IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Petitioner,

v.

JAMES V. McDONOUGH,
Interim Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LINDA MCDERMOTT
Florida Bar No. 0102857
Special Assistant CCRC-South

ANDREA HARRINGTON
Florida Bar No. 700991
Assistant CCRC- South

Office of the Capital
Collateral Counsel
101 NE 3rd Avenue, Suite 400
Ft. Lauderdale, FL 33139
Telephone (954) 713-1284
Facsimile (954) 713-1299

COUNSEL FOR PETITIONER

INTRODUCTION

The Petitioner, Robert Ira Peede, submits this Reply to the State's Response to the Petition for Writ of Habeas Corpus. Mr. Peede will not reply to every issue or argument raised by the State and, hereby, expressly does not abandon nor concede any issues and/or claims not specifically addressed in the Reply brief. Mr. Peede relies on the arguments made in his Petition for Writ of Habeas Corpus for any claims that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

CLAIM I

THE COURT ERRED IN ALLOWING THE INTRODUCTION OF EVIDENCE OF MR. PEEDE'S THREATS TO KILL OTHER PEOPLE AND OTHER MATTERS TO PROVE THAT MR. PEEDE KIDNAPPED HIS WIFE AND PREMEDITATED TO KILL HER. THE INTRODUCTION OF THE EVIDENCE VIOLATED MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT THIS ISSUE.

A. Summary of the State's argument.

In it's Response, the State argues that testimony regarding Mr. Peede's alleged plan to murder Geraldine Peede and Calvin Wagner in North Carolina was relevant to illustrate his motive to kidnap Darla Peede (Response at 6); that the trial court did not abuse its discretion in its determination that the probative value of this evidence outweighed the unfair prejudice to Mr.

Peede (Response at 11) and that this testimony was admissible as inseparable crime evidence (Response at 7). These arguments must fail for the reasons cited below.

B. The Balancing Test.

The State's argument in favor of the relevancy of this evidence is conclusory and fails to address the legal standard requiring courts to weigh the probative value of evidence against the danger of unfair prejudice. In conducting this balancing test it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; and the chain of inference necessary to establish the material fact. State v. McClain, 525 So. 2d 420 (Fla. 1988).

For example, the State's argument that Geraldine Peede's testimony regarding Mr. Peede's "hostile contact" towards her was relevant because it corroborated his confession ignores the balancing test that should occur in determining relevancy. Geraldine Peede's testimony constituted hearsay and was not necessary to corroborate Mr. Peede's confession. Rather, this testimony fit in with the State's strategy to portray Mr. Peede as a jealous husband with a propensity for violence. This

testimony contributed to making the uncharged bad acts a feature of Mr. Peede's trial and was confusing for the jury. The trial court should have excluded this testimony.

The State's argument that the trial court did not abuse its discretion in admitting the nude photographs is similarly flawed as the prejudicial nature of the photographs outweighs their probative value. The State's contention that these photographs formed the motive for Robert Peede to kill his wife is completely speculative. The photographs were introduced into evidence despite the fact that none of the witnesses were even able to state why Mr. Peede possessed the photographs. Further, these photographs portrayed Mr. Peede in a negative light to the jury who did not have enough information about them to properly weigh their evidentiary value.

The State argued that testimony regarding Mr. Peede having a loaded gun is relevant because it demonstrates Mr. Peede's "consciousness of guilt." The State cites to Anderson v. State, 574 So. 2d 87 (Fla. 1991) in support of its proposition that this testimony was relevant and admissible. The defendant in Anderson directly stated that he would kill witnesses and even attempted to hire somebody to kill a witness to a murder that he was being tried for. Anderson at 93.

In the present case, testimony regarding Mr. Peede having a loaded shotgun went to his alleged plans to murder others. This alleged plan was not as closely related to the crime Mr. Peede was being tried for as was the case in Anderson. Mr. Peede allegedly placed his loaded shotgun by the door after Darla Peede's murder, an action that was not part of an attempt to cover up Darla Peede's murder. This testimony had no bearing on the charges against Mr. Peede and was confusing for the jury as it's importance was overstated by virtue of the fact that two police officers testified to it.

C. Inseparable Crime Evidence.

1. The legal framework.

In Hartley v. State, 686 So. 2d 1316, 1320 (Fla. 1996), this Court explained the theory of admission for "inextricably intertwined" evidence: "...[E]vidence of other crimes that are 'inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged,' is admissible under section 90.402 (admissibility of relevant evidence) because it is relevant and necessary to adequately describe the crime at issue.".

Professor Ehrhardt describes inseparable acts as those "so linked together in time and circumstance with the happening of

another crime, that the one cannot be shown without proving the other." C. EHRHARDT, FLORIDA EVIDENCE § 404.17 at 208 (2000). Further, such evidence is admissible "where it is impossible to give a complete or intelligent account of the crime charged without reference to the other crime." Id. at 209 (citations omitted). Ehrhardt cautions that this exception to the general rule of exclusion must be narrowly interpreted to ensure it does not swallow the rule. Id. at 210. Like all other relevant evidence, evidence of inseparable crimes must be excluded if the danger of unfair prejudice substantially outweighs any probative value. Fla. Stat. §90.403. Further, even where collateral crime evidence is inextricably intertwined with the charged crime and is admissible to establish the entire context of the crime, care should be taken to exclude the unnecessary details. See Conde v. State, 860 So. 2d 930 (Fla. 2003).

2. The State fails to establish that Mr. Peede's threats against others is inseparable crime evidence. Under the State's interpretation this limited exception would swallow rule 90.403.

a. The State's Argument.

The State argues that "there was no intelligent way to prosecute this case without reference to Peede's motive in kidnapping Darla. In effect, Darla's kidnapping was the first step in a single criminal episode, in which Peede planned to

murder his ex-wives for the alleged infidelity and posing naked in swinger magazines." State's Response at 6-7. However, this argument is disingenuous as this theory contradicts the actual theory that the State used at trial – that Mr. Peede premeditated to kill Darla. Mr. Peede would not have premeditated to murder Darla Peede in Florida had he planned to use her in his plot to murder Geraldine Peede and Calvin Wagner in North Carolina. See Peede v. State, 474 So. 2d 808, 818 (finding the cold, calculated and premeditated without any pretense of moral justification aggravator invalid as that conflicts with the State's theory that Mr. Peede abducted Darla Peede in order to get close to Geraldine and Calvin Wagner).

The State's own arguments in favor of the relevancy of Geraldine Peede's testimony at trial belies the State's current position that Mr. Peede's motives and intents against Geraldine bear some relevance to the State's case against Mr. Peede for Darla Peede's murder. At trial the State argued that Geraldine Peede's testimony was relevant "to show Robert's motives and intents against Geraldine." R. 624 . The State's argument suggests that testimony regarding Mr. Peede's intent toward Geraldine had some independent relevance, as if it were a material element of the charged offense.

In support of its argument that the testimony at issue constitutes inseparable crime evidence, the State cites to State v. Cohens, 701 So. 2d 362 (Fla. 2nd 1997) and Hunter v. State, 660 So. 2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996), yet fails to explain how these cases are analogous to the instant matter. Indeed, these cases are distinguishable from Mr. Peede's case. In Cohens the court found that evidence of an earlier attempted robbery constituted inextricably intertwined evidence at Cohens' first-degree murder trial. This determination was based in part on the fact that Cohens claimed that he was merely present at the second robbery and that he was not participating in the robbery. Further, the first robbery immediately preceded the second and it's failure led directly to the second robbery.[1]

---

[1]According to Cohens' statement, his co-defendant blamed Cohens for the duo's failure at robbing a bakery because Cohens unsuccessfully demanded the money from the clerk while the co-defendant remained near the front door. For this reason the co-defendant advised Cohens that he was going to attempt another robbery with or without Cohens, took the pair's guns and left. Cohens claim was that he just went to the second robbery to watch. The court determined that evidence of the first attempted robbery was inextricably intertwined to the second because it showed Cohens had the specific intent to commit the second robbery and could be "used to rebut any conclusions that may be drawn from Cohens' statement that" he was not participating in the robbery, but was merely present. 701 So. 2d 362, 364 (Fla. 2nd 1997).

The trial court in Hunter likewise permitted testimony regarding a prior robbery that immediately preceded the robbery and homicide that the defendant was being tried for. 660 So. 2d 244 (Fla. 1995). Like in Cohens, and unlike the present case, "the inseparable crime evidence" consisted of an actual crime that immediately preceded the event for which the defendant was being tried. Further, in Hunter, testimony regarding the prior robbery established that the defendant had a gun during the first robbery and explained that the police discovered evidence implicating the defendant in the robbery/homicide based on a "be on the look-out" report resulting from the first robbery. Id. at 247-48. Compare Hartley v. State, 686 So. 2d 1316 (Fla. 1996)(finding trial court abused it's discretion where admitted testimony from officer as inseparable crime evidence that officer told defendant that he knew defendant had robbed murder victim two days prior to victim's murder); St. Louis v. State, 584 So. 2d 180 (Fla. 4th DCA 1991)(holding trial court abused it's discretion for admitting testimony regarding threats made by defendant that he would kill corrections employees as he had killed others as such testimony was not inextricably intertwined evidence of admission and trial court should have eliminated highly prejudicial statements about how defendant was going "to

blow [the employee's] head off" and "I'll blow away your family, your wife all of them" because showed defendant's bad character); Burgos v. State, 865 So. 2d 622 (Fla. 3rd DCA 2004)(reversing conviction where trial court admitted evidence that police officers approached by woman claiming defendant beat her up and police immediately questioned defendant and defendant responded with battery on the officers because holding that the battery of the girlfriend was not inextricably intertwined with the battery on the officers due to clear break between the two batteries and could explain the battery on officers without going into battery on the girlfriend); Thomas v. State, 885 So. 2d 968 (Fla. 4th DCA 2004)(reversing conviction for armed robbery where trial court permitted evidence of defendant having committed six other robberies in the three hours prior to the crime at issue because not necessary to adequately describe the event, especially when weigh the danger of unfair prejudice).

b. The trial courts admission of testimony from Darla Peede's daughters, Geraldine Peede, Kent Wilson, Ross Frederick and the photographs was an abuse of discretion as the judge failed to exclude unnecessary details.

In permitting collateral crimes evidence, the trial court has an obligation to exclude unnecessary details so that the collateral crime does not become a feature of the trial. See

Conde v. State, 860 So. 2d 930 (Fla. 2003). The State did not charge Mr. Peede with attempted murder of Geraldine Peede and Calvin Wagner, yet the trial court permitted this evidence without requiring the necessary safeguards to ensure competent evidence put before the jury. Even if this Court determines that evidence regarding Mr. Peede's alleged plot to kill others in North Caroline is relevant and admissible to prove his motive to kidnap Darla Peede, the trial court abused it's discretion by allowing this evidence to become a feature of the trial and by admitting evidence of questionable credibility. The trial court could have taken steps to limit this evidence– for example testimony from both Agent Wilson and Detective Ross Frederick regarding Mr. Peede having a loaded shotgun was unnecessary.

c. Even if the evidence is relevant, the danger of unfair prejudice outweighs it's probative value.

Like all other relevant evidence, evidence of inseparable crimes must be excluded if the danger of unfair prejudice substantially outweighs any probative value, *supra* Section b. Assuming any probative value, the probity of the above evidence was substantially outweighed by its danger of unfair prejudice. Evidence of uncharged crimes is presumptively prejudicial. *E.g.,* Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994). The

State's evidence established for the jury that Mr. Peede is also guilty of two uncharged attempted murders. The prosecutor needlessly highlighted this evidence during closing argument. See Consalvo v. State, 697 So. 2d 805, 813 (Fla. 1996)(stating that "under Section 90.107 Florida Statutes (1995), evidence that is admissible for one purpose may be inadmissible for another purpose" and "that once material 'is received into evidence, it will be received for any probative value it may have on any issues before the court'") (citations omitted).

D. The State's Other Procedural Objections to Claim I.

The State's Response argues that Mr. Peede's Williams Rule Claim with respect to Tanya Bullis's testimony is an attempt to re-litigate an issue previously raised in Mr. Peede's Direct Appeal Brief. State Response at 9. However, in Mr. Peede's direct appeal an issue was raised concerning Ms. Bullis' testimony because it constituted hearsay. See Initial Brief of Appellant at 24. Thus, the evidentiary ground upon which Mr. Peede relies was not raised on direct appeal due to his appellate counsel's deficient performance.

Furthermore, the State's argument that trial counsel's objection to Rebecca Keniston's testimony was not preserved as it was based on relevancy lacks merit. This testimony was not

relevant to the State's case against Mr. Peede, further, admission of this evidence in the context of all of the other evidence Mr. Peede complains of was fundamental error.

CLAIM II

MR. PEEDE'S RIGHT OF CONFRONTATION WAS VIOLATED AT HIS GUILT PHASE WHEN THE TRIAL COURT PERMITTED THE STATE TO CALL WITNESSES TO TESTIFY TO STATEMENTS MADE BY THE VICTIM. MR. PEEDE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED.

Mr. Peede acknowledges the Court's decision in Chandler v. Crosby, 30 Fla.L.Weekly S661 (Fla. October 6, 2005), holding that

Crawford v. Washington, 541 U.S. 36 (2004) is not retroactive in Florida. Mr. Peede maintains that this Court erred in it's decision in Chandler and points out that there is a division in the Federal Circuits on this issue. Mr. Peede maintains that Crawford is retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980) and under the Federal standard announced in Teague v. Lane, 489 U.S. 288, 307 (1989), as Crawford is a "watershed rule of criminal procedure." See also, Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005)(finding Crawford retroactive under principles announced in Teague and Summerlin).

CLAIM III

APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF

EMOTIONALLY DISTURBING TESTIMONY FROM THE VICTIM'S DAUGHTER CONCERNING HER IDENTIFYING HER MOTHER'S DEAD BODY AND THE ADMISSION OF VARIOUS NUDE PHOTOGRAPHS THAT VIOLATED MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A. Rebecca Keniston's Identification of her Mother's Body.

In its Response, the State attempts to justify its failure to demonstrate that it made a reasonable attempt to identify the victim before resorting to using a family member by blaming Mr. Peede's defense counsel. Response at 17. The exchange that the State's Response refers to occurred prior to the State's presentation of Ms. Keniston's testimony:

> MS. SEDGWICK: Go on the record, from the Defense's discovery of the case, I'd like to know if they have shown any evidence there was any other person that could have made an identification?
>
> MR. DUROCHER: I don't have to answer that. That's privileged.

This self-serving inquiry on the State's part hardly satisfies its burden under Lewis v. State, 377 So. 2d 640 (1979)(holding that a member of a murder victim's family may not testify for the purpose of identifying the deceased where a non-related witness is available to provide such information) and under Trowell v. State, 288 So. 2d 506, 508 (Fla. 1st DCA 1973) (informing that the State may prove a victim's identity using circumstantial evidence). When the State intends to offer such

evidence, it is the State's burden to show that it "made an effort to find witnesses other than relatives to identify the victim. The family member must be a witness of last resort." Thompson v. State, 565 So. 2d 1311 (Fla. 1990)("Thompson's argument, that the state could have sought other witnesses, is well taken. There is no evidence in the record that the state made a concerted effort to find other competent witnesses to identify [the victim]" at 1314. The trial court instructed that the witness not disclose his relationship to the victim. Id.

The State cites to Thompson in support of it's contention that Ms. Keniston's testimony, if error, is harmless. Response at 18; R. at 615-617. However, despite the State's characterization, the testimony was far more "inflammatory" and likely to "arouse unwarranted jury sympathy for the victim" and "interject[ed] matters not germane to the issue of guilt or punishment" than the testimony in Thompson. In this case, the jurors had already heard testimony from the medical examiner regarding the condition of the body, including the damage to the face. Thompson at 1314; See R. at 558.

In Thompson the victim's father merely identified a photograph as being of his daughter and the trial court immediately considered ordering a mistrial. This Court found

that the trial court erred in allowing the identification. Id. at 1314. The evidence at issue in the present case was considerably more disturbing for the jurors than the evidence in Thompson.

B. Pornographic Magazines and Photographs.

The State introduced two separate exhibits consisting of nude photographs. The first, Exhibit 9, were magazines with nude photographs, some with the initials written next to some of the photographs. Immediately after the State moved to introduce this exhibit into evidence the defense requested a bench conference to discuss the matter. R. at 800-01. Immediately after the bench conference, which was not recorded, the State attorney stated: "These items are now in evidence as State's Exhibit 9, is that correct?" to which the court responded: "Yes." R. at 801. It is obvious that the defense was objecting to the admission of the magazine photographs into evidence during the unrecorded bench conference, especially considering the fact that the defense objected to the Exhibit 10, also consisting of pornographic photographs, based on relevancy. Exhibit 10 consisted of several pornographic photographs, some cut out of magazines and some taken with a camera. R. at 805. When the State moved this exhibit into evidence, defense counsel

objected to their relevancy. R. at 806. Mr. Peede has a right to a complete and accurate transcript of his capital trial and should not be penalized for the negligence of the trial court in not providing a complete transcript.

Further, the trial court abused it's discretion in admitting the photographs as they were not relevant and even if they were relevant, their prejudicial nature outweighed their probative value. See *supra* Claim I, Section B.

CLAIM IV

THE SENTENCING PROCEDURES EMPLOYED AGAINST MR. PEEDE VIOLATED MR. PEEDE'S EIGHTH AMENDMENT RIGHTS.

The State's reliance on Gaskin v. State, 737 So. 2d 509, 520

(Fla. 1999) in support of its contention that Mr. Peede's Caldwell claim is procedurally barred is misplaced. In Gaskin this Court held that Mr. Gaskin's Caldwell claim was procedurally barred because **the issue was raised on direct appeal, not because it was not raised in the trial court**. Gaskin at 513. Further, at each stage that was critical in educating the jury on their responsibility in sentencing Mr. Peede the jurors heard misleading statements from the judge and the prosecutor diminishing their responsibility. These statements are outlined in Mr. Peede's Petition. (See Petition at 34-38).

This egregious diminishment of the jury's role in sentencing Mr. Peede to death is directly in line with the condemned practices in Caldwell v. Mississippi, 472 U.S. 320 (1985), Mann v. Dugger, 844 F. 2d 1446 (11th Cir. 1988) and Adams v. State, 412 So. 2d 850 (Fla. 1982).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed in this Reply as well as in Mr. Peede's Petition for Writ of Habeas Corpus, Mr. Peede respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by United States Mail, first-class postage prepaid to Scott Browne, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, 33607, this 15th day of March, 2006.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

LINDA McDERMOTT
Florida Bar No. 0102857

Special Assistant CCRC- South

ANDREA HARRINGTON
Florida Bar No. 700991
Assistant CCRC- South

Office of the Capital Collateral
Counsel – Southern Region
101 N.E. Third Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284

Attorneys for Mr. Peede