

IN THE SUPREME COURT OF FLORIDA

FILED

JAN 19 1990

cc
Deputy Clerk

MARK JAMES ASAY,

Appellant,

v.

CASE NO. 73,432

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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PRELIMINARY STATEMENT

Mark Asay relies on his initial brief to respond the State's answer brief except for the following additions concerning Issue I.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INJECT IRRELEVANT AND UNFOUNDED ISSUES OF RACIAL PREJUDICE INTO THE TRIAL, WHICH INFLAMED AND PREJUDICED THE JURY, THEREBY DEPRIVING ASAY OF A FAIR TRIAL.

The State asserts three points in response to this argument. None of them have merit.

First, the State argues that the error was not preserved for appeal. Although trial counsel failed to object, the prosecutor's improperly injecting racial prejudice into the case is fundamental error. Cooper v. State, 136 Fla. 23, 186 So. 230 (1939). The prosecutor's conduct was an egregious affront to the integrity of the judicial process. Such an inflammatory appeal to irrelevant racial issues cannot be condoned and constitutes reversible error regardless of the absence of an objection.

Second, contrary to the State's assertion, the evidence did not justify the prosecutor's actions and remarks. Mark Asay may have harbored prejudices against blacks, but the evidence never linked any such prejudices as a motive for the murders. Without that link, Mark's prejudices were irrelevant. Merely having prejudices does not lead to the inference that actions are necessarily motivated by those prejudices. In fact, here, the evidence shows only nonracial motives for the killings. Robbie Asay and Bubba O'Quinn testified that the homicide of Booker was the result of a confrontation

exacerbated by Mark's intoxication. (R 498-502, 559-563) O'Quinn, Charlie Moore and Danny Moore testified that Mark said he shot McDowell over a dispute about money for sex or drugs. (R 512, 650, 699-689) The State contends that three facts justify the prosecutor's theory and argument that the murders were racially motivated (Answer Brief at page 11): (1) Mark explained his confrontation with Booker by saying "you got to show a nigger who is boss" and "you can't let them run over you"; (2) Mark used the term "nigger" when he allegedly made admissions about the murders to a cell mate; and (3) Mark had tattoos possibly reflecting a prejudice against blacks. From these facts, alone, the prosecutor made the quantum leap to the conclusion that Mark's prejudices motivated the shootings. Moreover, the prosecutor grossly overstated the evidence in his argument in an attempt to support his unsupportable conclusion. (see Initial Brief at pages 19 through 22) These misstatements of the evidence included a statement that Mark told others he killed the victims because they were black. (R 851-854, 879-880, 884) No witness ever testified to any such statement.

Finally, the State contends that Mark's trial lawyer invited the prosecutor's argument about race as motive. (Answer Brief at page 12-14) Defense counsel did try to direct the jury from the red herring that racial prejudice motivated the killings which the State had presented through its witnesses. However, counsel did not invite this matter into the case. The State contends now, as did the prosecutor below, that Mark brought racial bias into the case because of his use of the

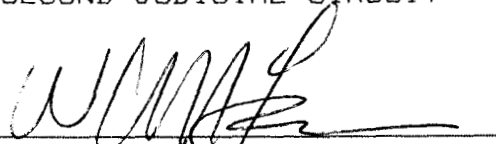
term "nigger" and his tattoos. (Answer Brief, at page 11-12) (R 851-852, 879-880) This position has no merit. Regardless of Mark's prejudices, the State never proved them relevant to the prosecution. The prosecutor wanted to sway the jury's verdict via a character assassination and proceeded to do so throughout the trial, not just in response to defense counsel's brief comment in summation.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Mark Asay asks this Court to reverse his judgments and sentences in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Richard B. Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mark Asay, #078387, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 19 day of January, 1990.


W. C. McLain