IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,	:	
Appellant,	:	
vs.	:	**Case No. SC01-1914**
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "SB". All emphasis is supplied unless the contrary is indicated.

This reply brief is directed to Issues I and II. As to Issues III, IV, and V, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE BEFORE THE JURY A SERIES OF STATEMENTS MADE BY APPELLANT DURING CUSTODIAL INTERROGATION CONCERNING "DWIGHT."

A. The Merits

The short version of appellant's reply is this: In a trial for the murder of Janice Nugent, the fact that appellant may have a "Dwight" whom he is inclined to blame things on to avoid responsibility for his actions has no relevancy in the absence of any evidence that appellant ever tried to blame the murder of Janice Nugent on Dwight. While appellant may have made an "implied admission" to his own confidential psychiatric expert that he was afraid that Dwight might have killed the Williams Rule victim Leanne Coryell, he made no such admissions regarding the murder of Nugent; in fact, he immediately, unequivocally, and consistently made it clear that neither he nor Dwight harmed or killed Ms. Nugent, and that he was never even in her house except on one occasion several weeks prior to her murder. The prosecution's odd juxtaposition of the improperly admitted "Dwight" evidence with the edited Williams Rule evidence misleadingly made it appear that appellant was using Dwight to avoid taking responsibility for the Nugent murder (see SB20, 23-26), when those statements actually pertained to the Coryell murder. That is one of

many reasons why the introduction of Dwight into this trial was harmful and reversible error.

Now the long version. The state has come up with -- for the first time on appeal -- a convoluted theory for the admissibility of "Dwight"; trying in effect to bootstrap him in through the Williams Rule evidence. The state argues:

> In context, Defendant referred to "Dwight" as a means of avoiding responsibility for the murder of Leanne Coryell, and in the trial for her [Coryell's] murder, Defendant admitted that he created the concept of "Dwight" just for that purpose. Consequently, when the Defendant told law enforcement about "Dwight" in relation to the instant murder of Janice Nugent, the statement became an admission which was properly admitted as a hearsay exception.

(SB20).

. . .

> Here, Defendant's comments about a person named "Dwight" living inside him, taken in context with his confession to killing Leanne Coryell, are relevant to whether Defendant murdered Janice Nugent, the victim in the instant case.

(SB24).

. . .

> In context with the statements made by Defendant in the trial for the murder of Leanne Coryell, the statements regarding "Dwight" were relevant and material admissions of a party-opponent because they were inconsistent with Defendant's denial of responsibility for Ms. Nugent's murder.

(SR24-25).

The state's reliance on context is surprising, since the prosecution chose to present the "Dwight" evidence entirely out of context. See appellant's initial brief, p. 54-60. To recap, appellant made some statements to his psychiatric expert in the Leanne Coryell case, Dr. Maher, to the effect that he was afraid that someone within him named Dwight had possibly murdered Ms. Coryell (C17/1612-13). This statement -- unlike the statements to Detective Noblitt in the Nugent case -- was an implied admission, and might have been admissible as such in the Coryell guilt phase. However, it was inadmissible in that case (and the prosecution did not even attempt to introduce it) for a different reason; it was made to a confidential psychiatric expert retained to assist the defense, and was therefore privileged. The statement about Dwight having possibly killed Leanne Coryell was testified to by Dr. Maher in the penalty phase of the Coryell trial (C17/1612-13). Then, after appellant testified in the Coryell penalty phase and admitted that he killed Coryell (while denying that he raped, kidnapped, or robbed her or that he intended to kill her), the prosecutor cross-examined him about his manipulating Dr. Maher by lying to him about Dwight (C18/1742).

In the Nugent trial, however, all of the so-called "context" upon which the state now relies so heavily in its brief is nowhere to be found. The Nugent jury (in the guilt phase) never heard that the Dwight statements which actually could be construed as implied admissions related to the murder of Coryell, not Nugent. The Nugent jury (in the guilt phase) never knew about any statements concerning

Dwight which were made to Dr. Maher.[1] Far from being presented "in context", the two very different statements concerning Dwight were blended together in such a way as to inaccurately make it appear as if appellant was admitting that he had tried to blame the Nugent murder on Dwight, when he was actually admitting that he had tried to blame the Coryell murder on Dwight.

In summary, the state cannot use the Williams Rule murder of Coryell to justify bringing Dwight in through the back door, because (1) the Dwight statements as they relate to the two cases were presented out of context and in a highly misleading way; (2) their prejudicial effect greatly outweighs their limited or nonexistent probative value, especially with regard to the charged offense; and (3) if, as the state seems to be contending, it is the Williams Rule crime which provides the only basis for the injection of Dwight into the trial for the charged homicide of Janice Nugent, then this shifted the focus of the trial so far away from the charged offense as to improperly make the collateral murder of Leanne Coryell a feature of the Nugent trial. See Issue II, infra. Not only was the Dwight evidence an extraordinarily prejudicial distraction which amounted to an attack on appellant's character, the prosecutor chose to use it as the climax of his closing argument (12/1152-53, see also 12/1146).

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[1] The state suggests that the confusion was cleared up by the prosecution's cross-examination of Dr. Maher during the Nugent penalty phase (SB25 n.3)(20/2327-28).. That is too little and much too late. The erroneous admission of the Dwight evidence, compounded by the misleading way it was presented, contributed to the jury's verdict in the guilt phase, and requires reversal of the conviction.

Which brings us back to the original question -- which the state evades in its brief -- of whether independent of the Williams Rule offense appellant's statements to Detective Noblitt regarding Dwight were admissions relevant to prove his guilt of the murder of Janice Nugent. The state says, "In context with the statements made by Defendant in the trial for the murder of Leanne Coryell, the statements regarding "Dwight" were relevant and material admissions of a party-opponent because they were inconsistent with Defendant's denial of responsibility for Ms. Nugent's murder" (SB24-25).

Were they inconsistent with appellant's denial of guilt? Throughout all three interrogation sessions, in the face of increasingly accusatory questioning by Detective Noblitt, appellant steadfastly maintained that he did not kill Janice Nugent, and that he was only in her house on a single occasion, after their dinner date several weeks prior to her murder. To determine whether the Dwight statements were "admissions" to the murder of Nugent, and whether they were inconsistent with appellant's claim of innocence, this Court need only look to the testimony of the witness through whom the prosecution introduced the statements, Detective Noblitt. In the second interview, before the subject of Dwight ever came up, appellant mentioned to the detectives that he has blackouts and seizures, and "[s]ometimes I get to doing something and doing it and doing it and when it's over I can't remember what I've done" (10/817-18). Detective Stanton asked appellant,"Is that what happened with you and Janice?", and appellant adamantly said "No, I did not kill Janice" (10/817-18).

Noblitt continued to tell appellant he didn't believe him, and asked him, "Was someone else there with you? Were you there and someone else did this?" Appellant said "No, absolutely not" (10/818).

At the beginning of the third interview, after what Noblitt described as some "minor conversation" and "small talk" about appellant's military discharge papers and who was going to pick up his property now that the search warrant had been executed (10/787-88,823-24), appellant said "I think I have a problem" (10/788,823-24). Noblitt said, "What kind of problem? I asked you the other day if you had any mental problems" (10/788), and that was when appellant started telling him about Dwight. [Contrary to the prosecutor's assertions, see 12/1146,1152, appellant did not "trot out Dwight" when he was confronted with the DNA. The state's own witness, Detective Noblitt, testified that when he advised appellant he had his DNA in the house, appellant's response was that "[h]e adamantly denied that anything occurred within the house" and he continued to maintain that he was only in Nugent's house on the one occasion approximately two weeks before the murder (10/826)]. Either before or after appellant made the statement that Dwight was very mean and he would like to cut him out of his body, the other detective, Stanton, asked appellant, "Did Dwight do this? Did Dwight cause Janice to get killed?" Appellant answered, "No, definitely not. I did not kill Janice" (10/824-25, see 10/790). If that weren't clear enough, Detective Noblitt made it even clearer on cross:

> Q. At no time did he admit to you that he had killed Janice Nugent?
>
> A. As I testified in this court, I'm going to tell you exactly what he said. Each time we confronted him with that, he denied that he did that.
>
> Q. Or even harmed her in any way, much less killed her?
>
> A. As I testified earlier, we asked him about any altercation or fight and he denied that he had any other altercation or fight other than what he told us about the dinner date.
>
> Q. And including what you say that he allegedly said about this Dwight person, he never tried to say that somebody else, some other person named Dwight harmed Ms. Nugent, did he?
>
> A. I didn't allegedly say it. I'm telling you, this court, that's what he said about Dwight and he did not say Dwight did this.

(10/830-31).

In light of the foregoing, it is almost astonishing that the state can claim that the Dwight statements were "relevant and material admissions of a party-opponent because they were inconsistent with Defendant's denial of responsibility for Ms. Nugent's murder" (SB25). Even with all the confrontational interrogation, and even with the detectives' leading questions virtually inviting him to do so, appellant never tried to blame the Nugent murder on Dwight. What actually happened in this trial is that the prosecution -- through the device of Dwight coupled with its edited Williams Rule testimony -- made it falsely appear as if appellant had tried to blame the Nugent murder on Dwight, and that is reason enough for this Court to

reverse appellant's conviction and remand for a fair trial on the charged offense.

B. Preservation and Harmful Error

The issue on appeal, which is the trial court's error in allowing the state to introduce the Dwight evidence as an "implied admission", is about as preserved as an issue can get. There was a pretrial motion in limine to exclude the Dwight statements as irrelevant and incurably prejudicial (3/406-07). Before Detective Noblitt testified at trial, the portion of his testimony involving Dwight was proffered to the trial court (10/787-90). Following the proffer, when the state took the position that the Dwight statements could be introduced as an "implied admission", defense counsel pointed out that appellant never said that Dwight harmed Janice Nugent; "[h]e just says he has these problems. He doesn't connect them in any way to the death of Ms. Nugent" (10/797). Defense counsel argued that the statements were irrelevant, prejudicial, and inadmissible (10/795-97,799-80), but the trial judge overruled his objection (10/801-03). During Detective Noblitt's ensuing testimony, defense counsel renewed his objection several times (10/824-26), and moved for a mistrial on exactly the right ground:

> . . . based on the testimony of the witness regarding Dwight and his associated comments. Anything regarding Dwight is improper. It's highly prejudicial and the idea being that the jury is now being asked to speculate that although the witness has acknowledged Mr. Johnston literally denied harming Ms. Nugent, the implication seems to be now, and I'm sure the State will attempt to argue later, that by

> admitting that Dwight is inside him and he wishes he could cut him out and you wouldn't believe the terrible things Dwight did, that he's really admitting to the homicide of Janice Nugent.

(10/827).

The trial court denied the motion for mistrial (10/827).

Therefore, if the state is trying to suggest otherwise (see SB29), the critical evidentiary error is fully preserved. What the state seems to be arguing is not that the error wasn't preserved, but rather that some of the harm it caused wasn't separately objected to. (Actually, undersigned counsel would submit that defense counsel was quite prescient in his motion for mistrial about the harmful effect of the Dwight evidence). In any event, the burden is on the state to show beyond a reasonable doubt that the evidentiary error of which it was the proponent and beneficiary could not have contributed to the jury's verdict.

In its obligatory "harmless error" argument, the state baldly asserts that the remaining evidence was "overwhelming" and therefore Dwight was harmless (SB26,28). However, the evidence against appellant was entirely circumstantial,[2] and even assuming arguendo that it was legally sufficient to go to the jury [see Issue III at p.81-93 of

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[2] Where the evidence of guilt is entirely circumstantial -- especially where identity is at issue and the defendant maintains that he did not commit the crime -- a significant evidentiary error is unlikely to be proven harmless. See e.g., Senterfitt v. State, __ So. 2d __ (Fla. 1st DCA 2003)(2003 WL 340839, decided February 17, 2003); James v. State, 765 So. 2d 763, 766 (Fla. 1st DCA 2000); Washington v. State, 737 So. 2d 1208, 1219 (Fla. 1st DCA 1999); Zecchino v. State, 691 So. 2d 1197, 1198 (Fla. 4th DCA 1997); Conley v. State, 599 So. 2d 236, 238 (Fla. 4th DCA 1992).

appellant's initial brief, discussing the circumstantial evidence and contending it was legally insufficient], it was far from "overwhelming".

The state ignores every single aspect of the evidence which might have caused the jury to question whether the prosecution had proved appellant's guilt beyond a reasonable doubt. See initial brief, p.52-53. In addition, the state totally misapprehends the legal standard for harmless error. As this Court has consistently reaffirmed, in order to establish that a trial error was truly harmless, the burden is on the state, as beneficiary of the error, to prove beyond a reasonable doubt that the error did not contribute to the conviction. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986); State v. Lee, 531 So. 2d 133, 136-38 (Fla. 1988); Goodwin v. State, 751 So. 2d 537, 541-43 (Fla. 1999). As this Court has repeatedly made clear:

> In reaffirming DiGuilio and its applicability to error such as the improper admission of collateral crime evidence, we reiterated in Lee that the harmless error analysis focuses on the effect of the error on the trier of fact. Id. at 137. Thus, the reviewing court must resist the temptation to make its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence. We also repeated our agreement with Chief Justice Traynor, previously quoted in DiGuilio:
>
> > Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without con-

> sidering other reasons untainted by error that would have supported the same result.

Goodwin v. State, supra, 751 So. 2d at 542.

In the instant case, the prosecutor chose to put the Dwight statements before the Nugent jury, over strenuous defense objection, even though the state now can explain no relevancy except through inference from the "context" of statements which pertained to the Williams Rule crime. Then the prosecutor (inaccurately stating that appellant's statements about Dwight were made when he was confronted with the DNA) chose to make Dwight a focal point and climax of his closing argument to the jury:

> That interview concludes. They go back a third time with a DNA result that puts him in the bedroom, a place where he's never admitted he has been and has consistently said he didn't kill her and didn't have sex with her.
>
> And he's confronted with the DNA and his admission is not I killed her, but I got a problem, and he trots out Dwight. He talks about how he gets to doing something and doing it and doing it and, man, you wouldn't believe how mean Dwight is.
>
> Why, when confronted with DNA in a room this defendant says he's never been in, did he start talking about Dwight? Because he would not take personal responsibility for the killing of Janice Nugent.
>
> By your verdict in this case, after reviewing the evidence, and I submit to you leading to one and only one conclusion, that this defendant killed Janice Nugent in a premeditated fashion, by your verdict can you place responsibility for Janice Nugent's murder not on the shoulders of Dwight, but on Ray Lamar Johnston who throttled Janice Nugent to death.

(12/1152-53, see also 12/1146).

Obviously, the reason why the prosecutor introduced Dwight into this trial and argued Dwight in this manner is because he believed it would have an impact on the jury. As was cogently stated in Gunn v. State, 78 Fla. 599, 83 So. 511 (1919) and Farnell v. State, 214 So. 2d 753, 764 (Fla. 2d DCA 1968):

> It is contended that . . . no harm could have been done by the admission of the sheriff's testimony. Then why was it offered by the state and admitted by the court? Surely not merely to consume time and swell the record? . . . Having gotten it before the jury over the objection of the defendant, and a conviction obtained, the state cannot be heard to say it was harmless error. Who can say that the testimony . . . did not and could not have the effect that the state's attorney intended?

As previously set forth, defense counsel objected strenuously and on all the right grounds to the introduction of the Dwight evidence. The state, because it is unable to meet its burden of proving that that error could not have contributed to the jury's verdict, argues instead that the prosecutor's closing argument -- which appellant cited as an important factor in rebutting any claim by the state that the improper introduction of the Dwight evidence was "harmless error" -- was not separately objected to (see SB29). The state, citing Pagan v. State, 830 So. 2d 792, 813 (Fla. 2000) and Reyes v. State, 700 So. 2d 458, 460-61 (Fla. 1997), contends that the prosecutor's use of Dwight in his closing argument was "fair comment on the evidence presented" (SB29), and that might indeed be true if the Dwight evidence had been properly introduced and accurately

argued.[3] Pagan and Reyes have nothing whatsoever to do with the situation where -- as here -- the evidence which the prosecutor uses as the climax of his closing argument to the jury was irrelevant and prejudicial and erroneously admitted. See e.g. Martinez v. State, 761 So. 2d 1074, 1081 (Fla. 2000) (erroneous admission of "opinion of guilt" testimony could not be found harmless beyond reasonable doubt, "especially when it was again highlighted in closing argument"); Rivera v. State, 807 So. 2d 721, 722 (Fla. 3d DCA 2002) (prosecutor's reference in closing argument to officer's inadmissible testimony compounded error); Stoll v. State, 762 So. 2d 870, 878 (Fla. 2000) (prejudicial effect of improperly admitted evidence "was exacerbated by the State's reliance on this evidence during closing arguments"); Delgado v. State, 573 So. 2d 83,85 (Fla. 2d DCA 1990) (prosecutor's closing argument "compounded the likelihood of unfair prejudice"). In none of those cases is it indicated or suggested that, having fully objected to the improperly admitted evidence, trial defense counsel must on appeal again object to the prosecutor's closing

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[3] In Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993), this Court cautioned:

> [W]hile the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.

argument in order to show that the state failed to meet its burden of proving that the evidentiary error was harmless.[4]

Finally, the two cases relied on by the state in support of its harmless error argument (SB28-29) are extremely distinguishable. In LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988), this Court rejected the defendant's contention that the trial court erred by refusing to admit hearsay statements of the defendant's brother offered by the defense. This Court found that the one statement was not an admission against interest, the other statement was meaningless without further development, and the trial court did not err in refusing to admit them. Moreover, there was other evidence before the jury showing that the brother had also been indicted and had some role in the crimes or in attempting to conceal them; therefore "[w]e do not see how this ambiguous hearsay could have affected the verdict." 533 So. 2d at 754.

In the other case, Blackwood v. State, 777 So. 2d 399, 407-08 (Fla. 2000), the murder victim's sister testified that appellant had told her around Christmas that the victim had left him, that she was pregnant with someone else's child, and that he was going to return to Jamaica because there was nothing left for him here. Although the introduction of these statements was raised as an issue on appeal,

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[4] The only case relied on by the state on this point -- Gonzalez v. State, 786 So. 2d 559, 567-68 (Fla. 2001) -- does not involve an evidentiary error, the harmfulness of which is demonstrated in part by the prosecutor's use of the improper evidence in his jury argument. Rather, Gonzalez -- like a hundred other cases -- simply says that when the appellate issue is a claim of improper prosecutorial argument it must be preserved by an objection below.

trial defense counsel had made no objection below. Therefore, this Court found that the issue was not preserved for review. 777 So. 2d at 407. Even if the claim had been preserved, the Court found no error except as to the Jamaica statement, which it found to be irrelevant but harmless:

> The statements about returning to Jamaica were made in context of relaying his sadness over his breakup with the victim and his corresponding belief that he had no reason to remain in the United States. Furthermore, during closing arguments to the jury, the State did not mention the fact that appellant planned to return to Jamaica or suggest that he planned kill the victim and then flee to Jamaica.

777 So. 2d at 408.

If the prosecutor's lack of emphasis on a relatively innocuous (an unpreserved) evidentiary error supports a finding of harmlessness, as in Blackwood, then a prosecutor's strong emphasis on a highly prejudicial (and preserved) evidentiary error -- as in the instant case -- compels the opposite conclusion. The state cannot show that the error could not have contributed to the jury's verdict. Appellant's conviction of the murder of Janice Nugent must be reversed for a new trial.

ISSUE II

THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE PERTAINING TO THE DISSIMILAR MURDER OF LEANNE CORYELL.

A. The Merits

When Williams Rule evidence is offered to prove identity, the state -- as proponent of the evidence -- has a "high threshold to meet."[5] It is not enough for the state to rely solely on the similarities between the two cases, because "where there are both similarities and substantial dissimilarities, then the admission of collateral crime evidence is prejudicial error." Whitehead v. State, 528 So. 2d 945,946 (Fla. 4th DCA 1988), citing Thompson v. State, 494 So. 2d 203 (Fla. 1986).[6] Conversely, where the "similarities are pervasive and the dissimilarities insubstantial", similar fact evidence is admissible. Gore v. State, 599 So. 2d 978, 983-84 (Fla. 1992); see also Chandler v. State, 702 So. 2d 186, 194 n.6 (Fla. 1997). The erroneous introduction of a substantially dissimilar collateral crime can deny the accused his right to a fair trial on the charged offense,[7] and is presumptively harmful error. Goodwin v. State, 751 So. 2d 537, 543 (Fla. 1999).[8]

In its answer brief, the state chooses to address only half of the issue. There is not one word addressing the dissimilarities

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[5] Randall v. State, 760 So. 2d 892, 903 (Fla. 2000) (Pariente, J., joined by Anstead, J., concurring), citing Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

[6] See also Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981); Peek v. State, 488 So. 2d 52, 55-56 (Fla. 1986); Davis v. State, 376 So. 2d 1198 (Fla. 2d DCA 1979); Joseph v. State, 447 So. 2d 243, 245-46 (Fla. 3d DCA 1983); Garrette v. State, 501 So. 2d 1376, 1378-79 (Fla. 1st DCA 1987); Bell v. State, 659 So. 2d 1278 (Fla. 4th DCA 1995); Miller v. State, 791 So. 2d 1165, 1169-71 (Fla. 4th DCA 2001).

[7] See Thompson v. State, supra, 494 So. 2d at 204.

[8] See also Peek v. State, 488 So. 2d 52, 56 (Fla. 1986); Gore v. State, 719 So. 2d 1197, 1199 (Fla. 1998); Garrette v. State, supra, 501 So. 2d 1376, 1378 (Fla. 1st DCA 1987).

between the Coryell homicide and the Nugent homicide (see SB30-35), or even acknowledging that the main thrust of appellant's objection below and his argument on appeal is based on the pervasive dissimilarities between the two crimes.[9] Nor does the state even attempt to contend that the dissimilarities were "insubstantial" or that they were mere "differences in the opportunities with which [the perpetrator] was presented." See Gore, 599 So. 2d at 984; Chandler, 702 So. 2d at 194 n.6. Under the circumstances, it would be tempting to characterize the state's silence as an implied admission.[10]

The caselaw relied on by the state (SB31-33) is distinguishable for the same reason; there were no significant dissimilarities between the Smith and Clark murders indicated in Crump v. State, 622 So. 2d 963, 967-68 (Fla. 1993), and the dissimilarities in Chandler v. State, supra, 702 So. 2d at 194 n.6, were found to be minor and "explainable by the course of events and the opportunities presented to Chandler." The instant case is very different. Here, in the Coryell homicide (1) the triggering motive for the crime -- as the prosecutor put it -- was desperation born of appellant's downward

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[9] The dissimilar nature of the two crimes is fully discussed at p. 63-74 of appellant's initial brief.

[10] Undersigned counsel also contended in his initial brief that the prosecution -- in arguing for the admission of the Williams Rule evidence and then in presenting it to the jury -- took an inconsistent position by relying on evidence in the Nugent trial which it had attacked as false when it was presented by the defense in the Coryell trial. See appellant's initial brief, p.64-74. The state's response in its answer brief is to totally ignore the problem. (SB30-35).

financial spiral in the summer of 1997;[11] (2) appellant -- as the prosecutor again insisted -- had no personal relationship with the victim;[12] (3) Ms. Coryell was accosted in the parking lot beside her car as she was returning from grocery shopping; (4) she was kidnapped and transported to a more secluded location; where (5) she was robbed of her ATM card and forced to provide her PIN number; and (6) she was was raped. None of these factors was shown to apply to the Nugent murder. Appellant knew Janice Nugent socially from Malio's night-club; he had dated her once, and was invited into her home on that occasion. He thought her behavior strange and he didn't want to see her again. Nugent's murder, which occurred several weeks later, took place in her home, and (as the prosecution and defense agreed) was committed by someone whom Ms. Nugent knew well enough to invite inside for wine and conversation.[13] [The state had no witnesses who saw appellant and Ms. Nugent together at any time after January 15, when, according to Fran Aberle, Ms. Nugent returned his jacket to him at Malio's by placing it on his chair]. There was no evidence of kidnapping, robbery, rape, or any financial motive for Nugent's murder. These dissimilarities are so extensive, and so basic to the nature of the crimes, that the introduction of the Coryell murder into the Nugent trial was prejudicial error which violated appel-

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[11] See C15/1339-40. The murder of Janice Nugent occurred in February 1997.

[12] See C18/1745, C15/1340.

[13] As the testimony of Ron Pliego illustrates, this person could easily have been someone other than appellant.

lant's right to a fair trial on the charged crime. See Thompson; Peek; Drake; Miller; Bell; Whitehead; Garrette; Joseph; Davis.

Regarding the similarities between the two crimes, of the nine found by the trial court only one -- the patterned bruises on each victim's buttocks consistent with a belt -- can be considered an unusual similarity. Three of the others are general similarities common to many crimes, while the rest are either insignificant, factually wrong, or rely on a version of the Coryell murder (i.e., that appellant killed her -- without intending to -- in the parking lot when she ignored his offer to help unload her groceries, and that she wasn't kidnapped, robbed, or raped) which nobody -- least of all the state -- believes to be true.[14] See appellant's initial brief, p. 68,72-77.

The state, reaching for similarities, argues "While Defendant may argue that many victims are strangled. It is rare for a victim to be strangled from behind. A review of Florida cases found only one case mentioning such a manner of death. See Overton v. State, 801 So. 2d 877, 882 (Fla. 2001) (medical examiner testified that

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[14] The trial court expressly stated that he would not have considered the fact that both bodies were found submerged in shallow water (Coryell in a pond, Nugent in a bathtub) to be a valid similarity in and of itself (3/410). Instead the trial court relied on appellant's testimony in the Coryell penalty phase that (1) after he realized that he had killed Coryell in the parking lot he originally thought about taking her body up to her apartment, but he was afraid she had an alarm system, and (2) that he put Coryell's body in the pond becasue he thought the water would destroy evidence (3/410). [Actually, appellant never said that. What he said was that he washed off his legs and shoes in the swimming pool in order to destroy evidence (11/1014; C18/1735-36)]. See appellant's initial brief, p. 74-77.

victim was strangled by a ligature with pressure applied from behind)." (SB33 n.5) However, the reason the state found only one case mentioning that the victim was strangled from behind is not because there are dozens of other cases specifying that the victim was strangled from in front, but rather because the vast majority of the opinions don't say one way or the other. For example, of the twenty cases cited at p. 79 n.12 of appellant's initial brief in which strangulation homicides were accompanied by beatings and/or blunt trauma injuries, the recitation of facts in two of them strongly suggest (without expressly stating) that the strangulation occurred from in front,[15] while most if not all of the other eighteen simply do not say whether it was from the front or from behind or some of both, or whether the evidence was inconclusive on that point.

Moreover, the state's assertion that "both victims were strangled from behind" (SB31) is in itself a bit of a stretch. The medical examiner in the Nugent case, Dr. Martin, found no petechial hemorrhages in or around the eyes (8/630-31,646). She testified that Ms. Nugent's death did not result from continuous compression of the neck, but more of a "pressure, release, pressure, release. There was some fighting activity" (8/631,646). Dr. Martin believed that <u>during at least a portion of the events</u>, Ms. Nugent's assailant was behind her (8/632-34). To compare this to the Coryell case, it again depends on which version the state wants to use. According to the version which the state presented to the Nugent jury, Ms. Coryell was

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[15] <u>Mansfield v. State</u>, 758 So. 2d 636, 641 (Fla. 2000); <u>Perry v. State</u>, 522 So. 2d 817, 821 (Fla. 1988).

leaning back into her car for more groceries and appellant grabbed her by the arm, asked her again if he could help her, and when he couldn't get her attention he grabbed her around the neck. It seemed like it just took a short time; her legs gave out, she hit her lip on the edge of the car door, and her chin hit the ground (11/997-99, 1011-12,1015). Under this version, it appears that the strangulation did take place from behind, but there was no beating, no fighting activity, no "pressure and release." Therefore, there was no similarity between the method of strangulation in the Coryell case with that in the Nugent case.

On the other hand, the state could use the version which it actually believes, and which it presented in the Coryell trial; i.e., that Leanne Coryell was not killed in the parking lot, but was abducted from there and taken to a wooded area by a pond, where she was robbed, forced to disrobe, raped and then strangled to death. The medical examiner in that case, Dr. Vega, found petechiae in her eyes and inside her eyelids, which he testified is more consistent with continuous pressure, and less consistent with compression and release (11/991-92). Asked whether he thought Ms. Coryell's assailant was behind her or in front of her when the strangulation occurred, Dr. Vega stated, "I think more likely that it was from behind but I cannot rule out either possibility" (11/984).

Using that scenario, you have one case (Nugent) where the assailant and the victim knew each other well enough to be having wine and conversation in the victim's house, when something happened -- the evidence does not even suggest what it may have been -- which

resulted in either a mutual fight or a one-sided attack. During the choking, which was apparently intermittent, the assailant was behind Ms. Nugent at least part of the time. You have another case (Coryell) where the motives were financial and sexual; the victim was kidnapped, robbed, and raped; there was no evidence of any fighting activity; the strangulation was done by continual pressure; and the medical examiner thinks the strangulation was more likely from behind but can't rule out either possibility. The state's claim of "both victims were strangled from behind" as a significant similarity does not withstand scrutiny.

To summarize, the similarities in this case, with the exception of the patterned bruising on the victims' buttocks, are either general or imaginary. The dissimilarities are pervasive. Introduction of the Coryell murder into the Nugent trial was prejudicial and reversible error.

B. Harmful Error

As it did with "Dwight", the state again recites its mantra of "sufficient overwhelming evidence" (SB34). As explained in appellant's initial brief, and in Issue I of this reply brief, the evidence as to the Nugent murder is entirely circumstantial and far from overwhelming. Moreover, the state persists in its misapprehension of the harmless error test, which is not to airbrush out the offending evidence and then conclusorily label what remains as "overwhelming." That type of superficial harmless error argument was put to rest in Goodwin v. State, 751 So. 2d 537, 542 (Fla. 1999):

> In reaffirming DiGuilio and its applicability to error such as the improper admission of collateral crime evidence, we reiterated in Lee that the harmless error analysis focuses on the effect of the error on the trier of fact. Id. at 137. Thus, the reviewing court must resist the temptation to make its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence. We also repeated our agreement with Chief Justice Traynor, previously quoted in DiGuilio:
>
> > Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

This Court in Goodwin also emphasized that the erroneous admission of collateral crime evidence is extremely serious and presumptively harmful. 751 So. 2d at 543. Addressing whether such presumptively harmful error also amounts to constitutional error, this Court answered its own question as follows: "Certainly the admission of such evidence impacts the defendant's right to a fair trial and therefore implicates a defendant's basic due process rights." 751 So. 2d at 543. In the instant case, the collateral crime was a murder; one with great potential to affect the jury emotionally. While the evidence in the charged crime was entirely circumstantial, the state introduced a confession to the Williams Rule murder. Photographs of the very attractive Williams Rule victim were introduced, and the trial judge noted the reaction of one of the jurors to the photograph of Leanne Coryell's nude body in the pond

(11/980). See Henry v. State, 574 So. 2d 73, 75 (Fla.1991) ("Indeed, it is likely that the photograph [of collateral crime victim] alone was so inflammatory that it could have unfairly prejudiced the jury against Henry"). 62 minutes of this kind of testimony as the crowning point of the state's case would have a devastating impact on any jury. Finally, even "Dwight" must be considered part and parcel of the Williams Rule evidence, since the only relevancy the state can offer to try to justify the introduction of the Dwight statements before the Nugent jury is in the "context" of his confession to the murder of Ms. Coryell, and his statement (to his own psychiatric expert) that Dwight might have killed her. [Appellant never said or implied that Dwight might have killed Nugent; he said just the opposite]. The state claims that the Williams Rule evidence "was not a feature of the trial." (SB34). In view of Dwight's now being added to the mix, undersigned counsel isn't so sure of that. But in any event, improperly admitted Williams Rule evidence need not be "a feature of the trial" in order to be prejudicial enough to preclude a finding that it could not have contributed to the jury's verdict. Improperly admitted Williams Rule evidence is presumptively prejudicial, and the burden is on the state to prove that it could not have had any significant impact under the circumstances of the given case. Goodwin. "Feature of the trial", in contrast, is the standard which appellate courts use to limit the extent of properly admitted Williams Rule evidence. As this Court said in Steverson v. State, 695 So. 2d 687, 689 (Fla. 1997):

> Even when evidence of a collateral crime is properly admissible in a case, we have cautioned that "the prosecution should not go too far in introducing evidence of other crimes. The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident." Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984).

See e.g. Macklin v. State, 395 So. 2d 1219, 1221 (Fla. 3d DCA 1981); Matthews v. State, 366 So. 2d 170 (Fla. 3d DCA 1979).

Since the state has completely failed to overcome the presumption that the erroneous introduction of the Coryell murder was prejudicial, and since all of the circumstances of this case affirmatively show that this Williams Rule error was in fact profoundly prejudicial, appellant's conviction for the murder of Janice Nugent must be reversed for a new trial.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his conviction for a new trial [Issues I and II], or for discharge [Issue III], or reduce it to second degree murder [Issue IV]. For all of these reasons, and those asserted in Issue V, appellant requests that his death sentence be vacated.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Kimberly Nolen Hopkins, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 801-0600, on this _____ day of March, 2003.

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