballistic Information Network. Now, all the database is is a database that is worldwide actually, and what happens is that a cartridge case, for example, let's say with one of these casings, would be put into this database. Now, what the computer does is it actually takes an image of the markings that I see under the microscope. It takes a computer image of it. It actually does it in two different ways. It does it in two dimensional, does it as a photograph, but it also does it in three dimensions. Now, what happens is then that information, that photograph is there then compared to anything in that database. Now, this database is millions and millions of casings from all over the world, and what the database does is then once it compares all of them, says, well, there's a possible match between this casing and another casing. So that's what that database does, is it just compares and it says there's a possible match here, we have to look further.
- Q. So, there's a computer program that compares a known

cartridge casing, a known casing to another casing and says these match, is that what you're saying?

A. No, it doesn't say that they match, it just says there's some similarity here, so further, there's some further investigation that needs to be done. So what would happen is if -- let's say the computer says, look, these two have very similar markings and the results come back to the analyst. The analyst would then have to retrieve that evidence, take it to the microscope and then determine whether it was from the same firearm or not. So, all the computer does is it's able to filter quickly millions and millions of images of things that look like that casing, and that's all it does. It assists in looking to see if the firearm or the same firearm has been used in other crimes.

Q. And how does it get into the database?

THE COURT: Could the attorneys approach?

(The following bench conference took place.)

THE COURT: How is this relevant? There's no database information here.

MR. SUSANECK: Yes, there is, Your Honor.

THE COURT: No, there's --

MR. SUSANECK: I can show you the report.

THE COURT: It says it was run in a database and there was nothing, am I correct? I thought it -- okay, so --

MR. SUSANECK: But I get to establish that they know --

THE COURT: You want them -- he's already said it, so,

what --

MR. SUSANECK: It's leading up to the question of whether or not it was run in the database.

THE COURT: So, what is it relevant to this crime whether or not this gun, or these cartridges were linked to another crime? How is that relevant?

MR. SUSANECK: It's not a question of whether or not they were linked to another crime.

THE COURT: No, the question is I want you to explain to me how this is relevant.

MR. SUSANECK: Because this is exactly what I'm talking about. This is the testing methodology. There is not --

THE COURT: It's not relevant. Move on.

(t. 1651-55).

While Appellant cross-examined Mr. Felix as best as possible in regards to this previously unknown and unascertained evidence, the trial court additionally cut off Appellant's cross-examination for no reason (t. 1654-55) and absent any objection by the State. It was peremptory, an abuse of discretion, unfair, and not substantial justice for the trial court to simply cut this questioning off, and all the more so in light of the surrounding and particular circumstances; of which the trial court was very

well aware.

The defense, as with the State, is entitled to a reasonable time to prepare, to investigate the facts and review the evidence, and to consult with witnesses. U.S. Const. Amend. 6, Fl. Constitution.

Appellant/Defendant in no way caused, or contributed to, the need for more time or another appropriate remedy. There was such last minute surprise evidence that the trial court did find it to constitute a discovery violation (t. 1098), but constructed no remedy. Proceeding in the fashion it did violated Appellant's fundamental and constitutional rights.

If not the requested exclusion, then an appropriate remedy should have been fashioned -- a continuance, delaying the testimony of Mr. Felix until the Appellant/Defendant could obtain its own expert, otherwise declaring it was willing and able to forego such an expert; or other appropriate redress. The onus was on the Court. The trial court erred, to the irremediable prejudice of Mr. Joseph, when the trial court denied the motion to exclude and failed to fashion any other appropriate remedy. Thomas v. State, 63 So.3d 55 (Fla. 4th DCA 2011) (issue preserved as to discovery violation when raised on first day of trial). And, State v. Schopp,

653 So. 2d 1016, 1020 (Fla. 1995) (the defense is procedurally prejudiced if there is a reasonable possibility that the Defendant's trial preparation or strategy would have been materially different if it reasonably could have benefited the defendant).

Thus, the harmless error standard for a State discovery violation does not focus on the discovery violation's effect on the verdict; instead, the inquiry is whether there is a reasonable possibility that the discovery violation materially hindered the Defendant's trial preparation or strategy. Scipio v. State, 928 So.2d 1138, 1149-50 (Fla. 2006). Appellant stated that yes, it did.

Lastly, for this portion of this issue, the trial court did not make an adequate inquiry into all the surrounding circumstances. Because the trial court did not require the State to determine the lack of procedural prejudice, and instead only inquired of Appellant how he would be prejudiced, the Richardson inquiry was inadequate. Thomas v. State, *ibid.*

Additionally, moreover, this ruling by the trial court, if herein affirmed, has the potential to cloud the long established foundational principle that

discovery must be full and fair, and by setting a lamentable precedent. The premise of the discovery rules that they are to be "construed to secure the just, speedy and inexpensive determination of every action" could be controverted, merely by delay on the part of the prosecution. Fla.R.Civ.P. 1.010.

With this ruling, the State could well argue, now or later, or at any time, that the untimely provision was inadvertent, and thus no remedy or other further action by the Court is necessary, irregardless of whether it, in fact, put defense counsel at a disadvantage, depriving them of a just and reasonable opportunity to prepare, prejudicing Appellant in his defense and cause.

This was error. It was not harmless. The trial court abused its discretion. This case should be reversed.

ISSUE II

THE TRIAL COURT ERRED IN ITS DETERMINATIONS REGARDING ADMISSIBILITY OF EVIDENCE FOR THE TRUTH OF THE MATTER VERSUS EVIDENCE TO IMPEACH A WITNESS OFFERED BY THE STATE. THIS ERROR WAS NOT HARMLESS.

Appellant stands by his brief, supplementing with the following.

Appellant's mother, Robin Denson, was first called as the State's lead off witness in this death penalty murder trial (t. 1148). After various preliminary and setting the scene questions (t. 1150-75), the State inquired about a conversation Mrs. Denson had with her son, your Appellant, Marlin Larice Joseph, prior to the sad events that bring us all here (t. 1175). The question, its response, and its follow-ups were as follows:

Q. Okay, but the two of you had a conversation?

A. Yes.

Q. Was Marlin upset during that conversation?

A. No, not really.

Q. Okay. What was his demeanor?

A. I don't, I don't know. Marlin was just Marlin, you know. He wasn't upset. He didn't show me any anger.

Q. Okay. So what was the topic of the conversation? What was Marlin saying to you?

A. At first he asked me if I received a text message.

MR. SUSANECK: Objection, hearsay.

THE COURT: Overruled.

BY: MS. WILENSKY:

Q. You can answer.

A. He asked me if I received a text message and I told him what text message.

Q. Okay.

A. And I said I haven't received the text message.

Q. Okay. He tell you about the text message?

A. He showed me but I just didn't really pay attention and he was saying like Kaladaa, somebody, like sent him a text message.

Q. Okay. At some point did Marlin start being disrespectful to you?

A. I mean he wasn't being disrespectful to me per se. His concern was, was Christina. I mean she's not here in the courtroom today but that's Kamare's mom. You know he was asking me was she coming to pick Kamare up. I mean, as I told you all before when I came to your office, the type of father that Marlin is, he don't care the kids there on the weekend. I just want get everybody to --

Q. Well, just wait for a question, okay?

A. Okay.

- Q. All right? So you were talking about Marlin as a father. Is Marlin a protective father over his daughter?
- A. I mean anybody's be a protective father over their daughter.
- Q. Is Marlin?
- A. I mean he, he, he care about his daughter, you know.
- Q. Okay.
- A. As his son, so it's not one-sided.
- Q. Okay. And it's your, it's your testimony here today that Marlin was not being disrespectful?
- A. I mean not disrespectful to me. He wasn't being disrespectful to me.
- Q. Okay. Was he being disrespectful to somebody?
- A. Again, as I was, you know, you know, trying to tell you, you know, he asked me about Christina and was she coming to pick up Kamare. I told him I contacted Christina and Christina said she was coming to get Kamare. Type of mom Christina is, she take her time about coming to get her kids when we have them, so there always been an issue.
- Q. Okay.
- A. So, you know, he went to, you know -- you know, I'm not saying that he was upset, you know, but he was like, you know, this may be the time, you know, pick up her kids, you know, because he couldn't afford to lose his job, so.

- Q. Okay. And it's your testimony he wasn't being disrespectful to you?
- A. Not to me. He was just talking in general.
- Q. Okay. Ms. Denson, do you recall after all of this happened going to the police station and speaking with the detective?
- A. Yes.
- Q. Okay. At the West Palm Beach Police Department?
- A. Yes.
- Q. Okay. That was about an hour or two after everything happened, right?
- A. I don't know if it was that long.
- Q. Okay. It was shortly after?
- A. Yeah.
- Q. Okay. When everything was fresh in your mind?
- A. I don't know what was fresh. I was in shock during that time, so.

(t. 1175-1179).

The Prosecutor failed to understand that testifying that she was in shock is not an inconsistent statement by Mrs. Denson. Brooks v. State, 918 So.2d 181 (Fla. 2000) (Florida courts have held that a witness's

inability to recall making a prior statement is not synonymous with providing trial testimony that is inconsistent with a prior statement, unless the lack of recollection is fabricated).

The Prosecutor also failed to understand the nature of shock. From her examination, it appears she believed that shock is evanescent. And further, it appears she believed that recognition of shock cannot be delayed.

Q. Okay. But that was right after everything happened?

A. Yeah.

(t. 1179)

The Prosecutor appeared not to understand that shock is a critical condition, and that, among its causes, is emotional and psychological trauma. Mrs. Denson had just beheld the death of her partner, Kalaada Crowell, and that of her partner's daughter also. When a person is in shock, her organs are not getting enough blood or oxygen. Mayo Clinic Basics, online site, 2021.

Nevertheless, the State continued its examination of its witness:

Q. And when you were there talking to Detective Creelman at the West Palm Beach Police Department, you told, you said that Marlin kept going on and on --

MR. SUSANECK: Objection, hearsay, and improper attempted impeachment.

THE COURT: Okay. Can you guys approach?

(The following bench conference took place.)

MR. SUSANECK: Sorry to take so long to get up here.

THE COURT: Why is it improper impeachment? She said she did not say he was being disrespectful. I don't have the statement to know if it's a proper impeachment.

MR. SUSANECK: At the time of the statement --

THE COURT: I mean the time was, you're asking for her to have a chance to review it. She can see the statement, you can point it out to her and see it, but it's not a refreshment but, yes, she can see the statement, if you want to --

MR. WAGNER: And you have to lay a predicate for a prior inconsistent statement.

THE COURT: Well, she did. She said it was with Detective Creelman hours after the incident. I mean what more -- at West Palm Beach Police Department.

MR. WAGNER: But before she can confront her, she should have a chance to look at it.

THE COURT: I don't believe she has to. I believe if you ask them, she may see it, but she still can, she can see it as you're confronting her. I think that's what the rule says. Okay? So, overruled on both and just show her the statement as you're impeaching her so that she may see it.

MR. SUSANECK: And, Your Honor, part of the objection is her saying what she said first. I think it's did you make a different statement, ask her to look at it and then when she looks at it --

THE COURT: She doesn't have to look at it. You're getting it confused with refreshing. That's not refreshing. She's allowed to impeach her own witness, and impeaching, she has to confront her with the statement. You do have to, you should be asking her did you ever make a different statement.

MS. WILENSKY: Sure.

THE COURT: And if she says no, then you can impeach her, so I'll sustain it on that minor technicality.

(t. 1179-81).

This was an abuse of discretion, and error, on several levels. The examination came in the wrong order for it to be compliant with law. Rowe v. State, 128 Fla. 394, 174 So. 820 (1937) (the first objection, that a proper predicate had not been laid, was without merit, for the time, persons present, place, and words said to have been used are embraced by the question). Here, there was no such embrasure. The State was improperly acting as if Mrs. Denson had already admitted the predicate that the State failed to lay; and that the Court failed to uphold. And, Ramsammy v. State, 43 So.3d 100, 108 (Fla. 4th DCA 2010) ("without deciding the issue, we

note that Ryan was never asked to explain or deny the prior statement prior to being confronted, on the record and in the presence of the jury, with the admission, via the prosecutor's questions of her hearsay statement) (decided on other grounds).

Ramsammy further holds that the admission of such a hearsay statement into evidence over objection without laying this predicate is reversible error. Ramsammy, Id. And, that even if this testimony was properly admitted to impeach, it was not to be used as substantive evidence.

Over Appellant's repeated objections, (t. 1179-1180), the trial court abused its discretion and admitted their evidence. The State was permitted to continue its examination unabated. The trial court also advised the State on what she believed was the proper method to impeach, thus departing from her role as impartial arbiter, and instead aided the State (t. 1181). This was also an abuse of discretion as to this impeachment issue. The State was then empowered to continue its improper, unlawful impeachment examination.

The same argument and law applies to the testimonies of Appellant's

brothers. The State kept putting the cart before the horse, so to speak: the trial court continued to abuse its discretion in authorizing the State's methodology and process.

Permitting this procedure by the State should have been outweighed by the law and rules and its dangers of confusing the issues and the dichotomy of substantive evidence versus evidence solely for impeachment purposes, and significantly unfair prejudice. It is equally the duty of the Court to ensure that the State is held to its burden of proof when someone is charged with a serious crime and liberty and life are at risk. Ballard v. State, 923 So.2d 475 (Fla. 2006).

This cause should be reversed.

ISSUE III

THE TRIAL COURT ERRED WHEN IT PERMITTED OUT-OF-COURT IDENTIFICATIONS OF APPELLANT, MR. JOSEPH, TO BE ADMITTED AS SUBSTANTIVE EVIDENCE IN THE CASE-IN-CHIEF WHEN THE SAME WITNESSES PROVIDED IN COURT TESTIMONY.

Appellant rests on his Initial Brief.

ISSUE IV

THE TRIAL COURT ERRED WHEN IT PERMITTED IRRELEVANT EVIDENCE TO BE ADMITTED, OVER APPELLANT/DEFENDANT'S OBJECTION.

Appellant stands by his brief, supplementing with the following.

While Appellee's argument may be appealing, and at first blush appear compelling, it is but a pyramiding of rank assumptions and inferences. The admission of Jeshima Tarver's testimony and evidence that she first heard Appellant "yelling" (t. 1611) about Kyra Inglett, one of the victims here, "two days ago" (t. 1611), was simply irrelevant.

As it was irrelevant testimony, not providing material evidence of any sort, but inherently carried prejudicial inferences despite its complete irrelevancy, admitting this question and answer was error. F.S. 90.401. It was an abuse of discretion for the Court to have permitted its entry over the objection of counsel, as it was made in plain error, and stifled Appellant's constitutional and fundamental rights. The trial court permitted a not so subtle influencing of the jury. (t. 1611).

This testimony provided no insight into the issues, gravamen, or truth of this case.

That Appellant yelled about Kyra about something unknown and

unascertained two days before the tragic deaths that bring us all here does not provide motive for the crimes charged. Nor is the simple fact of yelling a prior bad act. Motive is defined as "a reason for doing something, especially one that is hidden or not obvious". Oxford Languages (online). Testimony of prior bad acts, wherein testimony of wrongs that cannot be proven or which are barred from prosecution by the statute of limitations, are generally inadmissible to prove criminal conduct. Brown v. State, 719 So.2d 885 (Fla. 1998). Providing motive, Appellant concedes, is one such exception. However, this question and its response provided no motive; was inextricably intertwined with no aspect tending to prove the necessary elements of the crimes charged, contrary to the trial court's ruling. And, merely yelling about a child in no way constitutes a bad act. Annoyance, maybe; but not turpitude or malfeasance, which are necessary foundational elements of a bad act.

Appellant yelled about a child. So? There was nothing further to tie it to this cause in any way. Nor did the testimony go to proving a bad act. Yelling, without more, is simply not a prior bad act. If it were, all but the most sainted amongst us would be guilty.

Further, this statement by the witness underlined no propensity on

the part of Appellant to engage in the charged conduct. It established no propensity, nor trait, to kill people. It established only that he yelled about an eleven year old. This evidence was not relevant, it was not authenticated, it was hearsay, and it was not privileged.

Among the traditional reasons for prohibiting this sort of bad act evidence was that this evidence appeared too, or overly, probative, tending to over-persuade the jury. People v. Alcala, 685 P.2d 1126, 1140 (Cal. 1984) (such evidence is deemed objectionable not because it has no appreciable probative value, but because it has too much); Old Chief v. United States, 519 U.S. 172, 181 (1977) (quoting Michelson v. United States, 335 U.S. 469, 475-76 (1948) (it is said to weigh too much with the jury and to so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge).

Admitting this evidence was error.

It was patently not harmless, as the trial court erroneously found it to serve to establish a motive. This evidence harmed Appellant in both the guilt and sentencing phases; and irremediably so.

This cause should be reversed.

Appellee also raises Williams Rule issues in her Answer Brief as to this issue. The Williams Rule, F.S. 90.404, reads in pertinent part, as follows:

90.404 Character Evidence; when admissible...

(2) OTHER CRIMES, WRONGS, OR ACTS. —

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(d)1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (2), paragraph (b), or paragraph (c), no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Appellant never claimed this was Williams Rule evidence. After all, unknown yelling about someone to another unknown person is not a bad

act. It does not pass any smell test. Furthermore, the alleged "bad act" was not proved by the required standard of clear and convincing evidence, nor was it ever specified what the alleged bad act was.

Moreover, the State provided no written notice to Appellant prior to trial of the evidence's nature, nor of the purpose for which it was being offered. If Appellee had complied with law, if it was intending this as Williams Rule evidence, and thus had filed the required notice to Appellant, he would have filed his motion in limine so that the trial court, pre-trial, could determine whether the State had met its requisite burden of proof, whether the evidence was relevant to one of the narrow permitted issues, and whether its relevance was or was not outweighed by the danger of unfair prejudice to the Appellant. If the trial court had then ruled on its admission, if it had been found admissible, the trial court should then have instructed the jury that the evidence did not come in so as to prove propensity to commit the crimes charged, but only for the narrow purpose, i.e., motive, for which it was admitted.

None of this happened.

Appellant respectfully asserts that Appellee has misapprehended the nature of this issue. However, should her argument be validated by this

Court, we thank her for pointing out the State's and the Court's reversible error in this regard.

Admitting this testimony was fundamentally unfair. It was not harmless, either as to the guilt phase or to the penalty phase.

This cause should be reversed.

ISSUE V

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT/DEFENDANT'S MOTION TO DISMISS CHARGES IN THE ABOVE STYLED CASE AS A RESULT OF VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUIVALENT AMENDMENT IN THE GREAT STATE OF FLORIDA CONSTITUTION.

Appellant rests on his Initial Brief.

ISSUE VI

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT/DEFENDANT'S MOTION TO DISMISS CHARGES IN THE ABOVE STYLED CASE AS A RESULT OF VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUIVALENT AMENDMENT IN THE GREAT STATE OF FLORIDA CONSTITUTION.

Appellant stands by his Initial Brief, supplementing with the following.

Appellant filed his Motion to Interview Jurors (r. 1327-1329) May 29, 2020. The sworn affidavit of Robin Denson, filed concurrently with the Motion to Interview Jurors (r. 1330-1332) states that the information within the affidavit was first relayed to any member of Appellant's legal team on May 27, 2020, merely two (2) days previously.

The trial court denied this motion without any testimonial hearing (r. 1355-56). It refers only to earlier occurring events in this trial process. Given the gravity of the proceedings, and the gravamen of the situation, this was an abuse of discretion. Marshall v. State, 976 So.2d 1071 (Fla. 2008) (the trial court erred in summarily denying Marshall's juror misconduct claim, further observing that "it appears that" evidence could be submitted that could identify the purported juror who contacted Mr. Smith to

ascertain whether such misconduct took place). Although the facts in our case are not one hundred percent on point with the facts in Marshall, its precedential value is. There, the affidavit was based on a telephone call from a woman who claimed she had served on Marshall's jury. She told the affiant the following:

- (1) some jurors decided Marshall was guilty before the trial was over;
- (2) some jurors told racial jokes about Marshall;
- (3) some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates;
- (4) some jurors, despite the trial judge's order forbidding it, read and discussed articles concerning the trial.

Id. at 1074.

Inaccurate responses and problematic voir dire from the panel, based on what appear to have been untruthful or misrepresentative responses, prevented Appellant from the intelligent exercise of his rights to exercise challenges, be it for cause or peremptory. Further interview of the venire member in question was warranted; along with any appropriate follow-up,

including further, more detail specific questioning of the juror referenced in Mrs. Denson's affidavit.

The trial court erred to Appellant's prejudice when it denied him a hearing on the matter. Venire member or jury member, they apparently contaminated each other in the jury selection process in the case herein. Juror interview and/or interviews would have determined this information, and whether there was misconduct reaching down to the very foundation of the trial, warranting reversal and appropriate relief.

Additionally, Florida has applied a per se rule; so long as counsel exercises due diligence. A new trial is required whenever a juror fails to disclose material information that prevents counsel from exercising informed judgment during jury selection. De La Rosa v. Zegueira, 659 So.2d 239 (Fla. 1995).

Juror honesty and integrity during voir dire is an essential underpinning of the jury trial system.

"It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his

his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge." Zequeira, citing to Loftin v. Wilson, 67 So.2d 185, 192 (Fla. 1953), quoted from Rearcy v. Michigan Mutual Life Ins. Co., 111 Ind. 59, 12 N.E. 98 (1887)."

Thus, "a juror who lies his way into a courtroom is not really a juror at all," Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998).

Appellant should have been entitled to make a showing that there was juror misconduct, and to have a then determined appropriate remedy applied.

There is indeed a "very fine line that the courts must walk in investigating claims of juror misconduct without invading the confidentiality of juror deliberations". We respectfully assert that in this case, with its facts and circumstances, and given its most serious of consequences, the trial court fell on the error laden side of the line. Death is different.

This cause should be reversed. Appellant was prejudiced. The prejudice denied him his right to a fair and impartial trial. It is a case of life versus death.

ISSUE VII

ALTHOUGH THIS COURT HAS HELD THAT THE CONFORMITY CLAUSE OF THE FLORIDA CONSTITUTION FORBIDS PROPORTIONALITY REVIEW IN DEATH PENALTY CASES, IN REACHING THAT OPINION THIS COURT MISCONSTRUED THE UNITED STATES SUPREME COURT'S DECISION IN PULLEY v. HARRIS, 465 U.S. 37 (1984), ET AL, AND RENDERED FLORIDA'S CAPITAL SENTENCING JURISPRUDENCE ARBITRARY, CAPRICIOUS, AND UNCONSTITUTIONAL.

Appellant rests on his Initial Brief.

ISSUE VIII

AS THE AGGRAVATOR OF COLD, CALCULATED AND PRE-MEDITATED WAS ERRONEOUSLY FOUND, AND GREAT WEIGHT WAS PLACED UPON THIS FACTOR IN THE IMPOSITION OF THE DEATH SENTENCE, THE TRIAL COURT DID NOT PROPERLY WEIGHT THE SUFFICIENCY OF THE AGGRAVATING AND MITIGATING FACTORS SUCH THAT ITS DECISION WAS CONSTITUTIONALLY BEYOND REASONABLE DOUBT, NOR DID IT PROVIDE ADEQUATE SAFEGUARDS AND PROTECTIONS.

Appellant resets on his Initial Brief.

ISSUE IX

THE STATE DID NOT PROVE THE AGGRAVATOR OF ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL BEYOND REASONABLE DOUBT, THUS NEITHER THE JURY NOR THE TRIAL JUDGE PROPERLY FOUND IT. IT SHOULD NOT HAVE BEEN GIVEN GREAT, NOR ANY WEIGHT.

Appellant stands by his initial brief, supplementing with the following.

Further, as to Kyra Inglett, we do not know what she heard or did not hear when her mother was first shot (t. 1149-1616). That question was never asked nor was a response otherwise obtained. We simply do not know the order of the shots (t. 1713). She did not move, nor was she ever conscious, from the time she went down until the time she died. Based on Dr. Motte's expert testimony, we do not know that she felt any pain (t. 1703); nor that she was capable of feeling pain from the time of the first shot. We do not know that she was conscious at any time after the first shot. We also do not know whether she ran out of a sense of panic, or in order to get help, or out of panic for her life. We do not know that she was aware of her impending death.

Therefore, a finding of EHAC is not supported by competent evidence. As to Kyra Inglett, the evidence did not show that she was

conscious and aware of impending death. Williams v. State, 37 So.3d 187 (Fla. 2010); Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998) (striking HAC where medical testimony was offered during trial which established that the victim may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death). The trial court's outlining of the facts and conclusions lending support for a HAC finding were supposed by speculation, and only by speculation (r. 1448-49). They simply were not proved beyond a reasonable doubt.

The necessary aspects of both conscienceless or pitiless, and unnecessarily torturous to the victim were not found and thus are not applicable to this victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992) (the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim).

Thus, the factor of EHAC was not permissible for Kyra Inglett. Giving it as factor for their consideration and deliberation was error. Appellant was prejudiced. Given the facts and circumstances of this case, the error was not harmless. State v. DiGuilio, 491 So.2d 1121 (1984). This cause

should be reversed.

As to Kaladaa Crowell, Appellant stands on his brief.

ISSUE X

THE STATE DID NOT PROVE THE AGGRAVATOR OF COLD, CALCULATED AND PRE-MEDITATED MANNER BEYOND REASONABLE DOUBT, THUS NEITHER THE JURY NOR THE TRIAL JUDGE PROPERLY FOUND IT. IT SHOULD NOT HAVE BEEN GIVEN ANY WEIGHT.

Appellant stands by his initial brief, supplementing with the following.

Appellant asserts that there is insufficient evidence, other than by pure speculation and conjecture, to show CCP. Where the State argued calculation, they concomitantly hand in hand required the jury to fill in blanks in the testimony that had not come into evidence; or had only come in due to error by the trial court in order to reach that conclusion. The State did not provide evidence of calculation. They certainly did not prove this element beyond a reasonable doubt. There was no evidence inquired about nor provided concerning what Appellant was complaining about concerning Kyra to her mother two days previous (t. 1611). There was no evidence of when, or if, Appellant procured a gun; all that was established and that was established erroneously (see Issue I, supra) was that it was likely only one gun was used. The type of gun Appellant acquired, if any, prior to the shooting was never proved; nor was there evidence provided at all, never mind to a level of substantial competent evidence that the gun

used in these tragedies was the gun acquired by Appellant at any time.

Also, there was nothing evidenced to establish a heightened premeditation about these killings beyond that required to establish first degree murder. There was no evidence that these tragedies were the product of a cool, calm reflection. Pearce v. State, 880 So.2d 561 (Fla. 2004); Kopsho v. State, SC09-1383 (Fla. Mar. 1, 2012) (the defendant must have an opportunity for cool and calm reflection and actually coolly and calmly reflect). Also, the surrounding circumstances of a very full house with everyone awake and alert tends to negate such a consideration. We do not know why or how these killings were prompted, nor was there competent evidence of heightened premeditation. The State failed to prove this element beyond a reasonable doubt.

And, established by the State's own direct examination of Mrs. Denton, they failed to establish that these tragic events were realized in a cold manner (t. 1179). The "beyond a reasonable doubt" standard was not met.

The evidence simply was not inconsistent with a reasonable hypothesis negating this aggravated factor. If at all, this was a more regular first degree murder; not a heightened one.

Accordingly, there was insufficient competent substantial evidence of the cold, calculated premediated factor. Therefore, this factor was not lawfully permissible for the jury's consideration, nor the trial court's. Santos v. State, 591 So.2d 160, 162 (Fla. 1992) (the record discloses that the State failed to prove beyond a reasonable doubt that the present murder was cold, calculated, and premeditated); Mahn v. State, 714 So.2d 391, 398 (Fla. 1998) (finding trial court abused its discretion in finding CCP because "to satisfy the burden of proof, the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor).

This cause should be reversed.

ISSUE XI

LIFE IMPRISONMENT IS THE APPROPRIATE AND
LAWFUL SENTENCE IN THIS CASE, AS THIS CASE
WAS NOT THE MOST AGGRAVATED AND LEAST
MITIGATED OF FIRST DEGREE MURDERS.

Appellant stands by his Initial Brief, supplementing with the following.

Appellant concurs with Appellee that imposition of a sentence of death requires the Court to consider the totality of the circumstances in a case, and compare it with other capital cases. And that it must not consist of merely a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1991).

Appellant does note, however, that it is also legislative intent to extract the death penalty for only the most aggravated, the most indefensible of crimes. State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973).

The standard of review is de novo.

Appellant respectfully asserts that both the EHAC and CCP factors were found erroneously, and as to each victim.

If not for the improperly admitted evidence, as asserted in the earlier issues in this appeal, if not for the inflammatory and irrelevant evidence erroneously admitted, and if not for the inflammatory arguments permitted to be made by the State, and for their individual and combined effect on the

passions of the jury, all over the objections of Appellant, EHAC and CCP would likely not have been found as aggravating factors. The other aggravating factors found as to each victim in this case, and their foundational facts, were not, of themselves, likely to result in imposition of the death penalty, given what would then be the aggravators not found, the mitigating factors, and the totality of the circumstances. This would not then be one of the most aggravated murders this Court has had to consider.

Considering the totality of the circumstances in this case, their foundational facts and lack thereof, and comparing it to other capital cases, death as the sentence is neither appropriate nor proportionate. Cooper v. State, 739 So.2d 82 (Fla. 1999):

"review of a death sentence by this Court...is the final step within the state judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes.

Id. at 8.

This is neither the most aggravated nor least mitigated or murders, for which the death penalty is reserved. Kramer v. State, 619 So.2d 274,

278 (Fla. 1993) (finding death not appropriate where substantial competent evidence supported a jury finding of premeditation, but the case went little beyond that point).

This cause should be reversed.

ISSUE XII

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL PURSUANT TO BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Appellant rests on his Initial Brief.

ISSUE XIII

THE STATE'S PENALTY PHASE CLOSING ARGUMENT INCLUDED IMPROPER AND INFLAMMATORY EXHORTATIONS SPECIFICALLY APPEALING TO THE PASSIONS OF THE JURY. THIS WAS ERROR, RENDERING THE SENTENCING PHASE FUNDAMENTALLY UNFAIR.

Appellant rests on his Initial Brief.

ISSUE XIV

AS TO THE PENALTY PHASE, THE JURORS EITHER FAILED TO FOLLOW THE LAW OR THE COURT'S INSTRUCTIONS, DEPRIVING APPELLANT OF A FAIR TRIAL.

Appellant stands by his Initial Brief. supplementing with the following.

As argued in Issue VI, it is Appellant's assertion and contention that the trial court erred in denying his Motion to Interview Jurors filed concurrently with the sworn affidavit of Robin Denson, the State's lead witness, and Appellant's mother (r. 1330-32).

Had the Court authorized this interview, we would have learned whether any jurors were untruthful, or otherwise misrepresented their positions in order to become a deliberating jury member. If indeed the venire had members who had prejudged guilt versus innocence and/or death versus life prior to their being fully sworn in, and prior to the taking of any testimony and establishing of any evidence, it is highly possible that at minimum at least one juror was so tainted.

He or she or they were then clearly not following the trial court's instructions, and so failed at the basics of being a juror: honesty and integrity. De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995).

From the very beginning of the trial process, the trial court advised the venire:

I know as soon as something's posted in in the media, everybody believes what it was, and then sometimes you'll hear things in the media, right...

We want people who will not make up their mind, not speculate about things. We want people who will wait to do that and actually make decisions on what they hear from the actual witnesses and what's presented in Court.

Is there anyone here that cannot, under any circumstances, follow the law regarding that in this case?

(t. 51-52)

As advocated in Issue VI of this Reply Brief, a juror who had prejudged and predetermined that he, she, or they would vote for death penalty imposition in this case, and misrepresented this fact during voir dire would have prevented Appellant from exercising informed judgment during jury selection. This would have been prejudicial to him, as it impaired, undermined, and diminished his right to challenge and select jurors. Loftin v. Wilson, 67 So.2d 185, 192 (Fla. 1953) (full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to

challenge either peremptory or for cause. A juror who falsely misrepresents his interests or situation, or conceals a material fact relevant to the controversy is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge). A new trial would have been warranted.

Such a flawed or spurious juror, together with the inflamed or impassioned jury, overrode or ignored the protection of your Defendant/Appellant. Appellant was not sentenced with all great deliberation; nor was he sentenced reliably, analogously, consistently. Nor only after a careful, thoughtful, and deliberative process.

In her closing instructions, the trial court charged and reminded the jurors as, i.e., follows:

Before you vote, you should carefully consider and weight the evidence, realizing that a human life is at stake and bring your best judgment to bear in reaching your verdict.

(t. 2436)

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case...no juror has the right to violate the rules we all share.

(t. 2442-43)

The jurors violated the rules we all share. They rushed to judgment, and determined your Appellant's life or death in a precipitate and reckless manner. The jury and the trial court thus deprived Appellant, Marlin Larice Joseph, of due process and a fair trial.

This case should be reversed.

ISSUE XV

DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL AND DUE PROCESS PURSUANT TO THE UNITED STATES AND FLORIDA CONSTITUTIONS, AS A RESULT OF CUMULATIVE ERROR.

Appellant rests on his Initial Brief.

CONCLUSION

Based on the assertions and authority cited hereinabove, and also in our Initial Brief, Appellant respectfully requests that this Court conduct its review of this case, reverse Appellant's convictions, vacate his sentences, and take any and all further appropriate action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished to Rhonda Giger, Assistant Attorney General, Attorney General's Office, 1515 N. Flagler Drive, #900, West Palm Beach, FL 33409 (rhonda.giger@myfloridalegal.com); (CrimAppWPB@myfloridalegal.com); and a courtesy copy to Honorable Cheryl Caracuzzo, Circuit Judge, 15th Judicial Circuit, Palm Beach County, Florida (CAD-DivisionZ@pbcgov.org) this 27th day of June, 2021.

CERTIFICATE OF FONT COMPLIANCE AND WORD COUNT LIMIT REQUIREMENT

I HEREBY CERTIFY that this Reply Brief was composed in Ariel 14 point font and word count limit requirements.

DESIGNATION OF E-MAIL ADDRESSES

Fredrick R. Susaneck, Esquire, representing the Appellant in the instant case, hereby designates the following email address for the purpose of service of all documents required to be served, pursuant to Fla.R.Jud.Admin. 2.516; primary email address:
Levine.Susaneck@gmail.com.

CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

I HEREBY CERTIFY that an electronic copy of the foregoing Reply Brief of Appellant has been efiled in searchable PDF format via the filing portal the following address: www.myflcourtaccess.com.

Respectfully submitted,

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