IN THE SUPREME COURT OF FLORIDA

WILLIE H. NOWELL

Case Number SC06-276

Appellant,

v.

STATE OF FLORIDA

Appellee.

_____________________________/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT 1: THE TRIAL COURT ERRED IN ALLOWING THE STATE'S PEREMPTORY STRIKE OF JUROR ORTEGA, A MINORITY, IN VIOLATION OF *BATSON V. KENTUCKY*, 476 U.S. 79 AND *STATE V. NEIL*, 457 SO. 2D 481 (FLA. 1984).

First of all, the State correctly points out, in footnote 12 of their Answer Brief at page 64, counsel for the Appellant misidentifies venire member Ortega as a 2000 graduate of the University of Florida. (Initial Brief at pages 9, 52). It was in fact Juror Collins who graduated from the University of Florida in 2000. This correction in fact clarifies an important point about the strike used by the State against venire member Ortega. Mr. Collins, who sat on the jury, and Mr. Ortega, who was struck by the State, were about the same age, and thus, about the same age as the Defendant. It was Assistant State Attorney Parker who argued the Hispanic venire member Mr. Ortega would tend to "identify" with the Defendant and who may have thought, "that could be me" in the situation the Defendant found himself in. Mr. Parker apparently had no such concerns regarding Caucasian venire member Collins. (Vol. XX, pg. 646.).

The State inserted a significant amount of the trial transcript in its Brief as it related to Mr. Ortega. It appears to be an attempt to invite the Court to substitute its judgment for that of the prosecutor in terms of the rationale offered for the peremptory strike. There is no case law supporting the concept of hybriding the

"tipsy coachman" approach to improper peremptory challenges. The law does not allow for the Court to say if it can find some race-neutral reason it would have struck the juror, then the peremptory challenge stands. The law requires this Court address the reasons offered by the State at trial for its challenges. These were, again, as follows:

> "My reasons are two-fold. Number one, as I look at it, he appears young and of a similar age to the defendant. I would think that Mr. Ortega would relate to the defendant based on age.
> "Second of all, I noted that his wife works for Devereux, which is a childcare nurturing facility.
> "I am concerned, based on philosophies within the family, that he may not be able to follow the law when it comes to the actual, in any phase of this particular proceeding. (Vol XX, pg 643)

The trial court asked the Assistant State Attorney what specific answers Ortega gave that would warrant such a concern. (Vol. XX, pg. 643-44). The Assistant State Attorney answered there were **no** such specific answers." [emphasis added] (Vol. XX, pg. 644). Thus, the additional text the State offers in its Brief are irrelevant to the Court's inquiry. The Assistant State Attorney further stated:

> "My race-neutral reason is, in spite of the fact that he said he could follow the law, I don't particularly like him. I don't think he is going to be the kind of juror that I would like. And for those reasons which were race neutral, I'm asking the Court to proceed with allowing me my peremptory challenge." (Vol XX, pg 645).

"I don't particularly like him" is hardly a race-neutral reason. This is especially so when one looks at what the Assistant State Attorney next offers, which is nothing

less than a diatribe against the entire notion he cannot strike anyone he wants to strike for whatever reason he chooses. The Assistant State Attorney continued:

> "And this is why, because we have peremptoral [sic] challenges, the problem I have with it is, in the past it's not like somebody's face. The problem is, well, listen, you can't strike anybody from now on because of race. All minorities have a right to sit, they have a right to sit, can't strike them because of race.
> "My reason for striking him is that he's young and appears to be the same or similar age as the defendant, that's the first reason. I think that's sufficient for a peremptory challenge, whether or not it goes for cause for his inability to actually follow the law.
> "I think he would associate himself with the defendant because of his age. I think he looks at the defendant and says, you know, that could be me. As a result, it's going to be more difficult for him, if not impossible, to actually do what's asked of him in terms of following the law.
> "For that primary reason that [sic] I'm asking that he be stricken."
> (Vol XX, pg. 646.)

The trial court asked if there were any young males left on the prospective panel, and both sides agreed a gentleman named "Collins" was such a person. (Vol. XX, pg. 654-655). There is no suggestion in the record that Mr. Collins is a minority. Later in the trial, it was learned that Mr. Collins was a 2000 graduate of the University of Florida. (Vol. XXII, p. 915). The trial court then allowed the State's peremptory strike of Mr. Ortega. (Vol. XX, pg. 655). Collins was not struck by the State, and remained on the jury. The Defendant objected to the composition of the panel. (Vol. XX, pg. 656).

In *Melbourne v. State,* 679 So.2d 759 (Fla.1996), this Court articulated the three-step procedure for challenging peremptory strikes of jurors on the ground of

racial bias. A party objecting to the other side's use of a peremptory challenge on racial grounds must 1) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. All of these requirements were met by the Defendant in this case. Where these initial requirements are met, the court must ask the proponent of the strike to explain the reason for the strike.

At this point, the burden of production shifts to the proponent of the strike (in this case, the State) to come forward with a race-neutral explanation. If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. The court's focus is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

The State offers case law regarding the trial court's ability to assess the credibility of the proponent of the strike. Their presentation of law on this issue misses the point somewhat. First of all, the trial court ruled by saying "I will, at this time, exercise my discretion and find that the State's race-neutral reasons are reasonable from their point of view and allow that strike to remain." (V20, TT 641-655). The language of the trial court's ruling is somewhat puzzling, in that whether the State has offered a race neutral reason is not an act of "discretion."

The trial court cannot utilize its "discretion" in allowing the State to utilize a peremptory challenge improperly. The strike is either proper or it is improper. Here, the Assistant State Attorney's own words alone condemn the challenge. When his words are compared against the facts before the trial court, they are even more damning. If "I don't like him" is going to be held as a race neutral reason for striking a juror, even in the face of an utter inability to offer a race neutral reason for his dislike, then *Neil* and *Slappy* and their progeny are meaningless. If a Hispanic prospective juror can be struck because of his age and his potential to "identify" with the Defendant because "it could be me" sitting there, and a white male the same age is not struck for that reason, then *Neil* and *Slappy* are meaningless. If the prosecutor can openly on the record complain about the notion they have to explain themselves when they are alleged to have exercised peremptory challenges in a discriminatory manner, and that is not factored into the court's analysis, then *Neil* and *Slappy* are meaningless. Finally, if a trial court can, in its "discretion," allow discriminatory strikes, then *Neil* and *Slappy* are meaningless.

The State offers case law dealing with situations where members of the venire express discomfort with the death penalty. This was not a reason offered by the Assistant State Attorney in his discussions with trial court, so its inclusion in their argument is irrelevant. Moreover, they avoid directly addressing the words

used by the prosecutor in defending his challenge of Mr. Ortega. The reason is obvious; there is no defense for the reasons offered by the prosecutor.

For this reason alone, the Defendant is entitled to a new trial.

ARGUMENT 2: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S OBJECTONS AND MOTIONS FOR MISTRIAL DURING THE STATE'S GUILT PHASE CLOSING ARGUMENT

The State correctly notes, as did the Defendant that improper prosecutorial comments "must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise." *Spencer v. State, 645 So.2d 377, 383 (Fla. 1994)*. The Defendant has met this burden in the instant case. Interestingly, the State brings to the Court's attention yet another inflammatory comment made by the State in their Answer Brief. They point out the State argued in closing that the Defense was trying to excuse the "slaughter" occurring in Mr. Smith's closet because of the marijuana use by the victims. (State's Brief at page 69). The Defense made no such argument, but it typifies the State's approach to arguing this case.

Again, as with the issue of Mr. Parker's explanation of his peremptory challenge, the State does not directly address Mr. Parker's arguments to the jury. They do not attempt to defend the notion a prosecutor can speak in the voice of the victim, and they do not try to justify the notion the State can attribute to the defense an argument they didn't make: i.e., that the death of Ms. Gill and the shooting of Mr. Smith were justified based on their marijuana use. Instead, they

argue it was appropriate to point out Ms. Gill knew Mr. Nowell, as if that is what the State was arguing when they stated:

> "Michelle Gill speaks to you through the evidence. Michelle Gill tells you about that evening and early morning hours before she died. And along with the testimony of Mr. Smith, Michelle tells you this. I was pregnant, approximately seven months; I had a viable child in me. It was Kelvis's child. I worked at Ryan's Steakhouse where I've worked for years.
> "I worked with Willie Nowell. Willie knew me, he knew Kelvis. I didn't hurt Willie. I didn't threaten him. I didn't point a gun at him. I didn't call him names. There's nothing to suggest that that poor sole [sic] did a thing other than work and go home and carry her child."

(Vol. XXIX, pg. 1881). The State contends this is "fair comment" on Mr. Nowell's knowledge Ms. Gill could identify him and on the Defendant's argument Mr. Smith was an unreliable witness. (State's Brief at page 70). With all due respect, there is quite a chasm between what the State now contends this argument was about and what the plain language of the argument suggests. Like the argument regarding the peremptory challenge of Mr. Ortega, the State never directly addresses the propriety of what the Assistant State Attorney did at trial. Rather, they argue general principles of law that are inapplicable to the situation at bar.

Likewise, the arguments regarding what was going on in Michelle Gill's mind was not addressed directly. The State instead argues the State is entitled to ask the jury to draw reasonable inferences from the evidence. (State's Brief at

page 74). This is certainly true. While true, it has nothing to do with any issue at trial. Ms. Gill's mindset was not an issue for the jury to decide. What she thought when shots were fired is not at issue. It goes to no element of the offense charged.

The State also argues waiver. However, the Defendant made the following objection in asking for a mistrial in this case:

> "Your Honor, at this time Mr. Nowell would move for a mistrial based on the comments of the State of Florida. The problem is that the State of Florida has been continuously making an emotional appeal to the jury to convict as opposed to using the evidence at hand and arguing persuasively from that evidence.
>
> "Our position now is that he has gone to the point where the jurors cannot fairly look at this evidence in a rational way. Our position is that Mr. Nowell cannot receive a fair trial."

(Vol. 29, TT 1189-1190). The State did not argue waiver at this point, nor did the trial court contend there was some waiver. The trial court allowed defense counsel to argue the cumulative effect of the State's improper arguments and ruled on that motion, albeit adversely to the Defendant. *Id.* The trial court accepted the Defendant's argument regarding the cumulative effect of the State's improper closing arguments. This acceptance of the Defendant's right to argue the cumulative effect of the State's improper emotional appeal would seem to include the argument brought to the Court's attention by the State in their Brief; that is, the fictitious argument concocted by the State that the Defendant was suggesting the murder of Ms. Gill and the shooting of Mr. Smith was justified because of their drug use. The Defendant would certainly add that to the list of improprieties in the

State's closing argument that individually, and cumulatively were not only improper, but beyond the pale.

This was a case where there was on one hand an alleged eyewitness identification of the Defendant and on the other hand, a host of alibi witnesses presented by the Defendant. The eyewitness, Mr. Smith, lest the Court forget, was believed by the State to have shot the Defendant weeks before the incident at bar here. Error in this case cannot be considered harmless beyond a reasonable doubt. Although the State alleges the errors, "if any," were harmless beyond a reasonable doubt, but do not explain how the issues framed at trial would lead one to such a conclusion. If there were no alibi witnesses, and if Mr. Smith was not under a cloud of suspicion regarding his antipathy toward the Defendant, perhaps the State could make a harmless error argument. The facts as they exist in this case do not suggest the jury's decision was as simple as the State might have liked. Moreover, the vote for death was only 7 to 5, which suggests further unease about this case on the part of the jurors. Couple that with the fact the State was allowed to keep a juror out on spurious grounds, and it should become obvious why Mr. Nowell is entitled to a new trial.

ARGUMENT III: THE TRAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS AND MOTIONS FOR MISTRIAL WHERE THE PROSECUTOR MADE IMPROPER COMMENTS DURING HIS CLOSING ARGUMENT IN THE PENALTY PHASE OF THE TRIAL.

During closing argument in the penalty phase of the trial, the prosecutor made the following comments which the Defendant would argue were improper:

> 1) "We hear the word mercy. Mercy is a word that makes us feel good, we want to be the kind of person that can grant mercy, that's capable of doing that. Justice grants mercy when mercy is applicable.
> "In this particular case and as I speak and as Defense counsel speaks, I ask that you keep in your minds eye whether mercy is a part of justice in this case."
> "I submit to you it is not, because mercy was not granted to Michelle Gill. There was no mercy when Mr. Nowell and Mr. Bellamy had the opportunity to dispense mercy, when they had the opportunity to see Ms. Gill, to see that she was pregnant, to see her crying, to see her begging. When they had an opportunity to see that she was aware that her only means of safety and protection was in that very same closet with his hands tied behind his back, they were able to see that no one had a weapon other than the killers, they were able to see this.
> "And yet, in spite of that scene, in spite of those moments, Mr. Nowell, while those two helpless human beings, seated in a closet, disengaged from the rest of the world, no hope—"

(Vol. XXXV, pg 443-444). The defendant objected to these comments, but the trial court overruled the objection and motion for mistrial. (Vol. XXXV, p. 444). Later in his closing argument, the prosecutor returned to this theme:

> "Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever."

(Vol. XXXV, page 472). The Assistant State Attorney concluded his argument with the above comment. The defense again objected and moved for a mistrial (Vol XXXV, page 472). The objection was overruled and the motion for mistrial denied. (Vol XXXV, page 473).

Normally, the standard for review as to the propriety of arguments is whether the trial court abused its discretion. However, this Court has addressed the specific type of argument used here in no uncertain terms. In *Urbin v. State 714 So.2d 411 (Fla., 1998)* this Court was faced with a prosecutor who argued "If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none." *Id. at 421.* This Court stated:

> "This line of argument is blatantly impermissible under *Rhodes v. State,* 547 So.2d 1201, 1206 (Fla.1989) (finding same mercy argument improper because it was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence recommendation"), and *Richardson v. State,* 604 So.2d 1107, 1109 (Fla.1992) (finding error where prosecutor asked jury to show defendant "as much pity as he showed his victim")."

The State attempts to argue the State's argument is like the one offered in *Lukehart v. State, 776 So.2d 906 (Fla. 2000),* where the State argued the jury should not be swayed by sympathy. Their argument begs the question: is an argument that the Defendant's argument for mercy should be rejected because "mercy wasn't given

in this case, not by Mr. Nowell, not by Mr. Bellamy," more like a plea against sympathy for the Defendant, or might it be more like an argument to show Mr. Nowell the same mercy he showed Ms. Gill? The State's position that this was a simple plea against sympathy for the Defendant is refuted by the record before this court.

State Attorney's do not assign death penalty cases to inexperienced prosecutors. The Assistant State Attorney, who has years of experience, knew exactly what he was doing. He did it deliberately, and he was allowed at the trial court level to get away with it. This Court has stated the argument offered here is "blatantly impermissible." The State has demonstrated no reason in this case for this Court to recede from that holding.

ARGUMENT IV: THE TRIAL COURT ERRED IN FAILING TO FIND THE DEATH PENALTY UNCONSTITUTIONAL.

The Defendant would stand on the arguments made in the initial brief as to this subject, as he is unaware of any new case law on this subject since his or the State's brief was filed

ARGUMENT V: THE TRIAL COURT ERRED IN FINDING AS A STATUTORY AGGRAVATOR THAT THE DEFENDANT COMMITTED THE CRIME TO AVOID ARREST.

The State's position is at odds with their arguments at trial. They never argued the crime was designed to avoid arrest until sentencing. Quite to the contrary, their argument was that the killing was a) revenge, or b) that if they let Mr. Smith live, he would kill them.

Even if the State had argued this at the trial level prior to sentencing, it is illogical to think it would have been the "dominant motive" behind the killing. *See, e.g., Garron v. State*, *528 So.2d 353 (Fla.,1988).* Under the State's new logic, the Defendant and Mr. Bellamy concocted a plan to enter Mr. Smith and Ms. Gill's residence for no other purpose than to kill them so they could not let others know they entered the house to kill them. The theory offered by the State to justify this aggravator is circular and nonsensical.

PROPORTIONALITY

The Co-Defendant in this case, Jermaine Bernard Bellamy, following a conviction in this case and a jury recommendation, seven to five (7 to 5) in favor of death, was sentenced to life by Judge Tonya Rainwater, the same judge who sentenced Mr. Nowell to death.

CONCLUSION

The Appellant respectfully requests this Court either order a new trial on the grounds set forth herein, or in the alternative grant him a new sentencing hearing, or in the alternative vacate his death sentence and sentence him to a term of life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Barbara Davis, Attorney General, State of Florida, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118 this 19th day of March, 2007.

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I HEREBY CERTIFY the size and style of the type used in this brief is point proportionally spaced Times New Roman, 14 point.

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