

IN THE SUPREME COURT OF FLORIDA

KEVIN JEROME SCOTT,

Appellant,

v.

CASE NO. SC09-1578

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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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Kevin Jerome Scott, relies on the initial brief to respond to the State's answer brief with the following additions to Issues I, II and IV:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE PROSECUTOR'S IMPROPER COMMENT IN CLOSING ARGUMENT, SUGGESTING THAT THE DEFENSE COULD HAVE PRESENTED TESTIMONY TO DISPROVE THAT SCOTT'S VOICE WAS ON THE RECORDING DESI BOLLING OBTAINED FOR THE STATE, IMPROPERLY SHIFTED THE BURDEN OF PROOF FROM THE STATE TO THE DEFENSE IN VIOLATION OF DUE PROCESS REQUIREMENTS THAT THE STATE PROVE THE CRIME CHARGED.

Standard of Review

The State contends that the standard of review of this constitutional error is not *de novo*. (AB 13) This Court has held otherwise in Connor v. State, 803 So.2d 598, 605-608 (Fla. 2001), noting the appellate courts' responsibility to insure uniformity in deciding constitutional issues. At issue here is the trial court's ruling that the prosecutor's comment did not violate constitutional parameters. This issue is not the same as a discretionary ruling on a motion for mistrial after a trial court has correctly recognized a constitutional violation occurred.

Preservation

The State also argues that this issue has not been preserved for appeal because the defense did not object at the exact moment the comment was made. (AB 15-17) First, the prosecutor's improper comment occurred at the end of the prosecutor's rebuttal closing argument. (T9:953-954) After the rebuttal closing ended (T9:958), the court immediately announced recess. (T9:958) The very first matter addressed during the recess was the defense counsel's motion

for mistrial based on the comment. (T9:958) Contrary to State's assertion, the motion for mistrial was not after the recess. (AB 15) The motion for mistrial was timely. See, e.g., Nixon v. State, 572 So.2d 1336 (Fla. 1990); State v. Cumbie, 380 So.2d 1031 (Fla. 1980). This timely motion sufficiently fulfilled the contemporaneous objection requirement, since it was made quite soon after the improper comment and before submission of the case to the jury. (T9:958-959) The trial court had sufficient notice and time to instruct the jury or take other remedial action concerning the comment. See, e.g., Jackson v. State, 451 So.2d 458, 461 (Fla. 1984); Roban v. State, 384 So.2d 683 (Fla. 4th DCA) *reviewed denied*, 392 So.2d 1378 (Fla. 1980)(objection made later in witness's testimony deemed timely). Moreover, in this case, it cannot be said the court would have taken such action, because the trial court failed to recognize that the comment was a constitutional error. (T9:959)

Merits

The State argues that the comment in this case was nothing more than a permissible argument that the State's evidence about the identity of the voice was not contradicted. (AB 19-21) Scott acknowledges that the State can argue about its evidence and assert it was not contradicted, but the State may not go further and suggest that the defense could have had defense witnesses testify to refute the State's evidence. The prosecutor's offending comment

was not ambiguous:

I thought it was pretty ironic as I sat here listening to all the different witnesses the defense called today, girlfriend, friends. I just kept waiting.

I kept thinking at any moment now one of them is going to say, oh, I've listened to that jail tape. That's not his voice. That's not him. I mean that would be the most obvious thing, wouldn't you think? Oh, yes, Desi Bolling has scripted this with somebody. That's not his voice. You didn't hear that once.

Why is that? I don't know. Admit what you can't deny and deny what the state has no way to prove or disprove?

(T9:953-954) Contending that the defense could have called witnesses to refute the State's evidence crosses the line and impermissibly shifts the burden to the defense to produce evidence. (See, Initial Brief 31-37 and referenced cases).

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN A WITNESS MENTIONED SCOTT HAD BEEN INCARCERATED ON AN UNRELATED CRIMINAL DRUG CHARGE.

The State argues that this issue is not preserved for lack of a contemporaneous objection. (AB 28) This position is without merit. First, the offending comment from the witness was at the end of the State's cross-examination. (T9:799) The prosecutor literally asked eight more brief questions consuming one page of transcript before finishing his examination. (T9:799-800) Second, defense counsel promptly moved for a mistrial. (T10:804) Moreover, this issue about the unrelated drug charge had previously been the subject of a motion in limine where the State, the Defense and the Court agreed such information should not come before the jury. (T6:233-240; T9:804-805) The matter was not new to the trial court. The prompt motion for mistrial, on an issue that was not new to the prosecution or the trial court, sufficiently complied with the contemporaneous objection requirement. See, e.g., Jackson v. State, 451 So.2d 458, 461 (Fla. 1984); Roban v. State, 384 So.2d 683 (Fla. 4th DCA) *reviewed denied*, 392 So.2d 1378 (Fla. 1980)(objection made later in witness's testimony deemed timely).

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

The State asserts that four decisions from this Court support the imposition of the death sentence in this case. (AB47-50) However, these cases are distinguishable because each one involved significantly greater aggravation:

1. Hayward v. State, 24 So.3d 17 (Fla. 2009). This case involved the robbery of a convenience store and the shooting of the victim. The aggravation was significant - three prior violent felonies, including a conviction for another murder, and the homicide was committed during a robbery. This contrasts with Scott's case where his prior violent felony aggravator was a contemporaneous aggravated battery that was elevated from a simple battery solely on the fact he struck the victim with a firearm.

2. Bryant v. State, 785 So.2d 422 (Fla. 2001); Bryant v. State, 901 So.2d 810 (Fla. 2005)(post conviction appeal vacating the avoid arrest aggravator). This case can be considered one involving two aggravating circumstances, homicide committed during a robbery and previous convictions for violent felonies. However, Bryant's previous convictions for violent felonies were substantial when compared to Scott's aggravated battery. Bryant's prior violent felonies included sexual battery, grand theft, robbery with a weapon and aggravated assault.

3. Jackson v. State, 502 So.2d 409 (Fla. 1986). Nathaniel Jackson and his brother Clinton Lamar Jackson, Jackson v. State, 575 So.2d 181 (Fla. 1991), were convicted of murder of during the robbery of a hardware store in separate trials. The store owner was shot when he resisted the robbery. After disapproving two aggravators, this court affirmed two -- Nathaniel Jackson's previous conviction for an attempted robbery and the homicide in this case was during a robbery. Both Nathaniel and Clinton alleged the other was the triggerman in separate trials. This Court affirmed Nathaniel's death sentence, but in a later separate appeal, reversed Clinton's death sentence on the basis of Enmund v. Florida, 458 U.S.782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). Jackson, 575 So.2d 181, 190-193. Of note is the fact that both Nathaniel Jackson and Clinton Lamar Jackson are now serving life sentences for the murder of the hardware store owner. (Nathaniel Jackson, DOC #070498; Clinton Lamar Jackson, DOC # 072528) To the extent Nathaniel Jackson's case may be deemed a relevant comparable case in this appeal, Jackson's previous conviction for an attempted robbery constitutes greater aggravation than Scott's contemporaneous aggravated battery. However, given the circumstances surrounding the disputed triggerman status of Nathaniel Jackson, see, Jackson, 575 So. 2d 181, 190-193., his case should not be evaluated as a comparable case using that factor in mitigation.

4. Phillips v. State, case no. SC08-1882, __ So.3d __ , 2010

WL 1904537 (Fla. May 13, 2010). The aggravation in Phillips consisted of three statutory aggravating circumstances: the homicide was committed during a robbery, the homicide was committed to avoid arrest and Phillips had previous convictions for a violent felonies - both involving discharge of a firearm. Phillips had a prior conviction for aggravated battery for shooting his aunt in the leg with a shotgun. He also had previous conviction for grand theft, but the facts showed the case was an attempted robbery with an exchange of gunfire that did not produce injuries.

Contrary to the State's argument, the above cases do not support the approval of the death sentence in this case. Scott asks this Court to reverse his sentence.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Kevin Jerome Scott asks this Court to reverse his judgment and sentence.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to Thomas Winokur, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant, Kevin Scott, #J39149, F.S.P., 7819 N.W. 229th St., Raiford, FL 32026, on this _____ day of July, 2010.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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