



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

JAMES ROBERT WARD,

Appellant,

v.

CASE NO. 5D12-49

STATE OF FLORIDA,

Appellee.

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MOTION TO STRIKE INITIAL BRIEF OF APPELLANT

The State of Florida, by and through the undersigned Assistant Attorney General, hereby files this motion to strike Appellant's Initial Brief as violative of Fla.R.App.P. 9.210, and offers the following in support.

On November 2, 2012, Appellant filed the Initial Brief in the above-styled case. In his State of the Case, Appellant succinctly and properly stated the case in three sentences. However, immediately following those three sentences, is Appellant's "Statement of the Facts". That section of the brief starts with an "Introduction" that states:

I. Introduction

Diane died of a single gunshot wound to the head she sustained in the second story bedroom of the Wards' home. Because there were no witnesses to the incident other than Ward, the State's case rested entirely on circumstantial evidence.

Ward appeals on the grounds that the evidence was insufficient, and that the jury nevertheless convicted as a result of a pervasive pattern of prosecutorial misconduct, a series of erroneous evidentiary rulings by the trial court, and a critical omission in the jury instructions regarding the State's failure to preserve evidence. The facts regarding these matters are set forth below.

(Initial Brief, p.1). This "Introduction" is nothing more than improper argument, and has no business in the Statement of Facts. The "introduction" contains no cites to the record, which is further indication that it is pure argument.

The second section of the Statement of the Facts also begins without any record cites, arguing:

II. Fact relating to the sufficiency of the evidence.

The State's theory was that Ward shot Diane with malice, ill will, or spite sufficient to justify a verdict of second degree murder. The State, however, offered no specific theory regarding the manner in which the crime occurred.

(Initial Brief, p.1). That statement is nothing but argument, as shown by the failure to include any cite to the record to support the assertion.

The next section of Statement of Facts, beginning on page 4, it titled "Facts relating to evidentiary errors and prosecutorial misconduct". Again, the rest of the page contains nothing but argument:

Ward challenged the State's case both on the basis that the State had failed to prove its theory of second degree murder, and also on the basis that an equally or more reasonable hypothesis was that Diane was attempting to kill herself and that the gun accidentally discharged as Ward tried to stop her from doing so. As set forth below, the prosecutors resorted to a relentless pattern of misconduct in an effort to defeat the reasonable hypothesis of Ward's innocence, and to portray him in a false and misleading light through baseless attacks on his character, imputation of a supposed motive for murder and purportedly "odd" demeanor, and closing arguments that improperly ridiculed Ward's defense and attempted to shift the burden of proof to him. The trial court also committed a number of prejudicial evidentiary errors that compounded this pattern of prosecutorial misconduct and resulted in a trial that was fundamentally unfair and a verdict that is of dubious validity.

(Initial Brief, p.4). There are no record cites to support the assertions, which are blatantly argumentative.

The next section includes cites to the record, but is rife with argumentative references and phrases such as "The State began its efforts to eliminate attempted suicide as a possibility" and "the prosecutor attempted to elicit testimony". (p.5). The section goes on to state "Refusing to let the issue drop, the State then without warning asked the same question yet a third time, necessitating yet another defense objection." The argument is

blatant and continued in the next paragraph, stating "The State returned to this theme during the testimony of the medical examiner".

In almost each and every paragraph, Appellant uses argumentative and inappropriate phrases:

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Undeterred by this ruling, the prosecutor then asked . . .

. . ., but the jury would have been left with no doubt regarding the opinion the State was seeking to elicit.

The prosecutor made no effort to defend the appropriateness of either of these efforts to obtain testimony from the detective that he was not qualified to give.

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Garavaglia also repeatedly volunteered testimony that both she and the State knew was inadmissible and was designed to improperly influence the jury to disregard and even ridicule the possibility that Diane was attempting suicide.

. . . then ridiculed the very notion by stating that interrupted suicides are "common in Holly wood."

The defense objection was sustained, but again only after the jury had heard it.

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The State resorted to impropriety with Garavaglia in its effort to

cast doubt on the critical issue of Diane's high post-mortem Citalopram blood level.

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Indeed, virtually no Citalopram metabolite was found in Diane's post-mortem blood, which confirmed that her massive ingestion of the drug took place shortly before her death.

In addition to a need to try to rebut the reasonable hypothesis that this was an unsuccessful attempt by Ward to prevent Diane from committing suicide, the State also needed to try to explain why Ward would have suddenly murdered his wife after decades of peaceful and loving co-habitation. The State thus launched an all out effort to paint Ward as a bad man, which resulted in a combination of erroneous evidentiary rulings by the trial court and an array of instances of prosecutorial misconduct.

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1. The baseless suggestion that Ward was unfaithful

The State then capitalized on this testimony to suggest that Ward was cheating on Diane, and thus had a reason to murder her. For example, the State call the Wards' eldest daughter Mallory as a witness, and although she knew nothing about the topic . . .

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The State returned to this baseless suggestion of infidelity in its

closing argument . . .

2. Ward's wealth and the baseless suggestion that he had a financial motive to murder Diane

(Footnote at bottom of page 11) The State concluded its examination of the Wards' other daughter, Sarah, in a similarly improper and inflammatory fashion.

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Nevertheless, the prosecutor resumed her examination in a manner designed to suggest . . .

The State also repeatedly and gratuitously injected Ward's wealth into the case, inviting the jury to convict out of distaste for his lifestyle.

The State even went so far as to suggest . . . eliciting utterly irrelevant but highly prejudicial testimony without warning . . .

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3. Ward's demeanor and the erroneous admission and mischaracterization of his pre-trial statements

The State made numerous attempts to imply that Ward had acted out of ill will toward Diane . . .

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The State took inappropriate advantage of this state of the record in both its initial and rebuttal closing arguments, using the exact misleading use of Alleyne's efforts to avoid

interrogating Ward . . .

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In addition to twisting Alleyne's football conversation into "evidence" of Ward's lack of remorse, the State also elicited utterly improper opinion testimony from Detective Cross . . .

. . . the Court instructed the jury to disregard the answer, T2051-54, but it is doubtful that the jurors followed that instruction.

C. Prosecutorial misconduct in closing arguments

In addition to the pervasive pattern of misconduct during the presentation of the evidence described above, the prosecutors repeatedly made improper arguments in both their initial and rebuttal arguments.

In its initial closing, the State made the classic burden-shifting argument . . .

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. . . the State returned to this theme in its rebuttal closing, repeatedly making burden-shifting arguments and comments denigrating the defense.

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As noted above, the evidence that Diane ingested a massive dose of Citalopram just before her death went to the heart of the reasonable hypothesis that this was an interrupted suicide attempt by Diane. The State's attempt to rebut

this evidence turned on the claim that Diane's highly-elevated Citalopram blood level was unreliable because it resulted from post-mortem redistribution of the substance.

These clearly improper arguments appear throughout the entirety of the Statement of the Facts. Even where there is a cite to the record, Appellant has inserted blatant argument.

When an initial brief contains matters that are argumentative, immaterial, or impertinent to the appeal, striking the brief is appropriate. See *Sabawi v. Carpentier*, 767 So. 2d 585 (Fla. 5<sup>th</sup> DCA 2000); *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla. 1<sup>st</sup> DCA 1989). This Court has stated, "The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." *Sabawi*.

In the instant appeal, the Statement of the Facts is rife with argument and assertions that malign the prosecutors and the State. They serve no purpose other than to color the facts in a manner that presents only the Appellant's arguments. While it is acceptable for a skilled appellate writer to present the Statement of the Facts in a manner which highlights the facts which are key to the party's arguments, it is absolutely improper to insert blatant, undisguised argument under the guise of "fact".

Because the first 19 pages of the Initial Brief contained

improper argument which is violative of appellate rules and the case law interpreting the rules, the Court should strike the Initial Brief. If the brief contained only one or two inadvertent argumentative references, striking the brief might not be necessary. But when the **entire** Statement of the Facts is replete with improper and unacceptable argument, making it impossible for the State to address each specific impropriety, the only remedy is to strike the brief with directions to file a proper brief.

WHEREFORE, for these reasons, the State respectfully asks the Court to strike the Initial Brief of Appellant.

Respectfully submitted,

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ATTORNEY GENERAL

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DESIGNATION OF E-MAIL ADDRESSES

Rebecca Roark Wall, Assistant Attorney General representing the State of Florida, designates the following email addresses for the purpose of e-mail service, pursuant to Fla.R.Jud.Admin. 2.516: Primary e-mail address: crimappdab@myfloridalegal.com; Secondary e-mail address: rebecca.wall@myfloridalegal.com.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion has been furnished by e-mail to **James E. Felman**, attorney for Appellant, at jfelman@kmf-law.com, this 18<sup>th</sup> day of February, 2013.

/s/ Rebecca Roark Wall

Rebecca Roark Wall  
Counsel for Appellee