IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-703

COREY SMITH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI -DADE COUNTY
LOWER TRIBUNAL NO. F00040026A

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief, the record on appeal is cited as "R.", followed by the page number and the transcript of the proceedings is cited as "T.", also followed by the page number. References to the Initial Brief of the Appellant will be made by "IB" followed by the page number. The State's Answer brief will be referred to as "AB", also followed by the page number.

ARGUMENT IN REPLY

1. STATEMENT OF THE CASE AND FACTS

The statement of the case and facts in the State's brief is not inaccurate, it is incomplete. The witnesses did testify as the State reported, however, with very few exceptions the witnesses were motivated by their own self interest to testify as they did. Their history as criminals and as part of the alleged John Doe conspiracy and organization is a relevant and material part of their testimony.

The witnesses who testified that Smith was the mastermind behind the criminal conspiracy were individuals who themselves were immersed in criminal behavior. The State in the trial below characterized the various criminal activities that occurred as an enterprise and showed an organizational chart. The witnesses however, did not refer to themselves in terms of the organization, or give themselves titles. That characterization, as well as the chart purporting to be the organizational scheme of the "John Doe"

enterprise, was made by the State, according to the testimony of witness Julian Mitchell in response to cross-examination. (T. 1963).

The State is required to take their witnesses as they find them. In this case, the State chose to prosecute the alleged head of a criminal enterprise by using witnesses whose perfidy was matched only by their extensive history of heinous criminal behavior. The testimony of murderers, perjurers and liars cannot be sanitized by simply ignoring their backgrounds.

2. ARGUMENT

ISSUE I

SECURITY MEASURES

The State alleges in their reply that extra security was warranted by the facts of the case, nature of the charges, and "sworn testimony establishing Smith's prior attempts to interfere with the judicial system." (AB 15). No cite is made to the record to establish this point, as in fact, no sworn testimony was taken from anyone, at least that the defense was made aware of, prior to the trial court signing the order for the installation of an additional magnetometer at the entrance to the courtroom. (The order was signed October 4, prior to the jury selection commencing) With the metal detector came the several armed guards who were operating it, as well as additional armed

guards in the courtroom. The record is not clear under whose authority or by whose request those guards became part of the security force for the trial.

The concept of due process is a flexible one, depending on the given set of circumstances. It requires a balancing of the government interest and the private interest affected by the government action. Morrissey V. Brewer, 408 US 471, 481 (1972). Mr. Smith, like every other criminal defendant, ehas a significant interest in protecting the integrity of the trial process, and his presumption of innocence, from interference by outside factors. The imposition of additional security measures in his trial, could have a significant effect on an his right to a fair trial and an impartial jury. The State has an interest in preserving the safety of the participants in the trial, as well as assuring that the trial proceed without disruption. In theory, the State also has an interest in making sure that no innocent person is convicted because of matters extraneous to the evidence.

The State does not see any reason why the Defendant should have been given an opportunity for a hearing on the imposition of the security measures by the court, and relies on various cases for the proposition that courtroom security lies in the sound discretion of the trial Court.

In Zygadlo v. Wainwright, 720 F. 2d 1221 (Ca. 11 (Fla.) 1983), an appeal of a denial of a petition for habeus corpus from a conviction in state court, the Defendant

alleged, among other things that the security measures imposed during the trial compromised his presumption of innocence. The court stated that had the Defendant been tried in federal court, the district judge would be required to enter a factual finding and allow counsel the opportunity to object. In addition, if the factual basis for the security procedures was in dispute, United State v. Theriault, 531 F. 2d 281 (5th Cir. 1976) would mandate that the judge conduct an evidentiary hearing.

Had the Defendant actually requested a hearing, the court stated " we do not conclude that the due process clause would not have required an evidentiary hearing here had Zygadlo requested one". Unlike Mr. Smith, Mr. Zyglado did not request a hearing. No hearing was held for Mr. Smith, despite the court's apparent agreement do so.

The State argues that the Defense acquiesced or waived a hearing on the necessity for the excessive security measures when the court did not hold a hearing after the witness testimony was concluded. The law is clear that the Defense is required to make contemporaneous objections to preserve matters for appeal. The reason for that is to give the trial court an opportunity to correct the error. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In addition, the rule also prevents counsel from deliberately allowing errors to go uncorrected as a trial tactic (See Coffee v. State, 699 So. 2d 299, (Fla. 2d 1997).

Corey Smith's trial counsel did bring the alleged error to the court's attention numerous times, giving the court an opportunity to correct the error. It was the court who delayed the response, thereby not taking the opportunity to review the alleged error. The record does not support the State's contention that Smth's attorneys in this instance failed to preserve the error.

The State argues that no prejudice occurred because the Defendant was not found guilty as charged but rather found guilty of manslaughter in two of the six charged homicides, and only sentenced to death on two. While there was plenty of testimony about Smith's connection to the victims of the murders, the actual physical and eyewitness evidence was not overwhelming with regards to the homicides. No physical evidence, no eyewitnesses could put Corey Smith in the vicinity of the crimes, with one exception, the murder of Leon Hadley. (According to the testimony of Phillip White, an accomplice in that killing, Corey Smith was present at the homicide and attempted to shoot Hadley but his gun jammed, preventing him from doing the deed. Another man, deceased and conveniently unable to corroborate any of this story, did the killing. Phillip White, in addition to being an accomplice, was a cousin of the man already in prison for killing Hadley, and had never offered this exculpatory story before. He also was a Federal prisoner claiming to be getting no benefit from testifying. (T. 2363-2416).)

The State witnesses were all cut from the same cloth. Individually, they were not a credible lot. A real possibility existed that the multiple security measures bolstered their testimony, as to the dangerousness and depravity of Mr. Smith. In addition, the jury cold have easily concluded, even **before** hearing and evaluating the evidence, that since the trial court and the State had determined Mr. Smith was worthy of all these precautions, he must be guilty.

ISSUE II

OUT- OF- COURT COMMENT BY DEFENDANTS MOTHER

The State cites several cases in which the jurors were exposed to comments or evidence outside the courtroom, and the reviewing courts upheld the convictions, finding that the trial courts had not abused their discretion by denying a mistrial.

Street v. State, 636 So.2d 1297, (Fla. 1994), a tragic case for Miami-Dade County involving the slaughter of two police officers by an individual recently released from prison,can be distinguished. The four who heard the comment were already seated on the jury, the trial had begun, and testimony taken. The remark was made by "someone", not a potential witness in the case, nor the mother of the accused. That person uttered the word "Guilty", without anything further. Nothing in that simple phrase could be construed as frightening or intimidating.

In Hutchinson v. State, 882 So. 2d 943 (Fla. 2004), the jurors, during the course of the trial, were having lunch and a patron at the restaurant told them they should find the Defendant guilty. She was not connected to the case, and there was no indication her comment was any more than her opinion, not given in a threatening or intimidating manner.

Occhicone v. State 570 So. 2d 902 (Fla. 1990) involves a spectator who told a prospective juror she thought the Defendant was guilty. This remark was only directed to one juror, though overheard by the Defendant's niece. There is no indication that the remark was made in a threatening or intimidating manner.

In Larzelere v. State, 676 So. 2d 394 (Fla. 1996), the Defendant was convicted of masterminding the murder of her dentist employer, for a large insurance payout. After the guilt phase of the trial, but before the penalty phase began, three jurors were in the courthouse parking lot when a woman, **unconnected to the case**, (emphasis added) approached and threatened to blow up one of the jurors cars. Her motivation was not made clear in the reported case. When questioned by the court, none of the jurors indicated they believed the Defendant was responsible for the incident.

The facts of the instant case are clearly different, and significant. A good portion of the assembled prospective jurors heard and saw Corey Smith's mother make the comment. Mrs. Smith was a potential defense witness. The comment was not

necessarily construed as innocuous.

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The State characterizes the dismissal of the whole panel, as requested by the Defense, as a "harsh remedy." Dismissing the panel might have delayed the case, been inconvenient, and caused an already excruciatingly long process to continue, but it was not harsh. Under the circumstances, it would have been appropriate and necessary to remove any doubts that the jury selected to hear Mr. Smith's case was fair and impartial.

ISSUE III

MEANING OF TERMS IN RECORDED CONVERSATION

The Appellant relies on the points made in the arguments and cases cited in his Initial Brief for this issue.

ISSUE IV

INTRODUCTION OF THE POLICE REPORT

The State contends that the police report which was admitted into evidence and referred to by the State in their closing argument does not constitute hearsay, as it is not being presented to prove the truth of the matter contained therein. (The police

report contained a statement by Cynthia Brown that she saw Corey Smith shoot Domenic Johnson, that Corey Smith, also known to her as Bubba, ran the "John Doe"

gang, and that she knew him to be a very dangerous man and because of that she was she was afraid to testify (T. 990-991)). The State argues that even though a statement is made out of court, with no opportunity for the Defendant to cross examine or otherwise confront the declarant, the statement may be admitted for other purposes.

In this case Corey Smith was in possession of a police report that contained Brown's statements to the police about Smith's involvement in a murder. The State's theory was that because Corey Smith had the police report in his possession, he therefore knew that Ms. Brown was the sole witness, and that was his motivation for having her killed. The police report was admissible then, not to prove the truth, that Smith did kill Domenic Johnson, was a " drug lord" and a dangerous man, and put Ms. Brown in fear for her life, but to show his knowledge. That knowledge gave him the motive to have Ms. Brown killed.

An out of court statement offered to prove the truth of its contents is inadmissible hearsay. The statement can be offered to prove something other than the truth of the matter asserted, but is admissible only when the purpose for which the statement is being offered is material to the case. In addition, the probative value must not be outweighed by its prejudicial effect. The State cites a number of cases in which out of court statements were admitted for another purpose other than to prove

the truth of the matter asserted, and were not then hearsay. In none of the cases

cited are the facts of the evidence sought to be admitted as overtly prejudicial as the police report in this case.

In Blackwood v. State, 777 So. 2d 399(Fla. 2000), the victim's sister was allowed to testify that the Defendant/Appellant told her that the victim was pregnant by another man, and that he was going to leave town. These statements were introduced to prove that the Appellant had reason to kill her. The statements were not unduly prejudicial to the Defendant, as they were not accusatory in nature, did not implicate him in another crime, and in fact were made by him.

Foster v. State 778 So. 2d 906 (Fla. 2000) also deals with out of court statements made by the victim in the presence of the Defendant and others, about reporting the Defendant to the authorities. The victim had observed the Appellant an others commit vandalism and theft. This knowledge, the State argued, gave the Appellant motive to kill the victim. While the out of court statements do accuse Foster of committing another crime, the nature of the crime was not serious, and the statements do not take the form of an official document.

The State avoids the issue of he potential prejudice caused to Mr. Smith by the admission of this police report. Whether this statement is prejudicial is something that should be determined under the circumstances of each individual case. In this case,

Mr. Smith was being tried for, among other things, six murders: Ms.Brown, a State

witness in a murder he was accused of committing but not charged with; Angel Wilson, a young woman in the wrong place at the wrong time with tragic results; and four young men, all of whom were connected to some degree with the drug trade. This police report all but laid out the case agianst Smith for another murder.

The fact that Smith had the police report , and therefore presumably knew its contents, that Brown was going to testify that Smith killed Domenic Johnson was relevant to show his motive to have her murdered. However, the police report as admitted goes further, and describes not only what Ms. Brown saw, including a description of the getaway car, but related her statements that Corey Smith was head of the “John Doe” gang, and that she feared for her safety.

Unless one actually talks to a juror or the jury panel after the conclusion of a trial, it is impossible to know what information they took into account when rendering their verdict. Under the circumstances of this case, with the State portraying Smith as the mastermind behind six murders, it is very likely that regardless of what the judge instructed the jury about the purpose of the admission of the police report, the jury was going to accept that report for the truth of the matter asserted by Ms. Brown, that Corey Smith did kill Domenic Johnson. The fact that he pulled the trigger on Domenic

Johnson supported his culpability in the other killings he was accused of in this trial.

ISSUE V

LIMITATION ON CROSS EXAMINATION OF THREE WITNESSES

The Appellant relies on the points made in the arguments and cases cited in his Initial Brief for this issue.

ISSUE VI

HYPOTHETICAL QUESTION TO THE MEDICAL EXAMINER

The Appellant relies on the points made in the arguments and cases cited in his Initial Brief for this issue.

ISSUE VII

FAILURE TO DISCLOSE A WITNESS STATEMENT

The State does not provide any legal justification for the failure to turn over Mark Roundtree's statement. The argument they make is that though Scipio v. State 928 So. 2d 1138 (Fla. 2006) **might** have required the state to turn over Roundtree's

statement to the defense , it wasn't **really** necessary because had the defense known about the statement, it would have not materially altered their trial strategy.

Defense trial strategy is not the province of the State. The State is not always privy to the information that the Defense has, which, combined with the information they should have had, would have altered the trial strategy. The State is correct in stating that the Defense strove to undermine the credibility of the defense witnesses by showing their criminal histories. The State cannot say, beyond a reasonable doubt, that the Defendant was not procedurally prejudiced by the discovery violation . See State v. Schopp , 653 So. 2d 1016 (Fla. 1995).

The Defense tried through their cross examination to discredit the State's witnesses and show that the witnesses were willing to manipulate the truth to suit their own purposes. The only one of Corey Smith's former colleagues who came out and admitted it was Mark Roundtree, in his undisclosed statement, and he was not called by the State as a winess. Roundtree admitted that he would say whatever he had to in order to get on the Corey Smith witness list, because that would guarantee him consideration for his own problems. (He was incarcerated for the murder of Leon Hadley).

Despite what the State contends, no one really knows, beyond a reasonable

doubt, what effect Roundtree's testimony would have had on the jury's perception of the credibility of the other witnesses.

ISSUE VII

WITNESS TESTIFYING INCONSISTENTLY WITH HIS DEPOSITION

Carlos Walker epitomized what was wrong with the State's witnesses. He was a liar and a perjurer who twisted and manipulated the truth. He himself was a six time convicted felon. His testimony at trial was that Smith had told him he was going to have "Cookie" (Cynthia Brown) killed, and also made statements to him about the Jackie Pope killing. These statements were completely different from what he told the Corey Smith's attorneys during the deposition, though they were consistent with statements he had made previously in the investigation.

Walker testified that he was scared of Smith and that's why he (presumably) lied on his deposition.

There can be no dispute that the Defense was surprised at Walker's trial testimony. The Defense moved for a mistrial because Walker had testified in his deposition that he had no knowledge of Smith's involvement in the Brown or Pope homicides. The State argues that because the Defense knew of the original statement, they are not

entitled to relief. That argument misses the point entirely. As far as the Defense was concerned, during the deposition Walker recanted his prior statement, and they relied on what he said in his deposition as what his testimony would be **at trial**. Now at trial they were faced with the original statement, plus the extra testimony that Walker was afraid of Smith and that caused the perjury at the deposition.

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The State argues that the Defense cannot point to any statement made by the witness that they were not given. The record is not clear whether or not there was an actual statement made by the witness recanting his deposition testimony, but it was clear by the questions asked by the prosecutor that they State knew that he was not going to testify consistently with his deposition. Several courts have determined that an oral statement made by a witness must be disclosed to the Defense if the oral statement materially alters a prior written or recorded statement provided by the State to the Defense. Jones v. State, 514 So. 2d 432 (Fla. 4 DCA 1987).

The State also argues that Smith is not entitled to relief because the issue is not preserved for appeal. The magic words "Richardson hearing" may not have been uttered, but as the State refers to in their brief, (AB 79) trial counsel did state that in essence that the State should have notified the Defense in advance, of the change in Walkers statement, so they "could at least find out what is going on." Quite clearly, the state's discovery obligation had not been met and the defense wished to investigate the circumstances and reasons for the change of testimony.

The State attempts to distinguish State v. Evans 770 So. 2d 1174 (Fla. 2000). The witness in Evans, Sylvia Green, told the police and swore in her deposition that she was not an eyewitness to the homicide committed by Evans. At trial, Green testified that she had actually seen Evans do the shooting. She stated that she had provided her new version to the police about a month before trial, and admitted to

lying to the police previously, as well as on her deposition. The prosecutor's questioning of the witness clearly indicated the State knew of the changes in the testimony. The Defense objected, and asked for a mistrial, but never asked for a Richardson hearing.

The Court found, first, that upon being notified of the discovery violation, the trial court was obligated to conduct a Richardson hearing (No "magic words" needed but only the fact the discovery request was not met. Copeland v. State 566 So. 2d 856 (Fla. 1st DCA 1990)) During the Richardson hearing the first inquiry would have established if there was statement of the witness that was not provided to the Defense. Had that been established, the trial court would have been required to determine whether the violation was willful or inadvertent, substantial or trivial, and had a prejudicial effect on the aggrieved party's trial preparation.

The Defense had prepared their strategy based on the evidence and testimony that they anticipated being presented at trial. They were given no opportunity to demonstrate to the court the prejudice to them by the State's failure to advise them of

the material change in the witnesses statement. Neither were they allowed to show how their defense strategy was compromised when a witness why they reasonably believed (based on the deposition testimony) would not hurt them gave testimony that was even more damaging than his original statement.

ISSUE IX

PROSECUTORIAL MISCONDUCT

The State argues that this court has routinely denied relief on comments more egregious than those challenged by Mr. Smith, and cites several cases.

In Knight v. State 746 So. 2d 424, (Fla. 1998) the record indicates that the prosecutor made a comment or comments regarding the value of the lives of the Defendant and the victims. The Court characterized the comments, without describing them, as "this isolated incident of misconduct." . Smith argues that the misconduct was pervasive throughout the trial, not, as in Knight, an isolated incident.

In Chandler v. State 702 So. 2d 186 (Fla. 1997), the court denied relief to the Appellant because the claim of improper prosecutorial comments was not preserved for appellate review. The court stated that the prosecutor's comments about counsel (counsel engaged in cowardly and despicable conduct) and the Appellant ("malevolent...a brutal rapist and conscienceless murderer.") were thoughtless and petty, but not fundamental error.

In Crump v. State, 622 So. 2d, 963 (Fla. 1993), the Court found that the errors complained of were not preeserved for appellate review, and did not constitute reversible error.

The Defense certainly objected and brought the errors to the attention of the court throughout the trial. The State argues that because the Defense did not articulate an

objection based on "cumulative error", that issue should be barred. The State cites Castorv. State, 365 So. 2d 701 (Fla. 1978), for the proposition that contemporaneous obejections are required to allow the trial court to assess the errors challenged, and the purpose of the contemporaneous objection rule would be thwarted if appellants were not required to raise cumulative error to preserve the issue on appeal.

Cumulative error can not necessarily be corrected by the trial court. Groebner v.State, 342 So 2d 94 (Fla. 3d 1977). Judge Pearson, in Sharp v. Lewis, 367 So 2d 714 (Fla. 3d 1979) opined that cumulative error can be categorized as "shot gun" error, or "machine gun" error. "Shot gun" error, like the simultaneously fired pellets from a shot gun, cause their damage from the combined effect of all the pellets over one specific area. Machine gun error, on the other hand, is a series of errors over a long period of time, but when viewed from afar, in relationship to each other, provide a picture or design, much like the perforated bullets of a machine gun on its target.

The prosecutorial misconduct that occurred during this trial, much like the pattern that bullet holes create on a target, created a picture of the Appellant's guilt that was

not supported by competent evidence.

CONCLUSION

In view of the foregoing grounds, this Court must reverse Appellant's convictions and sentences for a new trial.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

The undersigned certifies that the font used in this brief is proportionately spaced 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's reply brief was mailed to Carol

Dittmar, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road. Suite 200. Tampa, Florida 33607 on this 11th day of June, 2007.

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TERESA MARY POOLER