IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,	)	
	)	
Appellant	)	
	)	Case No. 00-1148
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee	)	

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

REPLY BRIEF OF APPELLANT

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ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN REFUSING TO PERMIT APPELLANT TO CROSS-EXAMINE A KEY STATE WITNESS CONCERNING THE UNDERLYING FACTS OF THE WITNESS'S SUBSEQUENT MURDER CONVICTION, WHERE SUCH EVIDENCE WAS RELEVANT TO MITIGATION AND TO IMPEACH THE WITNESS'S TESTIMONY REGARDING EACH PARTICIPANTS' ROLE IN THE INSTANT MURDER.

The state first argues that Appellant did not preserve this issue for review because he did not properly proffer the evidence. On the contrary, defense counsel explained to the court what he expected the testimony to show. Specifically, defense counsel explained that the victim of the Maryland murder was stabbed to death, and as in Appellant's case, DiMarino again claimed he did not commit the stabbing, but rather, the co-defendant did (Vol. VI, T. 697-699). A summary of the testimony by defense counsel can be a sufficient proffer if it adequately informs the appellate court of the scope and substance of the proposed testimony. Erhardt, Charles W., Fla. Evid. Sec. 104.3 (1998 ed.); *see also Asay v. State*, 769 So. 2d 974, n. 15 (Fla. 2000)(noting that a summary of what the witness would testify to can be a sufficient proffer). Counsel's explanation in this case constituted a sufficient proffer. It is apparent from the record that counsel would elicit from the witness that he was involved in another murder in 1990, that the victim of that murder was stabbed to death, and that the witness blamed his co-defendant for the stabbing.

The cases cited in the state's brief, to support its argument that the issue was not preserved, are inapposite. For instance, in *Trease v. State*, 768 So. 2d 1050 (Fla. 2000), the trial court specifically instructed defense counsel to proffer the evidence before the court would rule on its admissibility. The trial court did so because it needed to determine whether the testimony was admissible in accordance with case law concerning evidence of drug use by a witness. Because the defense did not proffer the evidence, despite being instructed to do so if it intended to offer the testimony, the Court held that the error was not preserved. Moreover, there is no indication that defense counsel offered any type of summary of what the witness would testify to. Conversely in this case, the court did not instruct Appellant to proffer the evidence by questioning DiMarino; rather, the court ruled on its admissibility based on defense counsel's summary alone. The record is clear what the purported testimony would have been. Just as the trial court ruled on the admissibility based on defense counsel's summary, this Court can review the ruling for error based on that same summary.

Additionally, in *Finney v. State*, 660 So. 2d 674 (Fla. 1995), another case cited by the state, this Court held that the defendant's claim was not properly before the court because not only did he fail to proffer the testimony he sought to elicit, *but also the substance of that testimony was not apparent from the record*. In the instant case the substance of the testimony is apparent from the record. For this reason, the issue has been preserved for appeal.

The state additionally argues that Appellant is requesting this Court to ignore precedent by arguing the admissibility of evidence offered only to prove residual or lingering doubt of Appellant's guilt. Contrary to the state's argument, the

evidence was not offered to prove such doubt. At his resentencing hearing, Appellant never disputed that he played some role in Crawford's murder. He merely argued that the roles of Appellant and DiMarino were actually the opposite of what DiMarino claimed them to be. The defense was that DiMarino was lying and that he actually played a greater role than Appellant. The facts of DiMarino's subsequent murder were relevant to the jury's consideration of whether DiMarino's role was greater than Appellant's role. The respective roles of each participant were relevant to mitigation. Evidence tending to prove the relative roles of the participants is relevant to mitigation and is not inadmissible as an attempt to prove residual or lingering doubt. *See generally Downs v. State*, 572 So. 2d 895 (Fla. 1990); *see also Way v. State*, 760 So. 2d 903, 916 (Fla. 2000)(stating that as a matter of fundamental fairness and due process, "[a] defendant has a right to present evidence that is relevant to the nature and circumstances of the crime. . .An example of a relevant circumstance of the crime is that the defendant played a relatively minor role in the murder compared to other participants."). Because the evidence was offered to show that Appellant played a minor rule compared to DiMarino, the evidence was not being offered to show residual or lingering doubt. Thus, Appellant is not asking this Court to ignore precedent.

Next, the state argues that the evidence was inadmissible character evidence because the facts of the subsequent murder were not sufficiently similar to the facts involved in this case. Therefore, the state argues, the evidence was inadmissible character evidence under Section 90.404, Florida Statutes (2000). However, the rule that the collateral crime must be a "fingerprint" type of evidence should not apply to this case, where it was offered at the penalty phase of a capital trial, and where Appellant was not using the evidence to prove identity.

Cases requiring a fingerprint type of similarity before introduction of collateral crimes are cases in which the party offering the evidence is trying to prove the identity of the perpetrator. In such cases, the proponent of the evidence attempts to show that because the modus operandi is so similar in both cases, the same perpetrator committed both the collateral crime and the crime with which the defendant was charged. Conversely, in the instant case, Appellant was not trying to prove the identity of the perpetrator. Rather, he was attempting to show mitigation, i.e. that DiMarino's role was not as minimal as he asserted, and that Appellant's role was not as great as DiMarino claimed. Committing a subsequent murder, specifically a stabbing murder which DiMarino blamed on his co-defendant, was offered in mitigation, rather than to determine Appellant's guilt or innocence. Accordingly, the standard for admissibility of this type of evidence should not be as rigid when the defendant is using it to show mitigation at a penalty phase hearing. *Cf. Gore v. State*, 26 Fla. Law Weekly S257 (Fla. 2001)(recognizing

that the rules of evidence are relaxed at a penalty phase proceeding).

In *Gore* the defendant argued that the trial court erred in permitting the state to introduce impermissible character evidence at his penalty proceeding when the state questioned him about collateral acts of violence against other women. This Court held that the trial court did not err in permitting the evidence. This Court reasoned that not only did the defendant open the door to the testimony, but also that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case. *Id.* (*quoting Hildwin v. State*, 531 So. 2d 124, 127 (Fla. 1988), *affirmed*, 490 U.S. 638 (1989); *see also* Sec. 921.141(1), Fla. Stat. (2000)("Any such evidence which the court deems to have probative value may be received, *regardless of its admissibility under the exclusionary rules of evidence*, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.")(emphasis added). These cases demonstrate that because the rules of evidence are relaxed in the penalty phase of a capital trial, the same rules applicable to *Williams*[1] Rule evidence at a trial to determine guilt do not necessarily apply to a penalty phase proceeding. Accordingly, Appellant should

have been permitted to question DiMarino concerning the facts of the subsequent murder.

ISSUE II

THE TRIAL COURT REVERSIBLY ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO DISRUPT OR HINDER THE ENFORCEMENT OF LAWS, AS THE STATE FAILED TO PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

The state argues in its answer brief that competent, substantial evidence supported the trial court's finding that Appellant committed the murder to prevent Crawford from reporting the prior battery (Answer Brief at 33-35). As support for its argument, the state claims that although there was no direct evidence of Appellant's motive, there was sufficient circumstantial evidence. While Appellant agrees that an aggravating factor can be supported by circumstantial evidence, any so-called circumstantial evidence in this case did not support the conclusion that Appellant's dominant or only motive for the killing was to eliminate Crawford as a witness.

The evidence the state presented at trial supported the inference that Appellant participated in the murder as part of Crawford's "training." According to DiMarino, Appellant joined in the battery of Crawford when DiMarino went into his bedroom and told him that Crawford needed to be "trained." (Vol. VII, T. 912 and Vol. VIII, T. 998). The state presented no evidence to dispute the inference that the killing, at least on Appellant's part, was part of this "training." Thus, it would be mere conjecture to assume that Appellant's dominant motive was to eliminate Crawford as a witness. Additionally, if Appellant's only motive were witness elimination, there were several other witnesses he would have had to murder, particularly the women who were present when the battery occurred.

Routly v. State, 440 So. 2d 1257 (Fla. 1987), which the state cites, is distinguishable from

this case. In *Routly*, the defendant bound and gagged the victim after burglarizing his home; he then brought the victim to a field, where he shot him to death. This Court upheld the trial court's finding that the defendant murdered the victim to eliminate him as a witness. This Court explained that there was no logical reason to kill the victim except to prevent detection by law enforcement, and the defendant was unable on appeal to offer any other explanation for the murder. *Routly*, therefore, stands for the proposition that where the circumstantial evidence gives rise to the inference that the motive for the murder was witness elimination, *and* where such motive is the only reasonable explanation, the aggravator is justified. Such is not the case here, where the evidence just as easily suggests another motive for the murder.

Furthermore, there was no evidence, circumstantial or direct, to establish what Appellant understood Smith to mean when Smith said "he wanted no witnesses. . .take care of business." The state notes in its answer brief that when DiMarino told his brother, John DiMarino, that he had taken care of business, John understood this comment to mean "committing a murder." However, initially, when asked by counsel what this phrase meant to him, John DiMarino even acknowledged, "It could mean a lot of things." (Vol. VIII, T. 1064). Likewise, this phrase could have meant any number of things to Appellant, including that Smith wanted no witnesses to the murder. Again, what the statement meant to other people had no bearing on what Appellant understood it to mean. There was no evidence showing that Appellant understood Smith to say that he wanted Crawford murdered so she could not be a witness to the battery. Therefore, this aggravator was not proved beyond a reasonable doubt.

The state also claims that this Court previously upheld this aggravator, citing *White v. State*, 415 So. 2d 719 (Fla. 1982) and *Smith v. State*, 403 So. 2d 933 (Fla. 1981). In *White*, however, the decision does not indicate what evidence was presented and relied upon to justify the aggravator; this Court simply found that each of the aggravators was supported by the record. Also, as the state acknowledges, resolution of the issue in the original appeal is not dispositive. *Way v. State*, 760 So. 2d 903 (Fla. 2000), *cert. denied*, 148 L. Ed. 2d 975 (2001). This principle should be given even more force when the prior opinion does not elaborate on the reasoning, but merely concludes that the evidence supported the aggravator.

Additionally, in *Smith*, *supra*, this Court did not determine that the evidence was sufficient to sustain the aggravating factor that the murder was committed to disrupt or hinder enforcement of the laws. Rather, the question presented in *Smith* was whether the evidence presented was legally sufficient to support Smith's conviction for first-degree murder. This Court held that the evidence was sufficient for a jury to believe that Smith directed Crawford's murder, and, thus, acted as a principal. This was a different legal question from the question presented herein, which is whether the evidence supported the trial court's finding that Appellant's only or dominant motive for killing Crawford was to eliminate her as a witness and thereby disrupt or hinder the enforcement of the laws. Because the question presented in *Smith* was different from the one presented herein, this Court's statements in *Smith* should not be considered dispositive.

Next the state argues that if the trial court did err in finding this aggravator, the error was harmless because there was no reasonable likelihood of a life sentence being imposed (Reply Brief at 36). The state cites several cases for its proposition. However, each of these cases is distinguishable because they involved significantly less mitigation than in the present case. For instance, in *Green v. State*, 583 So. 2d 647 (Fla. 1991), the court found *no* mitigating factors, and in other cases, only a single mitigating factor, which the court considered insignificant. *See Hill v. State*, 515 So. 2d 176 (Fla. 1987)(defendant's age of 22 years was the only mitigator); *Rogers v. State*, 511 So. 2d 526 (Fla. 1987)(single mitigator that defendant was a good father was not significant); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984)(single mitigator of defendant's age given minor significance). However, in Appellant's case the trial court found three statutory mitigating circumstances and numerous non-statutory mitigators, some of which are considered

significant factors, such as Appellant's extensive history of alcohol and substance abuse.

Furthermore, *Geralds v. State*, 674 So. 2d 96 (Fla. 1996), which the state also relies upon, is equally distinguishable. In *Geralds* this Court considered not only the limited mitigation, but also that the jury recommended death by a unanimous vote and that the sentencing judge specifically stated he would impose the death penalty even without the invalid aggravator. These factors do not exist in Appellant's case. Given the numerous mitigators involved in the instant case, there is a reasonable likelihood that the trial court would have imposed a life sentence in this case. Accordingly, the error was not harmless.

CONCLUSION

For the reasons stated herein and in Appellant's initial brief, Appellant respectfully requests this Court to vacate his sentence and to remand for resentencing with instructions to impose a life sentence. Alternatively, Appellant requests this Court to reverse his sentence and to remand to the trial court for a new sentencing hearing.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing has been mailed to Stephen D. Ake, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607 this _____ day of July, 2001.

CERTIFICATE REGARDING FONT

The undersigned certifies that the font used herein is 12-point Courier New, a font that is not proportionately spaced, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted,

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[1] *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959)