IN THE SUPREME COURT OF FLORIDA

RAY JACKSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC07-1233
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER IMPEACHMENT BY THE STATE COUPLED WITH IMPROPER ARGUMENT TO THE JURY BY THE PROSECUTOR.

While appellee implicitly concedes that it was error for the prosecutor to name the conviction for which the state witness was serving time, he nevertheless seeks to minimize the importance of the error. While it certainly was appropriate cross

examination for the state to inquire as to the witness's dissatisfaction with what he believed to be an improper prosecution, there is simply no excuse or rationale to allow the exact nature of this prosecution to be revealed. While appellee is correct in noting that the admissibility of evidence is a matter of judicial discretion, no judge has the discretion to allow due process to be violated.

Appellee further argues that any error was harmless because the witness was limited in this case. However, the witness was a very key witness for the defense. While the witness Wallace may have been friends with the codefendant Wooten, there was no such relationship alleged or proven with appellant. Thus, as to appellant, the witness was an independent third party whose credibility was crucial. Additionally, the purpose of presenting the testimony of Wallace was to impeach the state's key witness and codefendant Hunt. Thus, the importance of this testimony cannot be underscored.

Additionally, it must be noted that the offending remarks were presented by a very experienced prosecutor - - Ed Davis - - who should have known better. The instant case is just another step in a very disturbing trend with the actions of Mr. Davis in his quest not to seek justice but only to seek a conviction. ***See Scipio v. State***, 928 So.2d 1138 (Fla. 2006).

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL ERRED IN ALLOWING INTO EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE PREJUDICIAL.

With regard to the comments regarding appellant's carrying of a gun in violation of a pretrial ruling by the trial court, appellee argues that this ruling is incorrect and that the evidence was relevant and thus admissible. However, appellee offered no evidence to support such an assertion. The cases cited by appellee involved possession of weapons that were actually used in the crimes for which the defendant was being charged. In the instant case there was no evidence that the gun had anything to do with the actual commission of the crimes for which appellant was charged. Additionally, the comment implied appellant constantly committed crimes by always carrying a gun.

With regard to the issue regarding the admission of evidence that appellant sold drugs, appellee argues that appellant has failed to preserve this issue for review. Appellee is incorrect. Prior to trial, the state sought by way of a motion in limine to permit evidence of drugs, drug usage and drug sales ostensibly to show positions of trust and also argued that such evidence would be "inextricably intertwined"

with the facts of the instant case. (Vol. XVI 29-32) Defense counsel objected to any evidence of drug sales because this constituted collateral crimes for which no notice was given and that such evidence was irrelevant that any probative value was far outweighed by the prejudice. (Vol. XVI 30) The trial court allowed such evidence over the objection of defense counsel. ***Section 90.104(1), Florida Statutes (2007)*** specifically provides:

> If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Thus, it appears that the issue regarding the admission of appellant's drug dealing was properly preserved for appellate review. As to the relevancy of such evidence, appellee argues that it was relevant to explain the setup and context for the kidnaping and murder of the victim. However, even assuming that appellant killed the victim, the drug dealings did not explain any motive. Pallis Paulk stole from appellant at his home. The fact that she may have stolen money and drugs do not translate into evidence of **drug dealing**. This is especially true when that particular evidence was elicited enlisted through the testimony of a separate witness and referred to a subsequent period of time.

Finally, with regard to the evidence that appellant had threatened to kill the state witness Hunt, appellee argues that this was proper to show Hunt's motive for

going to the police and further that it was not hearsay since it was not offered to prove the truth of the matter asserted. Unfortunately, the jury was not so instructed. The evidence of the threat was not direct evidence but rather was evidence that Hunt received second hand. To assume that it was not offered for the truth of the matter ignores the obvious implication of the evidence, to place appellant in a very bad light as a very dangerous person.

The combination of the offending comments and testimony combined to destroy any semblance of due process. Appellant is entitled to a new trial.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR AN INSTRUCTION REGARDING CIRCUMSTANTIAL EVIDENCE.

Appellant relies upon the arguments made in the initial brief.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE FAILED TO SHOW THAT THE VICTIM DIED BY THE CRIMINAL AGENCY OF ANOTHER.

Appellee argues that the evidence of the criminal agency element of homicide was proven by competent substantial evidence and points directly to the testimony of Dr. Beaver, the medical examiner. However, Dr. Beaver's conclusion that this was a criminal homicide was not based on any scientific evidence, but merely on the fact that the victim had apparently "gone missing" and her remains were found in a shallow grave. From this, Dr. Beaver, and appellee, conclude that the victim must have met her fate through the criminal agency of another, and in this case appellant. This is simply untrue. Nothing in Dr. Beaver's testimony discounts the possibility that Pallis Paulk died of natural causes. While appellee, apparently facetiously, notes that the victim did not walk out to a wooded, isolated area and bury herself in the process of dying of natural causes, the simple fact of the victim being buried does not necessarily prove that she died through the criminal agency of another.

If, as the state below suggested, appellant intended to teach the victim a lesson for having stolen from him, this could have been accomplished simply by the

kidnaping. There is no evidence regarding the time of death or the method of death. For example, there is no evidence to exclude the possibility that Pallis Paulk suffered a heart attack and died. Additionally, she could have accidentally suffocated. None of these possibilities were excluded by Dr. Beaver's testimony. While the state's theory is possible, it is not the only possible scenario. This is especially true given the risky lifestyle that Pallis Paulk had. The state's own witnesses supplied this evidence including the fact that it would not be unusual for someone with warrants out for her arrest to "disappear" for a period of time in order to avoid arrest.

Appellee alternatively posits that even if there was some defect in the state's evidence on first degree premeditated murder, the evidence overwhelmingly supported appellant's conviction for first degree felony murder with kidnaping as the underlying felony. However, while appellant has not attacked the sufficiency of evidence for the kidnaping conviction, this does not mean that appellant is conceding that the evidence supported a first degree felony murder conviction. Indeed, just the opposite is true. Even if the state is proceeding on a felony murder theory, the evidence still is insufficient to prove beyond a reasonable doubt that death occurred through the criminal agency of another. This is so because there is no evidence concerning when Pallis Paulk died. The evidence is consistent with

the theory that following the kidnaping, Pallis Paulk was released and met her fate at the hands of someone else. Thus, while there may be sufficient evidence to support a kidnaping conviction, this does not logically or legally translate into a felony murder conviction.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS IN THE PENALTY PHASE.

Appellee argues that the trial court acted within its discretion in refusing to instruct the jury as requested by appellant in the penalty phase. Interestingly appellee appears to argue somewhat disingenuously, that with regard to the requested instructions on the aggravators, there was no error because the trial court instructed on the **standard jury instructions**, while at the same time it argues that the trial court did not err in refusing to instruct the jury on the standard jury instructions of reasonable doubt and defendant not testifying. It is clear that due process requires a jury to be given full and adequate instructions on the law applicable to the issue to be decided. In the instant case, as in all capital cases, the penalty instructions are as important as the guilt phase instructions. The standard upon which the jury must decide the existence of aggravating circumstances is beyond a reasonable doubt standard. To refuse to instruct on reasonable doubt in essence totally deprives the jury of any workable standard upon which to make its

determination. The fact that the jury may have heard a reasonable doubt instruction some two weeks prior when they were deciding a guilt issue in no way translates to a proper instruction on the issue at hand during the penalty phase. Additionally, there simply was no logical reason for the trial court not to instruct the jury on the applicable law. This was not simply a discretionary matter. Certain instructions should be required particularly when the state is attempting to convince a jury that a defendant should lose his life.

Appellee's reiteration of the trial court's notion that defense counsel in closing could certainly remind the jury of the definition of reasonable doubt belies the direct admonishment that the trial court specifically gave the jury "please remember that what the attorneys say, either oral or written, is not evidence." (Vol. XXX 570)

In response to appellant's contention that the prior violent felony instruction was improper because it included battery of a law enforcement officer which is possibly not even a qualifying felony under this instruction under ***State v. Hearns***, 961 So.2d 211 (Fla. 2007), appellee argues that this issue is waived since appellant never made this specific argument below to the trial court. Appellant concedes that the ***Hearns*** case was not argued to the trial court for the simple reason that it may not have been available. This Court issued its opinion in ***State v. Hearns*** on

April 26, 2007 and denied rehearing on July 10, 2007. Appellant's penalty phase occurred on May 7, 2007. While technically the case was released a few days before the penalty phase, given the natural delay in having opinions published in Florida Law Weekly, it is quite possible if not probable that everyone was simply unaware of the ***Hearns*** decision. Notwithstanding this argument, the fact that the law with regard to prior to violent felony qualifiers has apparently changed points out the essence of appellant's argument that simply relying upon standard jury instruction is not always the most prudent course. Additionally, the jury in the instant case was specifically instructed at the offense of battery on a law enforcement officer is a crime of violence, an instruction which appears inaccurate and inappropriate in light of this Court's holding in ***State v. Hearns***, ***supra***.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellant relies upon the arguments made in the initial brief in this point.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

Appellant relies upon the arguments made in the initial brief on this point.

CONCLUSION

Based upon the foregoing reasons and authorities, cited herein as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate his judgment and sentence and remand the cause with instruction to discharge him from the murder charge and to grant a new trial on the kidnaping charge. Alternatively, appellant requests this Honorable Court to vacate his judgment and sentence and remand with instructions to sentence him to life or grant a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Ray Jackson, DC#973885, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 16th day of September, 2008.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER