IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-587

ROY MCDUFFIE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY

REPLY BRIEF OF APPELLANT

TODD G. SCHER
Florida Bar No. 0754773
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Telephone: (305) 861-9252
Fax: (305) 861-9253

Counsel for Appellant

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument in Reply 1

1. Reply to Argument I... 1

2. Reply to Argument VI 5

Remaining Arguments 10

Conclusion 10

Certificate of Compliance 11

Certificate of Service 11

TABLE OF AUTHORITIES

Fedd v. State,
461 So. 2d 1384, 1385 (Fla. 1st DCA 1984)................................ 3

M.N. v. State,
724 So. 2d 122, 124 (Fla. 4th DCA 1998).................................... 3

O=Brien v. State,
454 So. 2d 675, 677 (Fla. 5th DCA 1984).................................... 4

Patterson v. State,
419 So. 2d 1120, 1122 (Fla. 4th DCA 1982)................................ 4

Richardson v. State,
246 So. 2d 771 (Fla. 1971).. 1

S.G. v. State,
518 So. 2d 964, 966 (Fla. 3d DCA 1988).................................... 4

Shibble v. State,
865 So. 2d 665 (Fla. 4th DCA 2004)... 5

Streeter v. State,
323 So. 2d 16, 17 (Fla. 3d DCA 1975)... 4

Taylor v. State,
643 So. 2d 1122, 1124 (Fla. 3d DCA 1994)................................. 2

Wilcox v. State,
367 So. 2d 1020, 1023 (Fla. 1979)... 4

ARGUMENT IN REPLY

ARGUMENT I

FAILURE TO CONDUCT AN ADEQUATE *RICHARDSON* INQUIRY REGARDING A DEFENSE DISCOVERY VIOLATION AND ERRED IN EXCLUDING THE TESTIMONY OF DEFENSE WITNESS AND EXHIBIT.

Apparently, the Appellee has chosen to ignore the legal authorities cited in Mr. McDuffie=s Initial Brief, for had it consulted these authorities, it would have discovered that this issue is not, as the Appellee argues, Aa bit of a brain teaser since it was the defense that committed the discovery violation.@ Available case law amply explains defense discovery violations and what trial courts must do when confronted with a defense *Richardson* violation. In fact, Mr. McDuffie=s Initial Brief cited and discussed no less than a dozen decisions from the courts of this State addressing defense discovery violations (*See* Initial Brief at 49-55). Yet the Appellee fails to mention, address, discuss, or make any attempt to distinguish any of the relevant legal standards attendant to this claim.

After briefly summarizing *initially* what occurred during the proceedings on February 7, 2005, the Appellee utterly fails to mention or address what occurred *after* the prosecutor made his initial request for a *Richardson*[1] hearing. By simply labeling what occurred below as a Adiscussion,@ the Appellee apparently wishes to ignore what

---

[1] *See Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

the record actually reflects in terms of the critical issues attendant to Mr. McDuffie=s claim.

After the trial court questioned the prosecutor about his position on the *Richardson* violation he was raising, defense counsel told the court that there was an Ainadvertent@ oversight that Wiggins, who had been listed as a penalty phase witness, was not listed as a guilt phase witness (TV43/3798).[2] Acknowledging the late disclosure and noting that Wiggins=s testimony would be limited to discussing the document and the other loan made to Mr. McDuffie, defense counsel then proposed that if the State wished to verify the documents produced by witness Wiggins, the defense would have no problem calling Wiggins after the lunch break of the following day Aor give the State an opportunity to do it, to give the State an opportunity to

---

[2]The Appellee urges the Court to conclude that the defense violation was anything but inadvertent. The lower court, however, made no finding one way or the other; the court simply found a *Richardson* violation, dismissed the witness, and refused to permit the documentary evidence to be admitted in the defense case (TV43/3799). In any event, the Appellee=s condemnation of defense counsel is not borne out by the record; the simple fact that the defense listed Wiggins as a penalty phase witness but not a guilt phase witness hardly supports the insinuation that the defense was engaged in an attempt to Ablindside@ the prosecutor. Clearly, the failure to list Wiggins as a guilt phase witness was, as defense counsel articulated below, inadvertent (TV43/3798). While the defense acknowledged the late disclosure, the Appellee=s is incorrect that the prosecution was Ablinsided@ by the fact that Wiggins was a potential witness in the case, and its protestations to the contrary on appeal leave a Ahollow ring.@ *Taylor v. State*, 643 So. 2d 1122, 1124 (Fla. 3d DCA 1994) (reversal where court excluded witness due to *Richardson* violation because State knew of existence of excluded witness).

question him right now@ (*Id.*). Critically, in response to this argument, the prosecutor, reiterating that he was Atotally unaware@ and Asurprised@ by the appearance of Wiggins, informed the court that AI=m sure that I can probably deal with it at this point in time@ (TV43/3799). This critical statement is never mentioned or addressed by the Appellee, nor is the fundamental fact that the State *never moved to exclude the defense witness or documentary evidence* despite the late disclosure.

Given that the prosecutor never asked the court to exclude Wiggins or the documentary evidence, it is difficult to fathom how the trial court could, as the Appellee urges, properly exclude Wiggins and the documents. Such a draconian sanction is only appropriate as a Alast resort@ because it Aimplicates a defendant=s sixth amendment right to present witnesses as well as the fundamental right to due process.@ *M.N. v. State*, 724 So. 2d 122, 124 (Fla. 4th DCA 1998). Even when a court finds a discovery violation, A[a] trial judge must do more than simply ascertain that a discovery rule has been violated@ before it excludes defense evidence in a criminal prosecution.@ *Fedd v. State*, 461 So. 2d 1384, 1385 (Fla. 1st DCA 1984). Rather, the trial court=s inquiry Amust involve a determination of whether the violation resulted in substantial prejudice to the opposing party.@ *Id.* As this Court long ago noted, however, Aprejudice may be averted through the simple expedient of a recess to permit the questioning or deposition of a witness.@ *Wilcox v. State*, 367 So. 2d 1020, 1023 (Fla. 1979). As the Third District Court of Appeal has observed:

> [I]t is an abuse of discretion for a trial judge to `invoke the severe sanction of prohibiting the defense from calling . . . witnesses instead of granting a recess and allowing the prosecutor to interview the witnesses and satisfy himself as to whether the prosecution would be prejudiced by the witnesses being allowed to testify. *Streeter v. State*, 323 So. 2d [16], 17 [Fla. 3d DCA 1975)]; *see also O=Brien v. State*, 454 So. 2d 675, 677 (Fla. 5th DCA 1984) (AAlthough it is within the judge=s discretion to exclude witnesses, that most extreme sanction should never be imposed except in the most extreme cases, such as when [the violation is] purposeful, prejudicial, and with intent to thwart justice@); *Patterson v. State*, 419 So. 2d 1120, 1122 (Fla. 4th DCA 1982) (AExclusion is a severe remedy that raises very serious questions concerning the fairness of the judicial process@).

S.G. v. State, 518 So. 2d 964, 966 (Fla. 3d DCA 1988).

The Appellee contends that the error was harmless, referring to the testimony of Mr. McDuffie and family members. However, the Appellee overlooks that Wiggins was the only non-family member who could have provided the jury with evidence that loans were made to Mr. McDuffie in the week leading up to the murders, and, unlike the other defense witnesses, was the only witness who had objective documentary evidence establishing the existence of such loan. The Appellee fails to address the fact that the prosecutor below was able to substantially impeach the defense witnesses (including Mr. McDuffie himself) due to their familial relationship and, critically, the lack of any documentation to support their testimony regarding loans. Moreover, the State was able to take advantage of the exclusion of the defense evidence by arguing that the jury should disbelieve the evidence of family loans due to the fact that the only witnesses on this point were biased and had no documentation to support the

loans. *See Shibble v. State*, 865 So. 2d 665 (Fla. 4th DCA 2004) (error to exclude defense witness due to *Richardson* violation not harmless where State able to take advantage of exclusion during closing arguments). Contrary to the Appellee=s contention that this issue was Ainconsistent with the defense theory,@ it was entirely consistent with the defense theory that Mr. McDuffie did not need the proceeds from a robbery, thereby rebutting the State=s motivation testimony.[3] Under the facts of this case, the error was not, as the Appellee attempts to establish, harmless beyond a reasonable doubt, and, therefore, a new trial is warranted.

ARGUMENT VIB INSUFFICIENCY OF THE EVIDENCE.

The Appellee first argues that Mr. McDuffie Awaived@ his argument that the evidence against him was circumstantial. The fact that inmates were called to testify in the defense case-in-chief does not, as the Appellee contends, transform this case from a circumstantial evidence case to a direct evidence case. There was no eyewitness to the murders, and no direct confession from Mr. McDuffie. Mr. McDuffie has always maintained, and continues to maintain, his innocence of these

---

[3]Below, the State never made any argument that this line of inquiry would be Ainconsistent@ with the defense case. Instead, it complained about the late disclosure of Wiggins, a fact which more than supports the notion that the prosecutor below knew of the importance of Wiggins=s testimony to the defense case.

crimes.

Aside from the circumstantial evidence it presented (the alleged Amotive@ testimony@ for example) and the less-than-conclusive testimony from witnesses Matias and Sousa, the Appellee points to the fact that AMcDuffie=s palm print@ was discovered on Dawn Beauregard=s wrists. In actuality, what was located on the duct tape was a partial palm print found on a piece of the duct tape used to bind Beauregard=s wrists (TV39/3357). What remained unexplained, however, was the fact that although Beauregard was bound by her feet, mouth, and wrists, the tape on her mouth and feet contained no latent prints of any value (TV39/3379-82; 3397-98). FDLE lab analyst Perry testified that a Apartial palm print@ (less then 1/3 of the palm) from a Apiece@ of duct tape that had been originally submitted as a Awad@ of tape (AIt was just one roll that was continuously rolled@) was developed (TV39/3382-83; 3397-99). Perry opined that the latent on the piece of duct tape, labeled sample Q3 by the lab, matched the right 1/3 of Mr. McDuffie=s right palm (TV39/3391).

There was evidence presented below to cast doubt on the conclusive nature of the identification of this Apartial palm print.@ According to testimony below, the Awad@ of tape was still unseparated when it was submitted to FDLE analyst Perry, and he did not know where in the unseparated Awad@ of tape the part that contained Mr. McDuffie=s Apalm print@ appeared (TV40/3401). He had no idea how a partial palm print could be present yet no fingerprints as well, nor did he have any idea how only

one palm print could be present yet no other palm prints as well (TV40/3402-03). He had no idea how long the palm print existed on the tape (TV40/3403). He acknowledged that it was possible to transfer a print from one place with adhesive to another and that, in this case, he had to separate the Awad@ of duct tape by Apulling apart@ the various pieces from the wad (TV40/3404; 3408). The piece of tape he received was 1' 4" long and he did not remember if it was cut at different angles or just wadded together, it was just one piece of tape (TV40/3407). In his deposition, however, he stated that the tape appeared Alike it had been cut at different angles and just wadded together@ (TV40/3407), and he ultimately admitted that the tape from Beauregard=s wrists actually comprised of 15 pieces of tape wadded together (TV40/3409). After Perry conducted his examination, he turned over the tape to Martha Strawser of the FDLE (TV40/3411).

The testimony of FDLE analyst Martha Stawser provides further evidence on which to cast doubt on the Aidentification@ of the Apartial palm print.@ Strawser opined that the tape used to bind Beauregard=s mouth (sample Q2) was consistent with the same tape sold at Dollar (TV40/3466-70). Q2 was a single 10 2 long piece of tape (TV40/3470); neither end of the Q2 sample was consistent with the manufactured Aends@ of the standard tape roll (TV40/3470). She was not able to physically match either end of the Q2 sample with either end of either Q1 (the tape used to bind

Beauregard=s feet),[4] or Q3 (the tape used to bind Beauregard=s wrists) (TV40/3470-71). Nor was she able to reconstruct 3 of the 5 pieces comprising the Q1 sample, that is, 2 of the 5 pieces submitted as Q1 were not amenable to being reconstructed into one continuous piece of tape (TV40/3476-77). None of the five pieces of tape comprising Q1 had characteristic edges detected on the sample roll (TV40/3477), nor was there any correspondence between the fractured ends of Q1, Q2, or Q3 (TV40/3478).

The critical Q3 sample was submitted to Strawser in 2 overlapped pieces of duct tape which had been previously separated by David Perry (TV40/3479-80). After separation, Q3 comprised 15 individual pieces of tape, labeled Q3A through Q3O, which, in total, measured 79 inches (TV40/3481; 3496). Acknowledging that reconstructing the pieces of tape was like a Ajigsaw puzzle,@ Strawser was able to only reconstruct 12 of the 15 pieces that comprised Q3 (12 of the 15 pieces made one continuous piece of tape, and the remaining 3 pieces made another piece) (TV40/3482-94). Piece Q3B, which is where Mr. McDuffie=s partial palm print was discovered, was located 30 inches into the piece from one end, and 14 3/4 inch from

[4]The Q1 tape sample was submitted to Strawser already in a cut condition, and actually consisted of 5 pieces of tape, Aone on top of the other, overlaid on top of each other@ (TV40/3473-74).

the other end of the piece (TV40/3497). None of the fractured ends of Q3 was consistent with the start of a roll of tape (TV40/3498). The total amount of the tape from all three Q samples was 139 3/4 inches (TV40/3501).

On cross-examination, Strawser again acknowledged the difficulty in reconstructing where the various pieces of tape were located in the entire amount of tape submitted for analysis because of the Amissing pieces@ of tape (TV41/3510-11). She had Ano idea@ where the missing pieces of tape were (TV41/3519). Some of the pieces of tape submitted to her were cut, some were torn, and some had folded ends (TV41/3511-16). It was also possible that more than one roll of tape was used, she could not say how many were used (TV41/3518).

The bottom line is that the only piece of physical evidence that purportedly tied Mr. McDuffie to these murders was substantially called into question, and, on this record, cannot support the legal conclusion that there was sufficient evidence to sustain his convictions. Reversal for a new trial is warranted.

<u>REMAINING ARGUMENTS</u>

As for the remaining arguments, Mr. McDuffie relies on his Initial Brief and the arguments and authorities cited therein.

CONCLUSION

For the reasons stated herein and the Initial Brief, the judgements and sentences under review should be reversed.

Respectfully submitted,

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Telephone: (305) 861-9252
FAX: (305) 861-9253
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd. Suite 500, Daytona Beach, FL on this day of May, 2007.

TODD G. SCHER