IN THE SUPREME COURT OF FLORIDA

JONATHAN HUEY LAWRENCE,,

Appellant,

v. CASE NO. **SC00-1827**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FIRST** JUDICIAL CIRCUIT,
IN AND FOR **SANTA ROSA** COUNTY, FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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ISSUE I

THE COURT ERRED IN ALLOWING INVESTIGATOR TODD HAND TO GIVE HIS OPINION THAT LAWRENCE HAD AN "ALTER EGO" THAT ALLOWED HIM TO BECOME "THE PERSON HE WANTED TO BE" WHEN HE WAS WITH JEREMIAH RODGERS, A VIOLATION OF LAWRENCE'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

Lawrence called Todd Hand, the lead investigator in this case, to testify that Jeremiah Rodgers was an "alpha male;" he was "gregarious, outgoing, social." Lawrence, on the other hand was a "quiet, introverted type of individual in an openly public area." (5 T 747) In private, though, and after some time, the defendant talked more loud and freely (5 T 747). This led Hand to conclude, based on his training and experience in investigation (5 T 744-46), that "there was an alter ego inside of Jonathan Lawrence that Jeremiah Rodgers took advantage of." (5 T 748)

The State's cross-examination was short and only further explored the two defendants' relationship. "I believe that Jon Lawrence is much more open and outgoing in front of Jeremiah because of their friendship." (5 T 750)

Redirect examination further cemented the points developed on direct that Lawrence was a follower type.

Didn't you have an opinion that he was following the directions of Mr. Rodgers? This is Jonathan was?

A. I think possibly to a certain extent he may have been, yes.

Q. And did you not make a statement to me that you felt like there was an alter ego in Jonathan Lawrence that Jeremiah Rodgers took advantage of? You were seated here, I was seather here, and we were looking at each other dead in the eye and you said that?

A. I recall that in detail but--

Q. And you also admit that what goes on between these men in private--

MR. MOLCHAN: Judge--

THE COURT: He said "but." Did you want to allow him to finish or allow him to state--

MR. KILLAM: Judge, he answered the question and admitted that it took place.

THE COURT: I'll allow the state if you need to cross. Go ahead.

(5 T 752)

On recross-examination, the State pursued that point:

Q. Now, Investigator Hand, you were getting ready to say something to the jury and had a "but." Can you explain your thought process on that, your comment to Mr. Killam?

A. I believe it was a reference to Mr. Lawrence's alter ego. And naturally I'm not a psychologist or sociologist or anything like that, but from my judgment--

MR. KILLAM: The he is not qualified to answer a question.

THE COURT: Overruled.

THE WITNESS: Anyway, I said something about an alter ego on Jon Lawrence's part, and I believe that he does have an alter ego when he is with Mr. Rodgers. And I believe that the night that –that Justin Livingston was murdered and also Jennifer Robinson, I believe that Jon becomes the person that he wanted to be, he always want to be and couldn't be in society.

> And I believe that he becomes very demanding and forceful and violent. And I think that the evidence speaks for itself.
>
> MR. KILLAM: Judge, at this time I move the court for a mistrial based upon his testimony.
>
> THE COURT: Denied.

(5 T 755-56)

The court erred in overruling the defense objection, abused the discretion given it in matters of this sort, and it compounded the error by denying Lawrence's motion for a mistrial. Kersey v. State, 74 So. 983 (1917). Investigator Hand was not, as he admitted, an expert in psychology, so he was unqualified to give an opinion that clearly fell within the purview of that type of witness.

In the law, there are two types of witnesses: lay and expert. Lay witnesses generally can testify only about that facts of which they have personal knowledge. Section 90.604, Florida Statutes (2001). Harry can testify about a battery because he saw Bob hit Joe. Experts, on the other hand testify, because they have "specialized knowledge, skill, experience, training, or education" that "will assist the trier of fact in understanding the evidence or in determining a fact in issue." Section 90.702, Florida Statutes (2001). Dr. Jones, because of his training as a psychiatrist, can give his opinion that when Bob hit Joe he was psychotic and incapable of knowing right from wrong. Such opinion testimony is admissible because it will help the jury resolve the ultimate issue of Bob's sanity.

Lay witnesses generally cannot give their opinions about the facts. Doing so amounts to a comment on the evidence, and invades the fact finding function of the jury or trier of fact. Thorp v. State, 777 So. 2d 385 (Fla. 2000). Of course, as with all rules there are exceptions, so a lay witness can give his opinion if he or she "cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact. . ." Section 90.701(1), Florida Statutes (2001). Experts, on the other hand, cannot give opinions in areas outside their expertise, nor can they testify unless their particular expertise has been established.

In this case, Investigator Hand's objected to testimony was clearly his opinion about Lawrence's personality and was the subject that only a psychologist or psychiatrist could have given an opinion about. He obviously never saw Lawrence on the night of the murder, so he had no factual basis on which he could have concluded that when in the presence of Rodgers "Jon becomes the person that he wanted to be, ... he becomes very demanding and forceful and violent." (5 T 755-56) That was his speculative opinion, which the court should have excluded. He simply guessed, and did so without any expertise to justify it, about what personality changes Lawrence exhibited when he was with Rodgers. In Murphy v State, 642 So. 2d 646, 647 (Fla. 4th DCA 1994), a lay witness improperly testified that she thought "something illegal was going on," when the defendant's customers

were running up huge bills on what turned out to be stolen credit cards. There, as here, thoughts and hunches, became opinions, which the witnesses in both cases should have left to the jury to reach.

In this case, there were no facts from which Hand could have legitimately given his opinion as a lay witness that Lawrence became "very demanding and forceful and violent." He never saw Rodgers and Lawrence together, so he had no basis on which to give his lay opinion about how the defendant would act in the co-defendant's presence. Hansen v. State, 585 So. 2d 1056 (Fla. 1st DCA 1991)(Only because a lay witness had seen the defendant reasonably close to the time of the homicide could he give his opinion about the defendant's mental condition.)

Moreover, if he was somehow qualified as an expert, it was an unnecessary expertise because, as he said, "the evidence speaks for itself." (5 T 756) If so, then the evidence should have spoken for itself and not have his speculative, interpretive gloss.

But what about Hand's testimony elicited by Lawrence on re-direct examination (5 T 752)? If what the witness said on recross was improper, was not also what he said on direct as inadmissible? First, even if Lawrence opened the door with his question, only admissible evidence could come in. Inadmissible lay opinion evidence was still inadmissible. Second, if the testimony Lawrence elicited

was itself inadmissible opinion testimony, the State should have objected. The Criminal Appeals Reform Act, Section 924.051, Florida Statutes (Supp. 1996), and the contemporaneous objection rule both require a party to object to inadmissible testimony in order to preserve an issue for appeal. Here, if Lawrence was wrong for asking Hand about the defendant's "alter-ego," the State should have objected. That it did not, does not in some way authorize the court to overrule his objection to Hand's opinion testimony elicited by the State. That is, the State cannot cut off the defendant's right to object by its unwillingness to correct an error. Each party has the obligation to protect its position, and if one chooses not to do so, that lack of attentiveness does not somehow short circuit the other's efforts to defend his interests.

Moreover, the court's error presented strong evidence to counter the otherwise unanimous testimony that Lawrence was a follower type. Couched in terms of the statutory mitigators, the defendant was under the substantial domination of Rodgers. Section 924.141(6)(e), Florida Statutes (Supp. 1998). Of course, the court rejected that mitigator (2 R 343-45), but to do so it had to ignore the testimony of three experts who said Lawrence was easily led. The only evidence supporting that position came from Hand's inadmissible opinion testimony. Hence, the court's error in allowing it was not harmless beyond all

reasonable doubts, and this Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

CONCLUSION

For the reasons stated above, this Court should vacate the death sentence and remand for imposition of a sentence of life imprisonment, or alternatively, for new sentencing proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050; and to appellant, **JONATHAN HUEY LAWRENCE**, #898255, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this date, January 17, 2002.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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DAVID A. DAVIS