IN THE SUPREME COURT OF FLORIDA

TERENCE VALENTINE,

Appellant,

vs. Case No. 75,985

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant will rely upon his Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon his Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

Even if Appellee's assertion that Giavanna gave "implicit consent" to the taping is correct, the statutory requirement is explicit consent. The taped conversation between Appellant and Giovanna was not "necessary background" as claimed by Appellee, but totally irrelevant to the charges.

The taped conversation between Appellant and Livia Romero should have been redacted to eliminate prejudicial material that was irrelevant to the charged offenses. This material was not essential to provide a context for the jury's assessment of the evidence. The error in admitting the entire tape was not harmless.

A recent decision shows a comparable error by this trial judge in failing to require the State to give race-neutral reasons for exercise of peremptory strikes against African-American prospective jurors. Contrary to Appellee's assertion, the record shows that the voir dire of prospective juror Glymph

reveals no reason for her excusal that was not shared by white jurors who actually sat on the jury.

Contrary to Appellee's assertion, there is no evidence that Appellant owned a Bronco. The error in admitting John's hearsay statement was not harmless.

Appellee has misstated the circumstances of several of this Court's capital proportionality decisians. Although Appellant framed the issue as ane of whether the trial court erred by giving conclusive effect to the jury's recommendation, the circumstances at bar closely resemble cases where this Court found death to be a disproportionate penalty.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE TAPED TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND HIS DAUGHTER, GIOVANNA, BECAUSE SHE DID NOT CONSENT TO THE TAPING AND APPELLANT'S STATEMENTS WERE IRRELEVANT TO ANY FACT IN ISSUE.

Appellee contends that because Giovanna was aware that her conversation with her father was being taped, this Court should find "implicit consent." Brief of Appellee, p.6. This argument ignores the fact that consent of one party is an exception to the otherwise prohibited use of any intercepted wire communication. § 934.06, Fla.Stat. (1989). As an exception, the statutory provision must be strictly construed. In re Grand Jury Investi-

gation, 287 So.2d 43 (Fla. 1973). Explicit, not implicit, consent is required.

Appellee also contends that the jury needed to hear Appellant's conversation with Giovanna "to put the defendant's statements, as well as his tone of voice, in context." Brief of Appellee, p.8. Appellant's anger was expressed during his conversation with Livia Romero as well as with Giovanna. The State does not even contend that Valentine's conversation with Giovanna contained anything which implicated Valentine in the homicide; rather, it argues that the conversation "was necessary background." Brief of Appellee, p.8.

Appellee has not supported this argument by mention of any specific facts in the conversation which would be useful to the trier of fact. Appellant's verbal abuse of his young daughter when he found that she was planning to go with her mother and never see him again could well have inflamed the jury. However, it had no relevance to the charged offenses and should have been excluded from evidence.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCISE PREJUDICIAL PORTIONS OF THE TAPED TELEPHONE CONVERSATION BETWEEN LIVIA ROMERO AND APPELLANT.

Appellee also contends that the entire conversation between Appellant and Livia Romero "was essential to the jury's ability to understand and assess in context." Brief of Appellee, p. 12.

However, Appellee does not explain how Appellant's threats to Livia Romero and her family, Romero's accusation that Appellant was involved with drugs; or Appellant's "attitude about Porche's death" (Brief of Appellee, p.12) are relevant to the issue of whether Appellant committed the charged offenses.

The Court of Appeals of New York discussed at length in People V. Ely, 68 N.Y.2d 520, 510 N.Y.S.2d 532, 503 N.E.2d 88 (1986), the problem of tape recordings which contain both relevant and prejudicial material mixed together. The Ely court held:

> Whether there should be redaction of a tape turns . . . on whether the material to be redacted is more prejudicial than probative.

510 N.Y.S.2d at 538. Accord, Lamar v. State, 258 Ind. 504, 282 N.E.2d 795 (1972). Florida courts appear to follow the same rule. See Gomien V. State, 172 So.2d 511 at 515 (Fla. 3d DCA 1965); Parnell v. State, 218 So.2d 535 (Fla. 3d DCA 1969). Therefore, the trial judge at bar should have considered each of the parts of the conversation to which Appellant objected. The prosecutor's argument that excising portions of the tape would cause the conversation to "just . . . not flow" (R809) is insufficient to outweigh the prejudice caused to Appellant by the irrelevant evidence of bad character.

Finally, Appellee contends that any error in admitting the challenged portion af the tape was harmless because "the evidence of guilt was overwhelming." Brief of Appellee, p.13. However, the evidence was hardly overwhelming because most of it was the

accusations of the biased and impeached ex-wife, Livia Romero. Appellant presented two alibi witnesses who placed him in Costa Rica on the date of the shooting. The jury's sole request after retiring for deliberations was to hear the tapes again (R1265). Indeed, the first trial of Valentine resulted in a hung jury (R1379-80).

Clearly the State cannot meet the test of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) which requires proof beyond a reasonable doubt that the erroneously admitted evidence could not have contributed to the jury's verdict.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO FIND A LIKELIHOOD THAT THE PROSECUTOR EXCUSED TWO AFRICAN-AMERICAN PROSPECTIVE JURORS ON RACIAL GROUNDS.

Recently, in Harris v, State, 589 So.2d 1012 (Fla. 2d DCA 1991), the same trial judge was reversed for failing to require the state to give legitimate reasons for its peremptory challenge of an African-American prospective juror. As in Harris, the court at bar merely dismissed the defense objection with a finding that "the defense has not made a proper showing that the State, at this time, is exercising its peremptory challenges based solely on group bias" (R759). This was error because Appellant made a sufficient showing of a likelihood that the state was exercising its pcremptories in a discriminatory manner.

Appellee contends that the record reflects racially neutral

reasons for the prosecutor's peremptory strikes of prospective jurors Glymph and Aldridge. Brief of Appellee, p. 20. In particular, Appellee contends that the fact that prospective juror Glymph had been a burglary victim supports her excusal. Brief of Appellee, p.20. It seems highly unlikely that the prosecutor would have struck a white juror who had been the victim of a burglary, particularly one who, like Ms. Glymph, was satisfied with law enforcement efforts to solve the crime (R604). Indeed, the record shows that two white jurors who actually served on the jury, Linda Redus and Deana Price, had been burglary victims **(R604-6,768).**

Appellee also asserts that prospective juror Glyrnph "appeared to have reservations about the death penalty." Brief of Appellee, p.20. However, Glymph responded affirmatively to the prosecutor's question, "Under the appropriate circumstances, could you recommend the death penalty?"' (R637) She responded "no" when asked if she thought that "the death penalty ought to be automatically imposed in any **case."** (R743). These were the only two statements made by prospective juror Glymph with regard to the death penalty. Appellee's contention that prospective juror Glymph could be excused because of "reservations about the death penalty'' is fatuous.

ISSUE IV

THE TRIAL **COURT ERRED BY ALLOWING LIVIA ROMERO TO TESTIFY TO STATEMENTS MADE BY "JOHN"** BECAUSE **THESE STATEMENTS WERE INADMISSIBLE HEARSAY.**

Appellee has mistakenly asserted that "there was unchallenged evidence . . . that the defendant owned a gray, black and maroon Bronco and that this Bronco was seen near Porche's house at the time of the kidnapping/murder." Brief of Appellee, p.26. In fact, there is no evidence whatsoever that Valentine owned a Bronco. Rather, the record only supports a speculation that the Bronco seen in the neighborhood on the day of the homicide might have been the same vehicle as the one that Valentine was in when he visited Nancy Cioll in New Orleans. If John's hearsay statement had not been admitted, it is doubtful that the coincidence between the "faded red or white or faded red and gray" Bronco seen in the neighborhood (R976) and the "'maroon . . . gray and . . . black" Bronco seen in New Orleans (R960) would have any probative value.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE AS REBUTTAL EVIDENCE THE PRIOR INCONSISTENT STATEMENT OF GIOVANNA VALENTINE BECAUSE THE WITNESS WAS NOT GIVEN OPPORTUNITY TO EXPLAIN, ADMIT OR DENY THE PRIOR STATEMENT.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VI

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN INDEPENDENT WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES BEFORE IMPOSING THE DEATH PENALTY.

Although Appellant did not raise proportionality of sentence as an issue, Appellee has attempted to show that the sentencing judge committed no error (although he believed himself "bound" by the jury recommendation) because a death sentence would be proportionate. In doing so, Appellee has misstated the circumstances of this Court's prior decisions in several cases.

Appellee claims that this Court's decisions in Irizarry v. State, 496 So.2d 822 (Fla. 1986), Amoros v. State, 531 So.2d 1256 (Fla. 1988), and Farinas v. State, 569 So.2d 425 (Fla. 1990) involved "heated, domestic confrontations and, although premeditated, were most likely committed upon reflection of a short duration." Brief of Appellee, p.35. This is simply not true. All of these cases were similar to the case at bar because the defendants' wives or girlfriends had long since moved out and rejected them. All of these eases involved considerable preplanning and an invasion of the victim's new home, or automobile, in the case of Farinas.

Appellee compares the case at bar to Brown v. State, 565 So.2d 304 (Fla. 1990) and Porter v. State, 564 So.2d 1060 (Fla. 1990). Brief of Appellee, p.36. Brown is readily distinguishable because passion played no role in that homicide. While Porter involves comparable circumstances, it was also more

aggravated because two people were killed. Porter also had less mitigation than the case at bar because Valentine has no prior criminal record, not just an absence of prior violent crimes. Furthermore, Valentine has noteworthy achievements in his life including careers a5 an outstanding basketball player and as a nautical engineer.

CONCLUSION

Appellant will rely upon his conclusion as presented in his initial brief.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

CERTIFICATE OF SERVXCE

I certify that a copy has been mailed to Candance Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 23rd day of March, 1992.

DSC/ddv