IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE, :

Appellant, :

vs. : Case No. SC02-286

STATE OF FLORIDA, :

Appellee. :

_________________________________:

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed in reply to the Answer Brief of Appellee, the State of Florida. Appellant will rely on the arguments presented in his Initial Brief for Issues IV, V, and VII.

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

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED ON HIS RIGHT TO SILENCE IN HER OPENING STATEMENT.

The prosecutor implicitly commented upon Appellant's right to remain silent during her opening statement by telling the jury:

> In this particular case, as Kenneth Dessaure said himself, there is [sic] only two people that know exactly what occurred in that apartment. So, therefore, it is my job to take the physical evidence, the scientific evidence, the photographs, the witnesses' statements, experts, scientists, forensic technicians, and reconstruct what occurred for you.

[V27 350]

Both the trial prosecutor [V27 351] and counsel for appellee, Answer Brief, p. 52, have attempted to justify these remarks as comments on the evidence to be presented at trial because the State later presented Valdez Hardy's testimony that Dessaure said, "can't nobody say he killed her. Don't nobody know what happened but him and her." [V28 635] However, these attempts must fail. The prosecutor's remarks were impermissible comments on Dessaure's constitutional right to remain silent because they were "fairly susceptible of being interpreted as referring to [Dessaure's] failure to

testify[.]" *See Rodriguez v. State,* 753 So.2d 29, 37 (Fla. 2000). A juror could reasonably interpret the remarks as meaning that only Cindy Riedweg and Kenneth Dessaure knew exactly what happened, Riedweg was dead, and Dessaure would not testify. Indeed, counsel for appellee candidly "acknowledges that this Court has determined that similar comments have impermissibly highlighted the defendant's decision not to testify," citing *Rodriguez; Heath v. State,* 648 So.2d 660, 663-64 (Fla. 1994); *Dailey v. State,* 594 So.2d 254, 257-58 (Fla. 1991); and *State v. Marshall,* 476 So.2d 150, 151 (Fla. 1985). Answer Brief, p. 52-53.

Appellee's principal argument is that the error in denying the motion for mistrial was harmless because, "The evidence in the instant case is overwhelming against Appellant and the brief comment in the prosecutor's lengthy opening statement was not so prejudicial as to vitiate the entire trial." Answer brief, p. 53-54. However, this Court has repeatedly ruled that the harmless error test is not an overwhelming evidence test. *Williams v. State,* 28 Fla. L. Weekly S853 (Fla. Dec. 11, 2003); *Knowles v. State,* 848 So.2d 1055, 1057 (Fla. 2003); *Goodwin v. State,* 751 So.2d 537, 542-43 (Fla. 1999); *State v. DiGuilio,* 491 So. 2d 1129, 1139 (Fla. 1986). In *DiGuilio,* at 1139, this Court explained:

> The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the

> error did not affect the verdict, then the error is by definition harmful.

Accord, Williams v. State, 28 Fla. L. Weekly at S853.

There is at least a reasonable possibility that the prosecutor's comments on Dessaure's failure to testify affected the jury's verdict. Because her remarks highlighted Dessaure's failure to testify, it is at least reasonably possible that one or more jurors considered Dessaure's failure to provide an innocent explanation for the State's circumstantial evidence in deciding that he was guilty of first-degree murder. Such consideration of Dessaure's failure to testify would violate the Fifth Amendment and Article I, section 9, Florida Constitution, and deprive Dessaure of the fair trial to which he was entitled under the due process clauses of the Fourteenth Amendment and Article I, section 9, Florida Constitution.

Appellee also suggests that the proper remedy for the prosecutor's misconduct in commenting on Dessaure's silence would be bar disciplinary action rather than reversal for a new trial on the theory that reversal punishes the people of the State of Florida. Answer Brief, p. 54. Appellant questions whether counsel for Appellee is seriously urging this Court to consider subjecting the prosecutor to disciplinary action for her conduct in this case. Regardless of whether such action would be warranted, it would certainly not provide an adequate remedy for the violation of Dessaure's

constitutional rights. The State of Florida, through the actions of the trial prosecutor, deprived Dessaure of a fair trial. Punishing the prosecutor would not restore the fairness of the trial. The only appropriate remedy for Dessaure would be to reverse his conviction and remand for a new trial in which the State must scrupulously honor his constitutional rights. Reversal of Dessaure's conviction for a new trial would not "punish" the people of the State of Florida. The constitutional rights to remain silent and to a fair trial when accused of crime belong to all the citizens of Florida, who have an abiding and fundamental interest in protecting and preserving those rights against encroachment by the government.

ISSUE II

THE TRIAL COURT ERRED BY EXCLUDING DEFENSE EVIDENCE THAT ASHES FOUND IN RIEDWEG'S SINK MAY HAVE BEEN LEFT THERE BY STUART COLE AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT THE ASHES WERE EVIDENCE OF APPELLANT'S IDENTITY AS THE PERPETRATOR OF THE HOMICIDE.

Section 90.401, Florida Statutes (2001), provides, "Relevant evidence is evidence tending to prove or disprove a material fact." Appellee misquotes this statute by omitting the words "or disprove." Answer Brief, p. 60. Appellee's omission is significant. As misquoted by Appellee, the

statute would permit the admission of evidence only if it tended to prove a fact in issue. Appellee's version would allow the State to present evidence to prove guilt but would not allow the defense to present evidence to disprove guilt. The statute ensures the fairness of trials by allowing either party to present evidence that would tend to prove or disprove a fact in issue. The fundamental test for the admissibility of any evidence is relevance, *i.e.,* whether it tends to prove or disprove a material fact in issue. *Jorgenson v. State,* 714 So.2d 423, 427 (Fla. 1998); *Griffin v. State,* 639 So.2d 966, 968 (Fla. 1994), *cert. denied,* 514 U.S. 1005 (1995).

The State placed the origin of the ashes in Riedweg's sink in issue by arguing that they must have been left there by Dessaure because he smoked cigarettes, his foot print was on the floor near the sink, and Riedweg would have washed them away since she was a meticulous housekeeper. [V36 1693-94] It was fundamentally unfair to exclude defense evidence that tended to disprove the State's contention by showing that the ashes could have come from a marijuana cigarette smoked by Stuart Cole. The State argues that there is no evidence that Cole smoked marijuana in the apartment that day, Answer Brief, p. 61, but there is no direct evidence that Dessaure smoked a cigarette in the apartment that day. Both arguments are based on inferences from circumstantial evidence. The State also argues that the defense could have argued that the ashes came

from incense, Answer Brief, p. 65, but the odor of incense in the apartment was part of the circumstantial evidence that marijuana had been smoked in the apartment. Both parties are entitled to introduce circumstantial evidence tending to prove or disprove the fact in issue, and to argue reasonable inferences from that evidence.

Appellee asserts, "Despite Appellant's argument in his brief that the evidence was not offered to show that Cole killed Riedweg, defense counsel at trial argued to the contrary in his closing argument. (V37:1734-37) Appellant was attempting to argue evidence of another crime to show that Cole may have killed the victim and left the ashes in her sink." Answer Brief, p. 62. The record does not support appellee's argument. Defense counsel did not argue that Cole killed Riedweg. Instead, he discussed discrepancies in the State's evidence: Dessaure's blood was not found in Riedweg's apartment. Cole's blood was found on Riedweg's chair, but could have been placed there at any time he had been in her apartments over a two-and-a-half year time period. [V37 1734-35] Cole could not have killed Riedweg because he was playing golf from 1:30 to 6:00 p.m. on the day of the homicide. [V37 1735] Detective Klien told Cole that Riedweg had been killed at 3:30 a.m. the following morning, and Cole was distraught and cried, yet the apartment complex manager had seen Cole at the crime scene around 7:00 p.m. on the night of the homicide, and Daniel Copeland discussed a news report about it with Cole

at 11:00 p.m. [V37 1135-37]

Appellee discusses the standard for admissibility of similar fact evidence of other crimes. Answer Brief, p. 63-64. Evidence about marijuana found in Riedweg's apartment and Cole's marijuana habit is obviously not similar fact evidence in a murder trial, and defense counsel did not try to introduce it as such. When evidence is otherwise relevant to a material fact in issue, similarity with the charged offense is not required. *See Sexton v. State,* 697 So. 2d 833, 836-37 (Fla. 1997) (similarity not required where evidence of prior bad acts was relevant to the defendant's motive).

Dessaure had the right to present evidence in his own defense pursuant to the Sixth and Fourteenth Amendments and Article I, sections 9 and 16(a), Florida Constitution. *Washington v. Texas,* 388 U.S. 14, 19 (1967); *Zanicchi v. State,* 679 So.2d 40, 41 (Fla. 4th DCA 1996). The trial court violated that right as well as the due process right to a fair trial when it refused to allow defense counsel to present evidence tending to disprove the State's contention that the ashes in Riedweg's sink must have been deposited there by Dessaure. The unjustified exclusion of available defenses and witnesses in support of those defenses violates due process under both the federal and state constitutions. *Morgan v. State,* 453 So.2d 394, 397 (Fla. 1984).

Appellee asserts that the court's error was harmless

because the State's evidence was overwhelming. Answer Brief, pp. 65-66. As argued in Issue I, *supra,* the sufficiency of the State's evidence, even if it is overwhelming, is not the test for harmless error. *See Williams v. State,* 28 Fla. L. Weekly S853 (Fla. Dec. 11, 2003); *State v. DiGuilio,* 491 So. 2d 1129, 1139 (Fla. 1986). Instead, the State has the burden of showing that the error did not contribute to the conviction. *Id.,* at 1135.

Not only did two crime scene technicians testify about the photo showing ashes in the sink [V29 738-40, 746, 752-54, 774-75], the prosecutor questioned one of the technicians about 23 cigarette butts found in the parking lot and the area around the exterior of the apartment [V29 798-99], presented testimony that Riedweg did not smoke and refused to allow Cole to smoke in her apartment [V29, 708-09], and presented testimony about Dessaure smoking cigarettes in the parking lot. [V27 455-56; V29 739; V34 1357] In closing, the prosecutor emphatically argued that Dessaure's identity as the murderer had been established by the four things he left behind, a foot print, the ashes in the sink, the towel with semen, and a stain on the bedspread. [V36 1693-94] Thus, the prosecutor plainly believed that the evidence and argument about the ashes contributed to her circumstantial evidence of Dessaure's guilt. Moreover, to preserve the contribution of the ash evidence to her case, she steadfastly argued against

allowing the defense to counter the ash evidence with evidence of the marijuana cigarettes found in the apartment and Cole's habit of smoking marijuana [V2523-24; V30 805-07; V35 1587] and that she should be allowed to argue to the jury the inference that Dessaure put the ashes in the sink. [V36 1685]

Under these circumstances, there is a reasonable possibility that the jurors considered the State's ash evidence and argument in finding Dessaure guilty. There is also a reasonable possibility that the jurors would not have done so if the defense had been permitted to present evidence and argument to counter the State's claim about the ashes in the sink. The court's violation of Dessaure's constitutional right to present evidence in his own defense cannot be found harmless. This Court must reverse Dessaure's conviction and remand for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO IMPEACH DEFENSE WITNESSES WITH EVIDENCE THAT THEY WERE SERVING MANDATORY LIFE PRISON SENTENCES.

Appellee's reliance on *Howard v. State,* 397 So.2d 997 (Fla. 4th DCA), *review denied,* 408 So.2d 1093 (Fla. 1981), and *Strickland v. State,* 498 So.2d 1350 (Fla. 1st DCA 1986), Answer Brief, p. 71, is misplaced.

In *Howard v. State,* the Fourth District upheld the trial court's decision to allow the State to impeach a defense witness by introducing into evidence a copy of his prior conviction for obstructing justice to show his bias against the police. *Id.,* at 998. When the witness was asked if he had ever been convicted of a crime, he gave a rambling answer in which he said he had been charged with trespassing, one of the charges was dropped, he did not see where he was violating the law, and he thought the charge was politically motivated. He did not admit to the obstructing justice conviction. *Id.,* at 997-998. The decision in *Howard* was consistent with the rules established by this Court in *Fulton v. State,* 335 So.2d 280, 284 (Fla. 1976):

> When there has been a prior conviction, only the fact of the conviction can be brought out, unless the witness denies the conviction. . . . If the witness denies ever having been convicted, or misstates the number of previous convictions, counsel may impeach the witness by producing a record of past conviction.

Because the witness in *Howard* did not admit that he had been convicted of a crime, and claimed that he had simply been charged with trespassing for political reasons, the prosecutor was entitled under the *Fulton* rule to introduce a copy of the judgment for obstructing justice into evidence.

Instead of relying on the *Fulton* rule, however, the Fourth District stated that "conviction of a specified crime may be introduced to show bias of a witness." *Howard*, at 998. The Fourth District's reasoning was incorrect as a matter of law. In *Fulton,* at 284, this Court ruled, "A defense witness' supposed bias, attributable to charges concerning a totally distinct offense, is not a proper subject for impeachment." Moreover, "evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness." *Id.* Thus, the result in *Howard* was correct, but the court's rationale for its holding was a misstatement of the law. Furthermore, the Fourth District limited its holding to the facts of the case. *Howard,* at 998.

Strickland v. State, 498 So.2d 1350 (Fla. 1st DCA 1986), appears to be the only reported decision in Florida to rely on *Howard* as authority. In *Strickland*, the First District held that it was proper to allow the State to cross-examine a defense witness about her entry of a plea of nolo contendere to a misdemeanor charge of disorderly conduct which arose from the same incident for which the defendant was charged with

battery on a law enforcement officer and resisting arrest without violence in order to show her bias against the arresting officers. The situation in *Strickland* was not governed by *Fulton* because the charges against the witness did not concern a totally distinct offense. *Strickland* does not apply to the present case because the convictions of defense witnesses William Birchard and Rodney Stafford did not arise from the same criminal episode as the murder of Riedweg for which Dessaure was on trial. Because Birchard and Stafford were convicted of charges concerning totally distinct offenses, those offenses were not a proper subject of impeachment under the *Fulton* rules, and the State was only entitled to ask them how many times they had been convicted of felonies. Thus, the trial court abused its discretion by allowing the prosecutor to improperly impeach the defense witnesses and deprived Dessaure of his right to a fair trial. The conviction must be reversed, and this case must be remanded for a new trial.

ISSUE VI

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY.

In *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000), the

United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Ring v. Arizona,* 536 U.S. 584, 589 (2002), the Court held, "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." However, the Court noted that "Ring . . . does not challenge *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence." Subsequently, this Court has held that there is no *Ring* violation when one of the aggravating circumstances found by the judge is prior conviction of a capital or violent felony. *Duest v. State,* 855 So.2d 33, 48 (Fla. 2003).

In the present case, the sentencing judge found two aggravating circumstances based upon Dessaure's past record of criminal convictions: 1. Dessaure was previously convicted of a felony, conspiracy to commit armed robbery, and placed on community control[1] (some weight). [V24 4358-59] 2. Dessaure was previously convicted of a violent felony, resisting arrest with violence[2] (little weight). [V24 4359] However, the judge also found two aggravating circumstances that were not

based on Dessaure's past record of criminal convictions: 3. The capital felony was committed during the course of a burglary[3] (great weight). [V24 4359-60] 4. The capital felony was especially heinous, atrocious, and cruel[4] (very great weight). [V24 4360-61] The judge violated the Sixth Amendment as interpreted in *Ring* by finding the burglary and HAC aggravating factors.

Under the United States Supreme Court's analysis of death sentencing systems, Florida is categorized as a "weighing" state. *Parker v. Dugger,* 498 U.S. 308, 318 (1991). In a weighing state,

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 503 U.S. 222, 232 (1992).

By finding two constitutionally invalid aggravating factors, burglary and HAC, the judge placed two thumbs on death's side of the scale. He gave great weight to the invalid burglary factor and very great weight to the invalid HAC factor, while he gave only some weight to the community control factor and little weight to the prior violent felony factor. Since the judge gave much more weight to the invalid

(..continued)
[1] § 921.141(5)(a), Fla. Stat. (1997).
[2] § 921.141(5)(b), Fla. Stat. (1997).
[3] § 921.141(5)(d), Fla. Stat. (1997).

factors than to the valid factors, his finding of the invalid factors necessarily affected his decision to impose the death sentence on Dessaure. Therefore, the judge's error cannot be deemed harmless under the harmless error analysis for constitutional error set forth in *Chapman v. California,* 386 U.S. 18, 24 (1967), which was adopted by this Court in *State v. DiGuilio,* 491 So.2d 1129, 1134-35 (Fla. 1986), and reaffirmed in *Williams v. State,* 28 Fla. L. Weekly S853 (Fla. Dec. 11, 2003). The death sentence must be vacated, and this case must be remanded for a new penalty phase trial with a jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen D. Ake, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2004.

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(..continued)
[4] § 921.141(5)(h), Fla. Stat. (1997).

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