IN THE SUPREME COURT OF FLORIDA

LAWRENCE JOEY SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC01-2103
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
Assistant Public Defender
FLORIDA BAR NUMBER O229687

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief is filed in reply to the Answer Brief of the Appellee, the State of Florida.

References to the record on appeal are designated by V and the volume number, followed by the page number(s).

ARGUMENT

ISSUE I

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT DENIED HIS MOTION FOR MISTRIAL WHEN BUTTERFIELD TESTIFIED THAT AFTER SHOOTING CRAWFORD APPELLANT SAID THAT WAS THE THIRTEENTH OR FOURTEENTH PERSON HE HAD SHOT.

State witness Theodore Butterfield testified that after the shooting of "the other kid" [V13, 432-33], alleged murder victim Robert Crawford [V1, 5], "When Joey [Smith] got back in the car, he had made a statement that that was the 13th or 14th people that had been -- that he had shot." [V13, 433] Defense counsel objected and moved for a mistrial on the grounds that the statement was "totally irrelevant" and "extremely prejudicial." [V13 433-34] In the Answer Brief, at page 5-6, appellee argues, "It was evidence of his state of mind, was relevant to show his knowledge and intent and was not introduced to show propensity and bad character." Appellee is wrong.

In Jackson v. State, 451 So. 2d 458, 460-61 (Fla. 1984), state's witness Dumas testified in a capital murder case that Jackson had pointed a gun at him and boasted of being a thoroughbred killer from Detroit. This Court agreed that the testimony was impermissible and prejudicial, stating,

> We envision no circumstance in which the objected to testimony could be "relevant to a material fact in issue," nor has the state suggested any. The testimony showed Jackson may have committed an assault on Dumas, but that crime was irrelevant to the case sub judice. Likewise the "thoroughbred killer" statement

> may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2).

There is no substantive difference between the "thoroughbred killer" statement in Jackson and Butterfield's testimony about Smith's statement "that was the 13th or 14th people ... that he had shot." This statement suggested that Smith shot, and possibly killed, 11 or 12 people before shooting Tuttle and Crawford. But the statement neither proved that fact, nor was that fact relevant to any material issue in Smith's trial. Smith's intent and state of mind were relevant to the issue of whether the shooting of Tuttle and the shooting and killing of Crawford were premeditated as alleged in the indictment. But the boast about prior shootings was not probative of whether the shooting of Tuttle and the killing of Crawford were premeditated. The statement did not even indicate that the unproven prior shootings were premeditated.

Even if this Court were to find some marginal relevance of the statement to the issue of premeditation, the prejudicial impact of the statement overwhelmingly outweighed its probative value, so the statement was inadmissible under section 90.403, Florida Statutes (1999). See State v. Hubbard, 751 So. 2d 552, 565 (Fla. 1999) (in DUI manslaughter case, slight probative value of prior suspensions of defendant's driver's license was substantially outweighed by danger of unfair prejudice); Gore v. State, 719 So. 2d 1197, 1199-1200 (Fla.

1998) (in capital murder case, marginal probative value of evidence of child abuse was outweighed by tremendous prejudice).

Although the statement that Crawford was the 13th or 14th person Smith had shot was not repeated, it was the kind of remark that makes an indelible impression on the minds of the jurors. Because the statement indicated that Smith shot 11 or 12 people before he shot Tuttle and Crawford, the statement would convince an ordinary juror that Smith was an even greater danger to society than the evidence relevant to the shooting of Tuttle and Crawford indicated. The statement also invited the jurors to speculate about what happened as a result of the prior shootings. Were the victims of the prior shootings seriously injured or killed? Was Smith prosecuted for the prior shootings? If so, why wasn't he in prison? Why was he free to shoot Tuttle and shoot and kill Crawford? Such speculation would necessarily affect and/or contribute to both the guilty verdicts at trial and the jury's recommendation of death.

The danger of unfair prejudice is illustrated by the trial court's finding in the sentencing order: "After the killing, the Defendant announced to the people in the automobile: 'That's twelve and thirteen, eight more to go and I'll match Billy the Kid'." [V9, 1576] The court's version of the statement plainly incorporates the impermissible nonstatutory aggravator of future dangerousness. See Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997) (testimony that the defendant would kill again was evidence of nonstatutory aggravation which was not harmless). Appellee admits that there was no evidentiary basis for the court's finding other than Butterfield's

testimony. Answer Brief, at page 50-52. If the trial judge, with all his education and experience, was capable of so distorting Butterfield's testimony, it is very likely that the jurors also misconstrued Butterfield's testimony.

Because of the overwhelmingly prejudicial impact of the statement that Crawford was the 13th or 14th person Smith had shot, Smith was deprived of his due process right to a fair trial, and the trial court abused its discretion in denying the motion for mistrial.[1] Moreover, the prejudicial impact of the statement must have affected and/or contributed to the jury's guilty verdicts for both the first-degree murder of Crawford and the attempted first-degree murder of Tuttle, so the error cannot be found harmless under the standard of State v. DiGuilio, 491 So. 2d 1129, 1135, 1139 (Fla. 1986). This Court must reverse the convictions and remand for a new trial.

---

[1] In arguing that the court did not abuse its discretion in denying the motion for mistrial, appellee incorrectly asserted that "the victim ... testified the murder weapon was in Smith's hand and that Smith was the only possible assailant ...." Answer Brief, at page 12. Tuttle did not testify that the murder weapon was in Smith's hand, nor that Smith was the only possible assailant. [V13, 388-417] Tuttle testified that Smith got out of the car and stood between the door and the car, Tuttle had to crawl out, Tuttle was putting on his hat, and that was all that he remembered, everything went black. [V13, 404-406] He did not know whether anyone else got out of the car because his back was turned. [V13, 409]

ISSUE II

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT DENIED HIS MOTION FOR MISTRIAL WHEN THE PROSECUTOR SLAMMED THE MURDER WEAPON DOWN ON DEFENSE TABLE AFTER ASKING THE JURY WHERE THE GUN GOES.

Appellee seeks to distinguish this case from United States v. Calhoun, 726 F. 2d 162 (4th Cir. 1984), by asserting, "Unlike Calhoun, the record does not support the conclusion that the prosecutor's act was deliberate and calculated to influence the jury on the central issue in the case in an improper way." Answer Brief, at page 20. Yet the prosecutor in this case concluded his argument that Smith was the person who used the murder weapon by loudly smashing the murder weapon down on defense table. [V15, 792-793] There is absolutely no basis in the record for appellee to argue that this act was anything but deliberate. And since it was done to emphasize the prosecutor's argument that Smith was the gunman who shot Tuttle and Crawford, the act of smashing the gun down on the table was plainly calculated to influence the jury on a central issue in the case. As in Calhoun, at 164, there can be no real doubt that the prosecutor's improper act was calculated, deliberate, and prejudicial to Smith. The convictions must be reversed and the case remanded for a new trial.

ISSUE III

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO RECORD THAT THE PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE.

Appellee's reliance on Fortner v. State, 825 So. 2d 876, 879 (Ala. Crim. App. 2001), Answer Brief, at page 25 n.5, for the proposition that failure to swear the prospective jurors for voir dire is not jurisdictional and can be waived, is misplaced. The Fortner decision concerned whether the issue could be raised in an untimely, successive petition for postconviction relief, not whether the issue was cognizable on direct appeal or in a timely, original petition for postconviction relief.

In Fernandez v. State, 814 So. 2d 459 (Fla. 4th DCA 2001), Fernandez appealed an order summarily denying his motion for postconviction relief. Fernandez claimed that his trial counsel was ineffective in failing to object to the trial court's failure to place the prospective jurors under oath prior to voir dire. The Fourth District found that portions of the trial transcript attached to the order did not refute the claim because they were inconclusive on the question of whether the prospective jurors were ever sworn. Citing Ex parte Hamlett, 815 So. 2d 499 (Ala. 2000) (remanding for the trial court to determine whether the venire was properly sworn), the Fourth District remanded to the trial court to conduct an evidentiary hearing or to attach further portions of the record to show that Fernandez was not entitled to relief.

In the Initial Brief of Appellant, at pages 49-50, counsel for appellant relied upon both Johnson v. State, 2001 WL 1520614 (Ala. Crim. App. Nov. 30, 2001) ("The failure to swear a jury venire is reversible error, and we will not assume from a silent record that the jury was sworn."), and Ex parte Hamlett as authority. Counsel argued that this Court should reverse Smith's convictions and remand for a new trial because failure to swear the prospective jurors for voir dire was reversible error which could not be waived by a silent record, or in the alternative, remand for an evidentiary hearing to determine whether the prospective jurors were sworn for voir dire. In the Answer Brief of Appellee, at page 25, appellee argues that this Court should deny relief, or in the alternative, remand this case for an evidentiary hearing should this Court find that the record's failure to affirmatively demonstrate that the jurors were properly sworn requires further evidentiary development.

If this Court determines that it cannot decide the merits of this claim because the record is silent regarding whether the jurors were sworn for voir dire, appellant requests this Court to grant the alternative relief requested by both parties and remand this case to the trial court to determine whether the prospective jurors were sworn prior to voir dire. Remand would be needed so this Court would have an adequate factual basis to determine whether the trial court erred. To remand for such a determination would conserve judicial time and resources, because it would allow this Court to decide this issue on the merits on direct appeal rather than postponing a final disposition on this issue until a motion for postconviction relief

can be filed and litigated. However, if this Court denies relief on this claim on direct appeal, counsel requests this Court to do so without prejudice to Smith raising and litigating this issue in a motion for post-conviction relief.

ISSUE IV

APPELLANT IS ENTITLED TO A NEW PENALTY PHASE TRIAL BECAUSE THE PROSECUTOR MISLED THE JURY AND THE COURT UPON THE LEGAL STANDARD FOR WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Appellee resorts to semantic games by arguing that the prosecutor did not tell the jury they "must" or were "required" to return a death sentence. Answer Brief, at page 26. Appellee quotes the prosecutor telling the jury during closing argument,

> If you find no mitigating factors, if you find that the evidence is devoid of mitigation, then your **obligation** is to return a verdict to the judge recommending a sentence of death.
>
> * * *
>
> If you find ... that the aggravating factors outweigh the mitigating factors, then your recommendation to the Court **will be** that Joey Smith die. [Emphasis added.]

[V16, 922-23] Answer Brief, at page 28.

Webster's New Universal Unabridged Dictionary, p. 1233 (2d ed. 1983), defines "obligation" to mean "3. a duty imposed legally or socially; thing that one is bound to do as a result of a contract, promise, moral responsibility, etc." Webster's, p. 2093, further defines "will" as "1. an auxiliary used to express futurity, usually with implications of intention, determination, compulsion, obligation, or necessity ... shall and will are used interchange-ably ...." Thus, the prosecutor essentially told the jurors they had a legal duty and were bound or compelled to recommend a sentence of death if they found no mitigation or that the aggravating factors outweighed the mitigating circumstances.

The prosecutor's remarks in this case were precisely the sort of prosecutorial misstatement of the law condemned in Cox v. State, 819 So. 2d 705, 717 (Fla. 2002) (if "the evidence in aggravation outweighs the evidence in mitigation, the law says that you must recommend that Mr. Cox die."); Brooks v. State, 763 So. 2d 879, 902 (Fla. 2000) ("And if sufficient aggravating factors are proved beyond a reasonable doubt, you must recommend a death sentence, unless those aggravating circumstances are outweighed ... by the mitigating circumstances."); Henyard v. State, 689 So. 2d 239, 249 (Fla. 1997) ("[i]f the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death.").

In Cox, at 717-18, this Court found the prosecutor's misstatement of the law was harmless because of an additional statement by the prosecutor and because the trial court did not repeat the misstatement while instructing the jury. In Henyard, at 250, this Court found that the prosecutor's misstatement of the law was harmless because the comments occurred only three times and the misstatement was not repeated by the trial court when instructing the jury. Smith's case is distinguished from Cox and Henyard because the trial court did repeat the prosecutor's misstatement in the sentencing order:

> The aggravating factors far outweigh the mitigating factors and as such requires that the appropriate punishment in this case is death.
>
> ... [T]he legislature of this state has required that death must be imposed when the aggravating factors far outweigh the mitigating factors, and this court must be guided by this law. Ours is a country of law, not men, and

> the law of this state requires the result to be rendered hereafter.

[V9, 1585]

However, Florida law never requires or compels the imposition of the death penalty:

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.

Henyard, at 249.

Appellee argues that this claim is procedurally barred because defense counsel did not object to the prosecutor's misstatements of the law. Answer Brief, at pages 26-28. However, there is no requirement that defense counsel object to the court's error in the sentencing order, so appellant is entitled to argue the court's error.

Because the trial court expressly relied upon a misstatement of the law in sentencing Smith to death, there can be no doubt that the court's error affected and/or contributed to the imposition of the death sentence. Therefore, the court's error cannot be found harmless under the standard of State v. DiGuilio, 491 So. 2d 1129, 1135, 1139 (Fla. 1986). Thus, the death sentence must be vacated and the case must be remanded for resentencing.

Although defense counsel failed to object to the prosecutor's misstatements, those misstatements to the jury contributed further to the prejudice suffered by Smith. Because the court was misled by the prosecutor's misstatements of the law, there is a reasonable possi-

bility that the jurors were misled as well, so the prosecu-tor's misstatements to the jury cannot be held harmless under DiGuilio. Thus, the remand for resentencing ought to require a new penalty phase trial before a new jury.

ISSUE V

APPELLANT IS ENTITLED TO A NEW PENALTY PHASE TRIAL BECAUSE THE COURT INSTRUCTED THE JURY UPON AND FOUND THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN THE ABSENCE OF PROOF THAT SMITH HAD A CAREFUL PLAN OR PREARRANGED DESIGN TO COMMIT MURDER BEFORE THE FATAL INCIDENT.

It is well established that in order to find the cold, calculated, and premeditated aggravating circumstance "the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the crime began." Crump v. State, 622 So. 2d 963, 972 (Fla. 1993). Appellee's discussion of the evidence establishing the existence of the other elements of the CCP factor, Answer Brief, at pages 40-48, is irrelevant to the question of whether the state proved that Smith planned or arranged to commit the murder before the crime began.

In this case, the crime began with the kidnapping of Tuttle and Crawford from We Shelter America. The only evidence even remotely suggesting that Smith planned to kill Crawford before the crime began was that Smith arrived at We Shelter America armed with a 9 mm handgun [V12, 309-10, 329-30; V13, 400-01, 424, 440, 465], and Brittingham testified that Smith spoke to Pearce, but Britting- ham could not hear what they said. [V13, 466] However, the state's evidence showed that Pearce called Butterfield and asked him to come to We Shelter America, to bring Smith, and to bring firearms. [V12, 329, 352, 357; V13, 423, 444, 464] There was no evidence that Smith

knew why Pearce requested Butterfield to bring him and to bring firearms. Also, Smith's 9 mm handgun was not the murder weapon; Crawford was killed by .40 caliber gunshots. [V14, 622, 625-26, 633-36] Moreover, the court could not speculate as to what was said in the conversation between Smith and Pearce at We Shelter America.

Thus, there was absolutely no evidence that Smith knew about any plan or design to murder Crawford before the crime began. In the complete absence of proof of this essential element of the CCP aggravating factor, the court erred in concluding that CCP had been proven. Because the court gave great weight to the CCP factor [V9, 1563-77], there can be no doubt that this factor affected and/or contributed to the court's decision to sentence Smith to death, so the court's error in finding the unproven CCP factor cannot be held harmless under the standard of State v. DiGuilio, 491 So. 2d 1129, 1135, 1139 (Fla. 1986). The death sentence must be vacated for resentencing.

Moreover, because there was no evidence of an essential element of CCP, the court erred by instructing the jury on the CCP factor, so the resentencing must be conducted before a new jury. See Padilla v. State, 618 So. 2d 165, 170-71 (Fla. 1993) (factually unsupported jury instruction and court finding of CCP required remand for a new sentencing proceeding before a new jury).

ISSUE VI

APPELLANT IS ENTITLED TO RESENTENCING BECAUSE THE COURT RELIED UPON AN UNPROVEN STATEMENT IN FINDING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR AND THE UNPROVEN STATEMENT CONTAINED THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS.

Appellee admits that the trial court's finding, "After the killing, the Defendant announced to the people in the automobile: 'That's twelve and thirteen, eight more to go and I'll match Billy the Kid,'" had absolutely no evidentiary basis other than Butterfield's testimony. Answer Brief, at pages 50-52. But Butterfield testified that Smith said, "that was the 13th or 14th people that had been -- that he had shot." [V13, 433] Neither Butterfield nor any other witness testified at trial that Smith said, "eight more to go and I'll match Billy the Kid."

The trial court plainly misconstrued Butterfield's testimony and added a phrase from the court's imagination which clearly applied the nonstatutory aggravating circumstance of future dangerousness to the decision to sentence Smith to death. See Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997) (testimony that defendant would kill again was evidence of nonstatutory aggravation). Appellee argues that "no harmful or reversible error has been established." Answer Brief, at page 52. However, in Kormondy this Court found that allowing testimony of future dangerousness was not harmless: "[O]ur turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute."

Id. Here the trial court engaged in the flagrant use of nonstatutory aggravation, and this Court must not turn a blind eye. Smiths's death sentence must be vacated.

ISSUE VII

APPELLANT IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS AND RIGHT TO JURY TRIAL REQUIREMENTS THAT A DEATH QUALIFYING AGGRAVATING CIRCUMSTANCE MUST BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

The plurality opinion of the United States Supreme Court in Ring v. Arizona, 122 S.CT. 2428, 2443 (U.S. 2002), holds that the Sixth Amendment requires that the aggravating factors required for a death sentence must be found by the jury. Section 921.141(3), Florida Statutes (1999), requires that the findings of aggravating circumstances must be made by the trial court. Under section 921.141(2), Florida Statutes (1999), the jury's role is merely advisory; the jurors recommend a sentence of life or death upon considering and weighing the aggravating and mitigating circumstances, but they do not make express factual findings of the aggravating circumstances. As a result, Florida's death penalty statute is unconstitutional on its face.

Because the Florida death penalty statute is unconstitutional, there is absolutely no lawful authority for the State of Florida to execute anyone, no matter what the particular circumstances of their offense may be. To execute someone in the absence of any lawful authority to do so would be constitutional error of the greatest magnitude. Such error can never be waived or held harmless under any

circumstances. The death sentence imposed upon Lawrence Joey Smith must be vacated.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of December, 2002.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

PAUL C. HELM
Assistant Public Defender
Florida Bar Number O229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/pch