IN THE SUPREME COURT OF FLORIDA

FRANKLIN DELANO FLOYD,	:	
Appellant,	:	
vs.	:	Case No. SC03-35
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant will rely upon his statement of the case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon his statement of the facts as presented in his initial brief.

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT FOR FIRST-DEGREE MURDER.

Appellee asserts that the photographs depicting Cheryl Commesso "bound, beaten, and near death on the couch in Floyd's home" (Brief of Appellee, page 24) are sufficient to convict Floyd for her murder. This argument avoids the fact that Commesso was killed by two .22 caliber bullets, not by any injuries shown in the photographs. The shooting which resulted in her death was clearly an independent act without evidence as to the type of firearm that discharged the bullets, who shot her or where she was shot. Her remains were found years later and many miles from the location of Floyd's trailer.

While the State is entitled to fair and reasonable inferences from the evidence, unbridled speculation cannot support a verdict of guilt. The case at bar falls within the scope of caselaw which rejects the pyramiding of inferences to establish a conviction.

ISSUE II

THE TRIAL JUDGE ERRED BY ALLOWING UNFAIRLY PREJUDICIAL COLLATERAL CRIME EVIDENCE WHICH WAS ONLY RELEVANT TO SHOW BAD CHARACTER.

Appellee asserts:

> The State's theory in this case required not just a showing that Floyd has access to this truck, but also that the photographs were of such significance to Floyd that he would secure and maintain them while fleeing in a stolen truck with his kidnapped "stepson". Therefore, his state of mind with regard to the pictures was relevant.

Brief of Appellee, page 30. However, the testimony of Davis states that Floyd fled with all of the items which Davis had observed in the field where the truck stopped, not just the photographs (S17, T991-2, 995-6). While the State may be entitled to an inference that the photos were among Floyd's personal belongings piled under the sleeping bag, it strains plausibility that taking his belongings had such significance to Floyd's "state of mind" that the disconnected crimes of carjacking and kidnapping became relevant to the homicide of Commesso.

Indeed, Appellee offers no argument as to why the photographs of Commesso were more important to Floyd than the other photographs in the collection. Surely if it was "preoccupation with the evidence of a prior crime" (Brief of Appellee, page 31), Floyd would more likely have been concerned with the child pornography photos because mere possession of those would subject

him to arrest and prosecution. Would the State suggest that yet another disconnected crime – possession of child pornography – makes the Oklahoma carjacking and kidnapping relevant to the homicide of Commesso?

The truth about the State's theory of the case is that it depended upon presenting the jury with as much bad character evidence about Floyd as possible. A conviction could not be obtained simply by linking possession of the photographs depicting Commesso bound and beaten to Floyd. Rather, the prosecution had to convince the jury that Floyd was such a violent individual that he was the one who killed Commesso execution-style, with two shots in the head. Evidence of the Oklahoma carjacking and kidnapping committed five years later was irrelevant to who killed Commesso but highly prejudicial to Floyd's character.

Appellee finally contends that the trial court's tailoring of evidence about the Oklahoma offenses should be compared with cases where this Court originally reversed for admission of collateral crime evidence [Henry v. State, 574 So. 2d 73 (Fla. 1991); Sexton v. State, 697 So. 2d 833 (Fla. 1997)], but affirmed the retrials where "milder" versions of these facts were presented [Henry v. State, 649 So. 2d 1366 (Fla. 1994); Sexton v. State, 775 So. 2d 923 (Fla. 2000)]. This argument ignores the fact that the collateral crimes were highly relevant in both Henry and Sexton to an understanding of the homicide for which the defendant was being tried. In these cases, the collateral crime evidence was truly

inextricably intertwined with the charged offense and some of it had to be admitted.

By contrast, in the case at bar, the carjacking and kidnapping bear no relationship to the homicide of Commesso which occurred five years earlier. The sole point of relevancy of the whole incident is to explain how Floyd's collection of photographs might have ended up in the undercarriage of Davis's pickup truck. The jury could have been presented with enough information to understand the relevant point without hearing about Davis being tied to a tree and his fears for his life, etc.

Although Appellee asserts that any error in the trial court's ruling admitting collateral crime evidence would be harmless, this argument ignores this Court's oft-repeated warning that collateral crime evidence is presumed harmful. E.g., Straight v. State, 397 So. 2d 903 (Fla), cert. den., 454 U.S. 1022 (1981). Where only a tenuous chain of circumstances links the defendant with the crime, even a minor error would be prejudicial. The jury must have considered the Oklahoma carjacking and kidnapping when reaching their verdict in this case. Accordingly, the error cannot be held harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Sullivan v. Louisiana, 508 U.S. 275 (1993).

ISSUE III

THE TRIAL JUDGE ABUSED HER DISCRETION BY ALLOWING INTO EVIDENCE MARGINALLY RELEVANT

PHOTOGRAPHS WHOSE PROBATIVE VALUE WAS
OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

It must be remembered that of the 97 photographs found under the pickup truck, only 16 depicted the homicide victim Cheryl Commesso. In admitting the entire collection (subject to exclusion of the most prejudicial ones), the trial judge determined that all had at least minimal relevance because they were found in the same package as the photos depicting Commesso. Some had additional relevance because they were of identifiable people associated with Floyd, e.g. Sharon Marshall and Britney Keller. Therefore, they were relevant to establish the inference that all of the photographs belonged to Floyd and that Floyd may have been the one who actually took the photographs.

In short, the collection of photos was very much like the photo albums that many people maintain. Certainly the format and content was unusual, but it served as a remembrance of important people and events. If the photos had depicted typical social occasions with family and friends, the State would have had no interest in showing them to the jury. It is the lurid content that accounts for the fact that “the State’s case relied on the importance of the collection as a whole”. Brief of Appellee, p.38. In other words, the prosecution’s case depended upon characterizing Floyd as a depraved person. Jurors can be highly inflamed about child pornography, perhaps even more so than about the homicide of an adult woman who worked as a nude dancer.

Although Appellee states that the defense objections to the photographs are so unclear that "there is not a sufficient claim before this Court to grant relief" (Brief of Appellee, page 38), the issue was argued and preserved in the trial court many times. Defense counsel specifically objected to "Any other photograph … that is nude in any way shape or form" (S15, T716). Certainly this Court can determine which photographs fit this description. Also objected to were the photos of nine-year-old Britney Keller in clothed, but sexually suggestive poses. Here it was not any one photo, but the sheer number of Britney photos admitted that caused unfair prejudice.

Appellee asserts in her brief:

> The judge did not consider her definition of pornography to be the guiding factor; she acknowledged that some of the pictures she was allowing to go to the jury would typically be considered pornographic. However, she considered the extent to which the subjects in the pictures were posed in a manner similar to Cheryl, an appropriate consideration on relevance.

Brief of Appellee, page 39. However, the judge actually stated when admitting lewd photographs of unidentified children:

> The photos are similar in kind to Sharon [Marshall]. They are part of the collection. They are found with the photos of Cheryl Commesso at, what I assume the State is going to say, near the time she died or at the time she died.

(S16, T830). Certainly there were no other photos depicting

blindfolded or bound women who were beaten as Cheryl Commesso was. However, there were several similar to Sharon Marshall, "in pornographic poses" (S16, T828).

Of the 97 photographs found together, there were 16 of the victim, Cheryl Commesso, and a photo of Floyd's boat which were truly relevant to the case. Of the remaining 80, 7 were excluded from evidence by the trial judge as overly prejudicial. This means that 73 photographs, mostly pornographic in nature and many depicting children, were displayed to the jury. The photographs admitted into evidence which were entirely unrelated to the Commesso homicide outnumbered those which were by a ratio of 4 to 1.

Appellee makes a good point when she suggests that it might be more appropriate for this Court to analyze this issue "under the traditional principles governing the admission of collateral crime evidence" rather than the "gruesome photos" caselaw proposed in Appellant's initial brief. Brief of Appellee, page 43. This is particularly appropriate for the photographs in the case at bar because several do depict other crimes and most are at least evidence of bad acts. Section 90.404(2)(a), Fla. Stat. (2001) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,

> but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Viewed from this prospective, it is evident that the photographs in question are relevant to Floyd's character and propensity to sexually depravity, rather than material facts in issue with regard to the homicide of Cheryl Commesso. Compare, Holland v. State, 636 So. 2d 1289 (Fla. 1994) (evidence was inadmissible because it showed the defendant's propensity to struggle with a police officer when arrested).

Collateral crime evidence is subject to the further limitation that even if relevant to a proper fact in issue, it must not be allowed to become the feature of the case. Williams v. State, 117 So. 2d 473 (Fla. 1960); Matthews v. State, 366 So. 2d 170 (Fla. 3d DCA 1979). The extensive evidence of sexual proclivities at bar is comparable to that found an impermissible feature of the trial in Sutherland v. State, 849 So. 2d 1107 (Fla. 4th DCA 2003). See also, Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) (evidence that defendant was a pedophile made a feature of the case).

Surely the trial judge made the sexually explicit (or in some cases, sexually suggestive) photographs of Sharon Marshall, Britney Keller and unknown female children a feature of the case because they outnumbered the photographs of the homicide victim by at least 4 to 1. In the words of this Court in Williams, Floyd's trial "devolve[d] from development of facts pertinent to the main

issue of guilt or innocence into an attack on the character of the defendant whose character is insulated from attack unless he introduces the subject". 117 So. 2d at 475-6. His conviction and sentence should similarly be reversed.

ISSUE IV

THE TRIAL JUDGE ERRED BY ALLOWING F.B.I. EXAMINER MUSHENO TO TESTIFY BECAUSE HIS OPINIONS IMPROPERLY BOLSTERED THE STATE'S CASE AND DISRESPECTED THE JURY'S ROLE AS FACTFINDER.

Appellee offers several cases where expert testimony has been allowed on such subjects as knife wounds, bite marks, tool marks and bullets. Brief of Appellee, page 50. However, it is evident in these cases that the expert was testifying about subjects with which the average juror would have little or no experience. For instance, it would be beyond most jurors' experience to look at a photograph of a bite mark and determine whether or not the defendant's mouth could have made it.

By contrast, all jurors have some experience in comparing photographs for similarities and differences. FBI examiner Musheno was offered as someone who had heightened powers of observation and who could make better comparisons than the average juror – in other words, a super-juror. Will the State next offer "experts" with experience in the field of determining guilt or

innocence to “assist the jury”?

This Court should reject Appellee’s contention that it was within the trial judge’s discretion to allow Musheno to testify as an expert in side-by-side comparison.

ISSUE V

THE TRIAL JUDGE ERRED BY FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR ARGUED PREJUDICIAL FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.

Appellee concedes that “the prosecutor may have elaborated on what Rife did not complete”, but fails to appreciate the significance of the prosecutor’s mention of facts not in evidence during closing argument. Brief of Appellee, page 52. Surely the introduction of a prior battery committed by the defendant against the homicide victim is something which would make jurors more likely to reach a verdict of guilt. The trial judge’s comment to the jurors to rely on their own recollection was inadequate to dispel the prejudice caused by the prosecutor’s misconduct. The court should have rebuked the prosecutor and required him to correct his error.

Appellant disputes Appellee’s assertion that the jury already

had the "gist" of the evidence before them because Rife mentioned a bruise on Cheryl Commesso's face. A reasonable juror would not jump to the conclusion that the bruise was necessarily caused by Floyd hitting Commesso.

Appellee also fails to appreciate the degree of error that arguing facts not in evidence constitutes. The cases she cites where this Court has "denied relief on comments more egregious" (Brief of Appellee, page 54-5) all involved comments which were simply derogatory characterizations of defendants and defense counsel. The comments did not change the evidence which the jury considered in reaching their verdict. Because Appellant's jury did hear the prosecutor's addition to evidence of a prior battery committed by Floyd against the victim, it could have affected their verdict. Such an error is not harmless.

ISSUE VI

THE PROSECUTOR'S MENTION OF THE NATURE OF ONE OF APPELLANT'S PRIOR CONVICTIONS DURING THE PENALTY PHASE CROSSEXAMINATION WAS IMPROPER AND DENIED APPELLANT A FAIR PENALTY TRIAL.

Appellee contests Appellant's assertion that the prosecutor's mention of Floyd's prior conviction for child molestation violated

the judge's ruling. While she correctly points out that the prosecutor had withdrawn his request to use this conviction as evidence in the penalty trial before the judge actually made a ruling, she evidently feels that the prosecutor retained the right to change his mind and introduce it later if he felt the urge. Approving such a procedure would lead to lawyers withdrawing their requests when they sensed that an adverse ruling was about to be made. They would then go ahead with their plans as if nothing had happened and dare the judge to declare a mistrial. Such an attitude of "it's better to seek forgiveness than ask permission" cannot be countenanced in the court system.

Even more outrageous is Appellee's contention that the judge's assertion that the child molestation conviction "will not be mentioned to the jury in the penalty phase" (Brief of Appellee, page 58) was "merely attempting to reassure Floyd" (page 59) and not something that was binding on the prosecutor.

Turning to the merits of the issue, Appellant understands that a defendant can open the door to crossexamination about the nature of his prior felonies if he attempts to mislead the jury about his criminal history. Floyd did not do this; he correctly stated that he had 19 prior felony convictions. Because the prosecutor at trial detected a lack of confidence in Floyd's

response as to whether he had counted them correctly, he ignored established caselaw and started to list the convictions by their nature. His jump to Floyd's earliest conviction, the one for child molestation, seems calculated to create the same sort of outburst by Floyd before the jury that mention of this conviction had always brought about outside the presence of the jury. Even Appellee notes that "Floyd's frustration [about this conviction] rendered him unable to control his outbursts". Brief of Appellee, page 58.

Because there is ample support in the record for a conclusion that the prosecutor's conduct was intentional and designed to deny Appellant due process of law, this Court should not allow the matter to slide. In Geralds v. State, 601 So. 2d 1157 (Fla. 1992) this Court held that the State could not bring in evidence of a capital defendant's prior criminal history during penalty phase under the guise that it was being admitted for another purpose. Similarly, in Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996), this Court held that Hitchcock was denied "a fair and constitutional sentencing proceeding" when the State elicited evidence about pedophilia. Floyd should now be granted a new penalty trial because he also was denied a fair and constitutional proceeding.

ISSUE VII

APPELLANT'S SENTENCE OF DEATH WAS UNCONSTITUIONALLY IMPOSED BECAUSE FLORIDA CAPITAL SENTENCING PROCEDURE VIOLATES RING V. ARIZONA, 536 U.S. 584 (2002).

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VIII

APPELLANT'S SENTENCE OF DEATH SHOULD BE VACATED BECAUSE THE EIGHTH AMENDMENT REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING MAKES ANY SENTENCE OF DEATH UNCONSTITUIONAL IF IMPOSED WITHOUT CERTAINTY THAT THE DEFENDANT IS NOT INNOCENT OF THE HOMICIDE.

Appellant will rely upon his argument as presented in his initial brief.

CERTIFICATE OF SERVICE

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

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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