IN THE SUPREME COURT OF FLORIDA

PAUL DUROUSSEAU,

Appellant,

v. **CASE NO. SC08-68**

STATE OF FLORIDA,

Appellee.
___________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PAUL DUROUSSEAU,

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L.T. CASE NO. 03-CF-10182

STATE OF FLORIDA,

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_______________________/

REPLY BRIEF OF APELLANT

PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Issues 1, 3, and 4. Appellant will rely on the arguments presented in his Amended Initial Brief as to the remaining issues.

ARGUMENT

Issue 1

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF TWO COLLATERAL MURDERS WHERE THE STATE DID NOT PROVE APPELLANT COMMITTED THEM; THERE WAS NO UNIQUE MODUS OPERANDI FROM WHICH TO CONCLUDE THAT THE SAME PERSON COMMITTED ALL THREE CRIMES; AND THE DANGER OF UNFAIR PREJUDICE FAR OUTWEIGHED ANY PROBATIVE VALUE.

At pages 28-29, the state agrees that it must demonstrate by clear and convincing evidence that the defendant committed a collateral crime before it may be admitted as similar-fact evidence but

> disagrees with any suggestion that Florida law, as a general principle, prohibits evidence of similarities

> between the collateral crime and the charged crime as proof that the defendant committed the collateral crime. The state suggests that such an approach is particularly unsound in a prosecution involving a serial murderer, where the similarities between the various murders, as well as evidence linking the defendant to each of the murders, are critical to demonstrate that the defendant murdered each of the victims. While similarity to the charged crime is obviously not sufficient alone to permit introduction of collateral crimes, similarity between individual murders committed by a serial killer cannot be deemed irrelevant to demonstrate that the defendant committed the collateral crime.

In other words, the state asserts that the charged crime can be used to prove that appellant committed the collateral crimes so that the collateral crimes can be introduced into evidence to prove that appellant committed the charged crime. The states cites no authority for this suggestion but, more importantly, the state's suggestion suffers from logical, or evidentiary, circularity (i.e., bootstrapping), as when two conclusions are offered as proofs of the other with no outside evidence proving either. Furthermore, the state assumes appellant is a "serial murderer" when at this stage of the proceeding, he must be presumed innocent.

Next, the state argues the similarities are indeed unique, relying on serial murder cases in which evidence of collateral crimes was found admissible. See Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982); Conde v. State, 860 So.2d 930 (Fla. 2003), and Wuornos v. State, 644 So.2d 1000 (Fla. 1994). The

state's reliance on Townsend, Conde, and Wuornos is misplaced, however, because the defendants in those cases had admitted killing the victims of both the charged and the collateral crimes, and the identity of the perpetrator was not even an issue. Furthermore, unlike the present case, the similarities in those cases did in fact establish a "unique modus operandi."

In Townsend, the defendant was charged with first-degree murder in the 1973 strangulation deaths of Naomi Gamble and Barbara Ann Brown and the stabbing death of Thelma Jean Bell, all young black women, found nude from the waist down, and with their legs in spread eagle position. Townsend admitted killing the women to rid the world of prostitutes. He took police to the Gamble and Brown crime scenes but was unable to find the Bell crime scene. In support of an insanity defense, a psychiatrist testified that Townsend did not know the difference between right and wrong and was susceptible to being led so that he might admit to crimes he did not commit. In order to corroborate his confession of the charged crimes, the state introduced evidence of six other homicides[1] Thompson had confessed to and corroborated with facts only the killer would know. The collateral crimes evidence therefore was admitted to

[1] The collateral murders also involved prostitutes found partially nude, lying on their backs with legs spread eagle.

rebut the evidence that he might admit to crimes he didn't commit, not to establish identity.

In Conde, where the defendant was charged with the first-degree murder of Rhonda Dunn, the state introduced Williams rule evidence of five other murders. Conde confessed to each of the murders and was linked to all six victims by DNA, fiber, tire, and shoe evidence. Each victim was a prostitute who was killed by strangulation late at night between September 1994 and January 1995; each body was found within a small radius of Conde's home, re-dressed and turned face down in a seemingly posed position after having been initially on its back; and the word "third" was written on the third victim, indicating the serial nature of the crimes.

In Conde, the evidence was admitted to prove premeditation, not identity (Conde admitted he killed Dunn but claimed he killed her in an "instantaneous combustion" of unexpected emotions), and, obviously, a pattern of such crimes was relevant to proving what happened in the charged crime was not an unplanned "instantaneous combustion." Furthermore, even if identity were an issue, the similarities in Conde were striking and unique (listed above), in contrast to only general similarities between the three crimes here and numerous other unrelated similar category murders.

Wuornos, who was working as a prostitute, was charged with murdering Mallory, whose bullet-riddled body was found in a wooded area several miles from his abandoned vehicle. Wuornos admitted killing Mallory but claimed she killed him in self-defense after he abused her and threatened to kill her. At trial, the state introduced evidence of six other murders in which the male victims' bullet-riddled bodies had been found in remote areas and their cars found abandoned.

As in Townsend and Conde, identity was not an issue in Wuornos, and Wuornos had admitted killing the collateral crime victims. Furthermore, Wuornos did not argue the collateral crimes were insufficiently similar to be relevant; she argued, rather, that their admission was "overkill," and therefore more prejudicial than probative. As in Conde, the Court found the collateral crime evidence was relevant to rebut Wuornos' claim that she was attacked first, and that relevance therefore outweighed prejudice. Accordingly, Wuornos addressed a different issue from that presented here.

In these three cases, collateral crimes were admitted to show premeditation or rebut the suggestion of a false confession, not to prove identity. Also, since the collaterals were introduced to prove premeditation or rebut false confession rather than prove identity, the collaterals did not have to be unique or so unusual to be relevant. Finally, the collateral

crimes in each case in fact shared a lengthy series of extraordinarily unique markers distinguishing them from any other murders of a generally similar nature. In the present case, however, identity was the key issue with respect to the collaterals, the degree or lack of degree of similarity (both of the collaterals to the charged and all three to other same-category crimes) was crucial, and there was no long train of unique or unusual markers in fact connecting the collateral crimes with the charged crime. In those cases in which the admission of collateral crime evidence has been upheld, including the cases discussed above, the similarities are so unique that they point to the defendant and no one else. That is simply not the case here.

At page 37 n.5, the state asserts that five reported decisions do not demonstrate that cord strangulation is an unusual modus operandi. The cases appellant cited were examples of cord strangulation cases, not an exhaustive list of all such cases. There are many more (but this is not intended to be an exhaustive list either). See, e.g., Frances v. State, 970 So.2d 806 (Fla. 2007); Willacy v. State, 967 So.2d 131 (Fla. 2007); Caballero v. State, 851 So.2d 655 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Smith v. Duggar, 529 So.2d 679 (Fla. 1988); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Porter v. State, 400 So.2d 5 (Fla. 1981); Alvord v. State, 322 So.2d

533 (Fla. 1975); Grant v. State, 171 So.2d 361 (Fla. 1965); Berube v. State, 5 So.3d 734 (Fla. 2d DCA 2009); Van Loan v. State, 736 So.2d 803 (Fla. 2d DCA 1999); Dempsey v. State, 238 So.2d 446 (Fla. 3d DCA 1970); see also Marek v. State, 34 Fla. L. Weekly S461 (Fla. July 16, 2009)(ligature, unknown type); DeAngelo v. State, 616 So.2d 440 (Fla. 1993)(same).

Issue 3

THE TRIAL COURT FAILED TO PROPERLY FIND AND EVALUATE APPELLANT'S MENTAL MITIGATION EVIDENCE, BASING FACTUAL CONCLUSIONS ON THE COURT'S PERSONAL OPINIONS AND SPECULATION, AND REJECTING MITIGATING CIRCUMSTANCES WITHOUT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT ITS DECISION.

In his Amended Initial Brief, appellant argued that the trial judge improperly rejected Dr. Lewis's unrebutted opinion testimony based on unfounded speculation and the trial judge's own personal opinions about psychiatry and behavior. The trial judge rejected Dr. Lewis's diagnosis of schizoaffective disorder, including symptoms of bipolar disorder, and her opinion that as a result of this disorder and the brain damage he suffered since childhood, appellant's ability to conform his behavior to the law was substantially impaired and he suffered from extreme emotional disturbance at the time of the crime. The trial court's order was lengthy, and appellant discussed how each of the judge's numerous conclusions and reasons were based

on speculation or his own lay opinions and were not supported by any competent evidence in the record.

In response, the state has asserted that a trial court is free to reject unrebutted opinion testimony, citing Walls v. State, 641 So.2d 381 (Fla. 1994). However, this Court has never said that a trial judge may reject unrebutted opinion testimony for no reason at all or for reasons that have no basis in the record. As this Court recently made clear, "uncontroverted expert opinion testimony may be rejected if that testimony cannot be squared with the other evidence in the case." Coday v. State, 946 So.2d 988, 1001-1002 (Fla. 2007)(emphasis added); accord Foster v. State, 679 So.2d 747, 755 (Fla. 1996); Morton v. State, 789 So.2d 324, 330 (Fla. 2001). Furthermore, although the expert testimony in Walls was not rebutted, that testimony also failed to establish the statutory mitigators because "all the experts hedged their statements, gave equivocal responses, or responded to questions that themselves were equivocal." 946 So.2d at 391n.8. For example, the psychiatrist could not testify to Walls' state of mind at the time of the murder and another expert responded to a question that asked only if Walls was suffering any impairment at the time of the murder. Id.

At page 66, appellee states that "Durousseau asserts that lay witness testimony cannot be the basis of contradictory evidence." This is incorrect. Appellant argued that the lay

testimony in this case did not contradict Dr. Lewis's testimony.[2] See Amended Initial Brief at 82-84.

At page 66, the state also asserts that the "facts of the murders contradicted the opinion testimony." The state does not explain what facts contradicted Dr. Lewis's testimony other than to say the facts of the murder establish "purposeful conduct, which rebuts any notion that appellant was suffering from an extreme mental illness." Answer Brief at 67. For this proposition, the state cites Philmore v. State, 820 So.2d 919 (Fla. 2002), and San Martin v. State, 705 So.2d 1337 (Fla. 1997). However, in neither of those cases did this Court affirm the trial court's rejection of mental mitigation based on the defendant's purposeful conduct. In fact, in both cases, the state's expert disagreed with the defense expert and in San Martin the defense expert's testimony also was rebutted on cross-examination.

The state has not pointed to any competent evidence in the record that supports the trial judge's rejection of Dr. Lewis's testimony. Appellant would further point out that the state never challenged Dr. Lewis's testimony or her diagnoses at trial, either on cross-examination or during closing argument, and has therefore taken an inconsistent position in this appeal.

[2] The state concedes that the lay witness testimony did not specifically contradict the expert's diagnosis. Answer Brief at 66.

Regarding this Court's holding in Trease v. State, 768 So.2d 1050 (Fla. 2000), the Court did not hold, as the state's brief suggests at page 68, that a trial court is free to assign no weight to a mitigator for no reason at all. The Court held in Trease "that a mitigating circumstance may be given no weight based on the unique facts of a particular case, such as when a defendant demonstrates he was a drug addict twenty years prior to the murder and the prior drug addiction has no real bearing on the present crime." Coday, 946 So.2d at 1003.

Issue 4

THE EVIDENCE WAS INSUFFICIENT TO PROVE DUROUSSEAU KILLED TYRESA MACK.

The state has asserted that the circumstantial evidence rule does not apply in DNA cases, citing, citing Reynolds v. State, 934 So.2d 1128 (Fla. 2006), Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005), and Orme v. State, 677 So.2d 258 (Fla. 1996). First, none of these cases say that the standard of review for circumstantial evidence cases does not apply when there is DNA evidence. As the Court explained in Orme, "Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue." DNA obviously does not fit into this category of evidence.

Second, DNA can prove only that a defendant was present at the scene or that the defendant had sex with the victim. DNA

alone cannot establish that a person committed a crime as can eyewitness testimony. Here, the issue was the identity of the killer. As to that issue, the state's evidence was wholly circumstantial. There was no eyewitness testimony establishing the identity of the killer.

The state proved only that appellant had sex with Mack the day she was killed. The state's evidence did not prove beyond a reasonable doubt that appellant is the person who killed her.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, reverse appellant's murder conviction for a new trial; Issue 2, vacate appellant's death sentence and reverse for a new penalty phase proceeding; Issue 3, reverse for resentencing by the trial judge; Issue 4, vacate appellant's murder conviction; Issue 5, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **THOMAS D. WINOKUR**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to **PAUL DUROUSSEAU**, #J189087, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, August 14, 2009.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

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Assistant Public Defender