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IN THE SUPREME COURT OF FLORIDA

DERRAL HODGKINS, :
Appellant, :
vs. : Case No. SC13-1004
STATE OF FLORIDA, :
Appellee. :
_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

MATTHEW D. BERNSTEIN
Assistant Public Defender
FLORIDA BAR NUMBER 0043302

Public Defender's Office
Polk County Courthouse
P.O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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ARGUMENT

ISSUE I

THE STATE FAILED TO PROVE THAT DERRAL
HODGKINS KILLED TERESA LODGE.

The State maintains that this case remains similar to Washington v. State, 653 So. 2d 362 (Fla. 1994). (Appellee's Br. at 34.) However, unlike Washington, the State's circumstantial evidence in this case remains insufficient.

Unlike this case, the State in Washington presented substantial evidence of guilt. In Washington, the victim "was found murdered in her bedroom, having been badly beaten about her face and head. Her body was badly bruised. There were signs that she had been vaginally and anally raped, and she suffered seventeen rib fractures." Id. at 363. "Death occurred between the hours of 5:51 a.m. and 10:00 a.m." Id. Detectives learned that Washington was imprisoned at a work release center approximately 2.1 miles from the victim's home. Id. "The Center's records indicated that on the day of the murder, Washington left the Center at 6:00 a.m., returned at 9:17 a.m., and did not work at his job at Cocoa Masonry." Id. Washington's "co-workers informed [the detective] that Washington sold a gold-colored watch to fellow co-worker." Id. A detective visited the co-worker, recovered the watch, and showed the co-worker a photo of Washington. Id. The co-worker "identified Washington as the person who sold him the watch, which was later identified as belonging to [the victim]." Id.

In Washington, this Court found that "the jury had sufficient basis to exclude all reasonable hypotheses of Washington's innocence." Id. at 366. "The evidence against Washington included DNA test results that matched his semen with those found at the murder scene; microscopic tests that matched his hair characteristics with hairs found at the murder scene; his possessing and selling the victim's watch; and his proximity to the victim's home." Id.

In this case, unlike Washington, the State's circumstantial evidence remains insufficient; the jury in this case did not have a sufficient basis to exclude all reasonable hypotheses of innocence. Unlike Washington, the only evidence linking Mr. Hodgkins to the crime scene was DNA under Lodge's fingernails. Also, Mr. Hodgkins' DNA was found only under the fingernails of Lodge's left hand; Mr. Hodgkins' DNA was not found anywhere else in the apartment. Also, unlike Washington, the State in this case failed to produce any evidence placing Mr. Hodgkins at the scene of the crime at the time of the murder. The State notes that Mr. Hodgkins spoke with Lodge for a few minutes at her apartment a couple of days before she was found dead (Appellee's Br. at 34); however, the State did not present any evidence placing Mr. Hodgkins at the apartment *at the time of the murder*. Further, unlike Washington, Mr. Hodgkins did not possess or sell any of Lodge's possessions. Therefore, the evidence presented in this case to support an inference of guilt does not exclude all other inferences.

Like the State's evidence in Dausch v. State, 141 So. 3d 513 (Fla. 2014), the evidence in this case is insufficient to conclude, beyond a reasonable doubt, that Mr. Hodgkins was responsible for the death of Lodge. In Dausch, the victim was murdered in July 1987, and "for more than fifteen years, there was no known connection between the physical evidence and any suspect, until DNA testing eventually led investigators to Dausch." Id. at 515. The victim was found on the side of a road in Sumter County. "His body was found clothed, but his wallet and car were missing." Id. "An eyewitness saw a man who generally resembled Dausch abandon the car and walk toward the interstate." Id. "The car was processed for evidence, and latent fingerprints were retrieved from the car's exterior and from a cigarette lighter wrapper found inside of the car." Id. An autopsy revealed that the victim "died as a result of blunt trauma to his head and upper chest. The medical examiner obtained anal swabs that revealed the presence of semen, although [the victim's] body revealed no evidence of sexual trauma." Id. The anal swabs and cigarette butts were eventually tested for the presence of DNA. Dausch's DNA matched the DNA extracted from the cigarette butts at all thirteen loci. Id. at 516. DNA extracted from the anal swabs identified Dausch as a possible contributor on four of thirteen loci. Id. Also, "the fingerprint retrieved from the cigarette lighter wrapper was matched to Dausch's fingerprints. Additionally, the palm prints on the rear driver's side door and above the rear driver's side door matched those of Dausch." Id.

In Dausch, this Court found that the State's evidence created nothing more than an insufficient suspicion of guilt: "Without question, there is competent substantial evidence to place Dausch inside of [the victim's] vehicle. Dausch does not dispute this fact. His presence in [the victim's] car, then, would tend to create a suspicion of Dausch's guilt. However, suspicion alone is not enough." Id. at 518. This Court stated: "The competent substantial evidence in this case links Dausch to [the victim's] car – not to [the victim's] murder. The State was unable to produce any witnesses to the murder. In fact, the State did not produce competent substantial evidence that even placed Dausch in Sumter County at or around the time of the murder." Id. "[W]hile the State's DNA evidence may leave one suspicious of Dausch's guilt, that evidence does not constitute competent substantial evidence of identity." Id.

In this case, like Dausch, the State's evidence creates nothing more than an insufficient suspicion of guilt. Like Dausch, no evidence in this case links Mr. Hodgkins to the murder. The lead detective in this case acknowledged that, without the DNA evidence found under the fingernails of Lodge's left hand, he would not have questioned Mr. Hodgkins; the detective testified that "[p]rior to obtaining [the] FDLE reports, [he] didn't even know that any relationship existed between [Lodge] and Mr. Hodgkins." (V9/T1092) The State, however, maintains that "physical evidence [places Mr. Hodgkins] at the crime scene." (Appellee's Br. at 33.) The DNA found under

Lodge's fingernails proves only that Lodge, at some unknown time, touched Mr. Hodgkins. The presence of DNA does not prove that Mr. Hodgkins killed Lodge. Like Dausch, the State in this case did not produce competent substantial evidence that placed Mr. Hodgkins at Lodge's apartment at the time of the murder; the State produced no witnesses to the murder, and nobody saw Mr. Hodgkins at or near Lodge's apartment at the time of the murder. Also, compared to the evidence in Dausch, the evidence in this case tying Mr. Hodgkins to the murder remains more tenuous; while Dausch's fingerprints and palm prints were found in the victim's car, Mr. Hodgkins' fingerprints were not found at Lodge's apartment. Therefore, like Dausch, the evidence in this case does not constitute competent substantial evidence of identity; like Dausch, the State's case rests entirely on bare suspicion and inference.

At trial, Mr. Hodgkins consistently maintained that someone else killed Lodge. During closing argument, Mr. Hodgkins argued this reasonable theory to the jury: "What is Derral Hodgkins saying? He tells -- he told you on this recording that he had sex with Teresa Lodge. They had been friends for a very long time and they had sex. Was it three days before? Was it two days before? Not sure. Is it reasonable? Absolutely." (V12/T1603) In its brief, the State argues that "this Court has acknowledged that inconsistent statements to law enforcement are properly considered proof from which guilt may be inferred." (Appellee's Br. at 32.) However, inconsistent statements do not constitute

evidence of murder; to prove that Mr. Hodgkins killed Lodge, the State had to offer "competent evidence that is inconsistent with [the defendant's] version of events and from which the jury reasonably could have excluded every hypothesis except that of premeditated murder." Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991). In this case, the State's circumstantial evidence as to when Mr. Hodgkins' DNA was left under the fingernails of Lodge's left hand generated hypotheses that were equally consistent with Mr. Hodgkins' innocence as with his guilt. The DNA could have been left under Lodge's fingernails at some point before the crime, and the State presented no evidence to rebut this reasonable hypothesis of innocence. The State in this case proved only that Lodge had contact with Mr. Hodgkins at some unknown time before her death, and this evidence alone does not rebut the reasonable hypothesis that someone other than Mr. Hodgkins killed Lodge.

Appellant relies on the Initial Brief in response to Appellee's remaining arguments.

ISSUE II

THE STATE FAILED TO PROVE PREMEDITATION IN
THIS CASE.

The State argues that Mr. "Hodgkins did not properly preserve this issue for appellate review." (Appellee's Br. at 36.) However, this Court has a mandatory obligation to independently review the sufficiency of the evidence in this case and determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of all the elements of the crime beyond a reasonable doubt. See Fla. R. App. P. 9.142(a)(5); Brown v. State, 143 So. 3d 392, 407 (Fla. 2014) ("[T]his Court has a mandatory obligation to independently review the sufficiency of the evidence in every case in which a sentence of death has been imposed. In assessing sufficiency, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." (citations omitted)); King v. State, 130 So. 3d 676, 689 (Fla. 2013) ("[T]his Court has a mandatory obligation to review the sufficiency of the evidence in every case in which a sentence of death has been imposed."); Hall v. State, 107 So. 3d 262, 281 (Fla. 2012) (same); see also Zommer v. State, 31 So. 3d 733, 744 (Fla. 2010) (noting that "this Court has an independent obligation to review the record to determine whether sufficient evidence exists to support the conviction" and stating that "[i]n

support of premeditation, the record reflects that Zommer decided to kill Robinson when he perceived that she recognized him as the person who stole a boat from the neighbor's yard").

In its brief, the State, citing Johnston v. State, 863 So. 2d 271 (Fla. 2003), argues that "strangulations that are particularly elongated or cause more suffering can prove premeditation." (Appellee's Br. at 39.) However, the State points to no evidence in this case that proves that the strangulation was "particularly elongated." Further, this case remains distinguishable from Johnston; in Johnston the victim was both conscious and suffered defensive wounds: "[The victim] would have been conscious for a good portion of the attack. Defensive bruising on [the victim's] arms and hands and defensive fingernail injuries on her nose showed that [the victim] struggled with her assailant and attempted to pull the assailant's hands off her face." 863 So. 2d at 285. In this case, unlike Johnston, Lodge did not display any defensive wounds and no evidence suggested a "particularly elongated" struggle. (V8/T1016,1052)

The State also compares the facts of this case to the facts in Hodges v. State, 55 So. 3d 515 (Fla. 2010). (Appellee's Br. at 40.) However, like the victim in Johnston, the victim in Hodges also suffered defensive wounds. See Hodges, 55 So. 3d at 541 ("The evidence established that Hodges killed Belanger after consciously deciding to do so. ... Dr. Cumberland identified four separate wounds that would each have been life-threatening and

other, nonlethal wounds that were indicative of defensive wounds.”). Therefore, because the victims in both Hodges and Johnston suffered defensive wounds that suggested a conscious struggle, both Hodges and Johnston remain inapposite.

Appellant relies on the Initial Brief in response to Appellee’s remaining arguments.

ISSUE III

THE TRIAL COURT ERRED BY LIMITING CROSS-
EXAMINATION OF A PROSECUTION WITNESS
REGARDING A PENDING CRIMINAL CHARGE.

The State argues that "[t]he evidence against Hodgkins was overwhelming." (Appellee's Br. at 43.)

However, the State's evidence in this case was entirely circumstantial, and the DNA found under Lodge's fingernails on her left hand was the only evidence that linked Mr. Hodgkins to the crime scene. The evidence in this case remains anything but overwhelming.

Appellant relies on the Initial Brief in response to Appellee's remaining arguments.

ISSUE IV

THE TRIAL COURT ERRED BY ORDERING MR.
HODGKINS VISIBLY SHACKLED DURING THE PENALTY
PHASE WITHOUT MAKING ANY CASE-SPECIFIC
DETERMINATION ADDRESSING THE NEED FOR
SHACKLES.

Citing Lucas v. State, 376 So. 2d 1149 (Fla. 1979), the State argues that this issue "is not properly preserved." (Appellee's Br. at 46.) In Lucas, defense counsel "did not interpose an objection; but rather, he deferred to the trial court's statement of the applicable law." Id. at 1152.

Unlike Lucas, defense counsel in this case did "interpose an objection." In this case, defense counsel objected to Mr. Hodgkins being shackled in front of the jury. (V13/T1710-1718) Defense counsel objected specifically to the Sheriff's protocol: "[I]t's going to be practically impossible to keep this jury from seeing, at some point in time, seeing the lockbox. And I would submit that this protocol is unnecessary and it violates, what I would suggest, violates the opportunity for Mr. Hodgkins to have a fair penalty phase." (V13/T1714-1715) Defense counsel also noted that the jury might also see the "chain and the lock that is wrapped around his entire body." (V13/T1717) The trial court in this case expressly found that the "**objection is noted for the record.**" (V13/T1718) For the record, and to facilitate review, the trial court also took four photos of Mr. Hodgkins in shackles. (V13/T1772-1774;SV4/R2719-2723) Therefore, this issue is preserved for review.

In its brief, the State attempts to distinguish Deck v. Missouri, 544 U.S. 622 (2005): "Furthermore, in Deck, the trial court made no case specific findings, but required him to be shackled merely because he had been convicted of a capital offense." (Appellee's Br. at 47.) Contrary to the State's arguments, Mr. Hodgkins, like the defendant in Deck, was shackled based solely upon his conviction in the guilt phase; the trial court in this case noted that the Sheriff deemed Mr. Hodgkins, *based solely upon his conviction in the guilt phase*, both a suicide risk and an escape risk. (V13/T1711)

The State also maintains that the trial court in this case "did not merely acquiesce to the Sheriff's Office directive to have the defendant in restraints." (Appellee's Br. at 47-48.) However, the trial court clearly deferred to the Sheriff; the trial court found "that the jail's protocols and the courtroom security protocols are under the direction and control of the Sheriff's [*sic*] of Pasco County, and the Court is not going to ask them to violate their standing protocols." (V13/T1713) Because of this protocol, the trial court stated: "Mr. Hodgkins, I can't take you out of the box." (V13/T1714) Therefore, the trial court in this case believed it lacked discretion and deferred to the Sheriff's protocols; contrary to the dictates of Deck, the trial court placed Mr. Hodgkins in shackles (lockbox, leg irons, and waist chain) without making a case-specific determination that reflected particular concerns related to Mr. Hodgkins.

In its brief, the State cites Hernandez v. State, 4 So. 3d 642 (Fla. 2009), to support its contention that shackles were necessary in this case. (Appellee's Br. at 48.) However, in Hernandez, the trial court found shackling necessary because "Hernandez had twice committed a battery against law enforcement officers, had been convicted of battery on his codefendant after fighting with him in their jail cell, had threatened a law enforcement officer when she did not provide him with a razor after one of the attacks on a law enforcement officer, [and] had self-mutilated with a razor during a previous trial." Id. at 657. In this case, unlike Hernandez, the trial court noted for the record that Mr. Hodgkins conducted himself properly throughout the guilt phase of the trial. (V3/T1714)

The State also argues that "the trial judge in Hodgkins' case insured that the shackles were not visible to the jurors." In this same paragraph, however, the State concedes that a juror was able to see Mr. Hodgkins' shackles. (Appellee's Br. at 48.) Further, if Mr. Hodgkins put his hands above the table, the jurors clearly could see the restraints. (V13/T1712,1715) Defense counsel also noted that the jury might also see the "chain and the lock that is wrapped around his entire body." (V13/T1717)

In this case, because the trial court ordered Mr. Hodgkins visibly shackled without making a case-specific determination, the trial court violated Mr. Hodgkins' constitutional right to due process. Mr. Hodgkins relies on the Initial Brief in response to Appellee's remaining arguments.

ISSUE V

FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH
ALLOWS A DEATH RECOMMENDATION TO BE RETURNED
BY A BARE MAJORITY (7-5) VOTE OF THE JURY, IS
UNCONSTITUTIONAL.

Appellant relies on the Initial Brief in response to
Appellee's arguments.

CERTIFICATE OF SERVICE

I certify that a copy has been served via the portal to Sara Macks, Assistant Attorney General, at capapp@myfloridalegal.com and sara.macks@myfloridalegal.com on this on this 3rd day of November, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

/s/ Matthew D. Bernstein
MATTHEW D. BERNSTEIN
Assistant Public Defender
Florida Bar Number 0043302
P.O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
mbernstein@pd10.state.fl.us
mjudino@pd10.state.fl.us

mdb