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IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JAMES ROBERT WARD,

Appellant,

v. Case No. 5D12-49

STATE OF FLORIDA,

Appellee.

____/

On Appeal from the Ninth Judicial Circuit of Florida,
In and for Orange County

REPLY BRIEF OF APPELLANT
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STATUTES

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I. The evidence is insufficient to sustain Ward's conviction.

In his Initial Brief, Ward explained why the evidence is insufficient to sustain his conviction. IB23-30. The Initial Brief detailed the reasonable hypothesis of innocence that Diane's death was accidental, and explained why the State's proof failed to exclude this hypothesis or to establish the malice necessary for second degree murder. IB23-30. The Answer Brief continues the State's pattern of avoiding any explanation of what specifically took place or how Ward's guilt can be reconciled with the physical evidence. Instead, the State posits Ward's guilt as a given, and attempts to bolster this with assertions that are either (1) false, (2) without record support, or (3) irrelevant. Each category of assertion is discussed below, as is the State's claim that the special standard of review for circumstantial cases is inapplicable.

A. False statements in the Answer Brief

The State twice asserts without citation that Diane's DNA "could not be" or "was not" found on the gun. AB29, 32. This assertion is false. The State's expert identified DNA on the gun from Ward and a second person, but could not identify the second person or exclude the possibility that it was Diane. T1484, 1486, 1505-06. Ward's DNA expert testified unequivocally Diane was the second person. T2315, 2334-35.

Although the State admits that GSR was found on Diane's hands, it twice asserts as fact that this "was not forensically significant." AB10 (citing 1689-90), 29. Review of the transcript pages the State cites confirms that GSR was found on Diane's hands,

but that according to the State's expert "the amount *may* not be forensically significant." T1689-90.[1] There was indeed GSR on Diane's hands, and no witness said this "was not forensically significant" as the State asserts.

B. Statements in the Answer Brief without record support

The State represents that "the evidence showed that [Diane] could not have held the gun on herself, pointing it directly at her own face, and still pulled the 12 pound trigger on the double action gun, shooting herself straight on in the face." AB29. This sweeping assertion is not in the State's Statement of Facts, and in its Argument lacks citation. It is without record support, and is contrary to the overwhelming evidence showing not only that Diane could have caused the gun to fire while struggling over it – a mere 12 pounds of force were required – but that she in fact did so.[2]

The State represents as fact Ward "made it very clear that he did not want Diane to testify about" what the State asserts were improper payments by Ward's business for Diane and their children. AB30; *see also* AB6-7 (describing such transfers as established fact).[3] In support of its representation the State cites nothing. There is

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[1]This statement was not explained, but it appears to reflect that the GSR could have resulted from transfer, being near a gunshot, or firing the gun. T1690.

[2]This is demonstrated not only by Ward's contemporaneous statements, but also by Diane's DNA on the gun and GSR on her hands. It is thus telling that the State's critical summary assertion about the evidence is not only without record basis, but is specifically contradicted by the two matters the State has misrepresented.

[3]The State fails to reveal that these transfers were not established as fact, but rather were allegations in an unidentified civil complaint not in evidence. T1962.

nothing the State could have cited because the assertion has no basis in the record.

C. Irrelevant statements in the Answer Brief

Aside from false or baseless statements, the State's remaining assertions about the sufficiency of the evidence are irrelevant. For example, the State repeatedly states that the gun was "double-action," meaning that it need not be cocked before firing, and that it required 12 pounds of force to pull the trigger. *See* AB10, 28, 29, 32. The State never explains the significance of this. The fact is that only 12 pounds of force were needed to pull the trigger, and if the trigger was pulled (once), the gun fired. There was no evidence Diane could not produce 12 pounds of force. The State asserts repeatedly that Diane's eyes were open and that the gun was at least 12 inches from her face when it fired. AB27, 28, 29, 31, 32. The relevance of this is not explained, and it is consistent with the gun firing accidentally during a struggle.

The State points out that before the call from her attorney about her deposition Diane was "in a good mood the day she was killed." AB28. This hardly matters, as the evidence showed that later that day Diane spoke with her counsel, T1990, then started drinking, T1769, 2192, 2243, which caused her personality to change and sometimes become violent. T2017. The State notes that Ward's business was in financial difficulty, but never links that to any reason for Ward to kill Diane, especially given that his personal assets were held with Diane as tenants by the entireties and thus protected from his creditors only while Diane was alive. T2413, 2425. The State notes

the evidence of a broken wine glass and stain downstairs, and stains on the back of Ward's shirt and the sheets on his side of the bed. Aside from proving that Ward's reaction to what the State says was a "possible disturbance on the patio," AB30, was to get in bed and lie down, nothing about this proved Ward's guilt or disproved the reasonable hypothesis of his innocence.

The State claims that Ward's guilt is demonstrated because he did not call his daughters or Diane's sister to tell them of Diane's death. AB29. Ward may have reasonably decided that no purpose would be served by calling his daughters late at night from jail to break the news to them that their mother was dead. And similarly Ward may reasonably have decided that rather than tell Diane's sister of her death, it was more prudent to have that conversation with the sister's husband. The State omits to mention that a critical feature of Ward's discussion with the sister's husband was how to tell his daughters in the morning about Diane's death. T1234, 2066.[4]

Finally, the State points out that Ward had no GSR on his hands, which the State asserts is inconsistent with the theory that the gun fired while he was trying to stop Diane from killing herself. AB29. Of course, this avoids the "elephant in the room" that the absence of GSR on Ward's hands is also inconsistent with the State's theory

[4]The State also misstates the content of this call, claiming that the sister's husband asked Ward "what happened" but that Ward "never told [him] what happened to Diane." AB8. In truth, Ward was asked: "[I]s there anything that you can say about how it happened," T2066, and Ward told him "it was an accident." T1234.

that Ward shot Diane, and is hardly evidence of Ward's guilt. The matter is irrelevant in any event, as there were a plethora of reasons for the absence of GSR on Ward given that he was not tested until hours later after many events that could have resulted in the residue no longer being detectable. T1094, 1117, 1157, 1400, 1711.

D. The special standard of review for circumstantial cases applies here.

Relying on the recent opinion in *Knight v. State*, 107 So. 3d 449 (Fla. 5th DCA 2013), the State argues that the special standard of review for circumstantial evidence cases does not apply here. AB26-27. *Knight*, a drug case, holds that the special standard applies only where a case is "wholly circumstantial." 107 So. 3d at 467. The court acknowledged, however, that there is "conflict and much confusion" among the Florida courts regarding whether that is the case or if the standard applies anytime at least one element is based solely on circumstantial evidence.[5] *Id.* at 466.

Although *Knight* did not limit its holding to drug cases, applying that rule to a homicide case would conflict with the Florida Supreme Court's opinion in *Walker v. State*, 957 So. 2d 560, 577 (Fla. 2007). The *Walker* defendant confessed to a killing, but because he did not admit that the killing was intentional, the court stated that the State's evidence regarding the intent element was circumstantial and applied the

[5] The court certified conflict with cases from three other districts and requested that the Florida Supreme Court clarify the special standard of review. 107 So. 3d at 451, 467. A notice to invoke the discretionary review of the Florida Supreme Court has been filed and the case is presently pending as Case No. SC-13-564.

special standard of review to that element. *Id.* In the 911 call the State relies on here, Ward stated that he had "just shot [his] wife" and that it was "an accident." T1072-75. Under *Walker*, the special standard of review thus applies to the question of whether the death was accidental – the only issue that is in dispute.

Once the State's false, unsupported, and irrelevant assertions are put to one side, the remaining evidence is wholly insufficient to rebut the very reasonable hypothesis that Diane's death was accidental. Ward's conviction should be vacated.

II. Pervasive prosecutorial misconduct denied Ward a fair trial.

Ward's Initial Brief explained that his trial was marred by pervasive prosecutorial misconduct, including improper questions, comments on his silence, appeals to class prejudice, and improper closing arguments. IB30-39. The most salient aspect of the State's Brief is what it does not contain – any effort to defend the propriety of the vast majority of the prosecutors' conduct. Instead, as noted below, the State limits its response in most instances to claiming the misconduct was unpreserved or harmless.

A. The Court may consider each of the instances of misconduct.

While the State argues that some of the misconduct is unpreserved because Ward did not move for a mistrial, AB33-34, all of the misconduct may be considered. Ward objected to many improper arguments, T2581, 2589, 2653, 2658, 2673, and moved for mistrial during the State's closing. T2673. Because a defendant need only move for mistrial before the jury retires to deliberate to preserve objections to improper

argument, *Cole v. State*, 866 So. 2d 761, 764 (Fla. 1st DCA 2004), each of those objections was preserved. Further, some of Ward's objections were overruled, T2589, 2653-54, meaning that no mistrial motion was necessary to preserve them. *See Robinson v. State*, 989 So. 2d 747, 750 (Fla. 2d DCA 2008). As to any unpreserved instances of misconduct, the Court may "consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt." *Martinez v. State*, 761 So. 2d 1074, 1082-1083 (Fla. 2000). If the Court finds that when the preserved errors are "combined with additional acts of prosecutorial overreaching ... the integrity of the judicial process has been compromised," it should reverse. *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999).

B. The State asked improper questions.

The State repeatedly asked improper questions of virtually every type. *See* IB31-33. The State makes little effort to defend this conduct on appeal; as to all but four of the improper questions, the State argues only lack of preservation. AB33-34. As discussed above, however, the Court may consider the State's pervasive misconduct in deciding whether the preserved errors were harmful.

Regarding the four improper questions the State does attempt to defend, it claims that the objections to those questions were lack of foundation, and that the State then laid a foundation and re-asked the questions. AB33-34 (citing T1695, 1702-04, 2090, 2558-59). The State is mistaken. In each of these instances, the witness was ultimately

permitted to answer a *different* question than the improper one that Ward objected to. *Cf.* T1695, 1702, 1703 *with* 1703; *cf.* T2090, 2097, *with* 2099; *cf.* T2058 *with* 2059. The fact that the State was able to ask different questions on similar topics does not vitiate the harm from the State's improper questions.

C. The State commented on Ward's silence.

The State also both distorted the facts regarding Alleyne's conversation with Ward and improperly used that evidence to comment on Ward's silence. IB15-16, 33-34. Although Alleyne initiated the conversation about football, R1565-66, the State misleadingly suggested it was Ward who chose to talk about football and used his silence about his wife to argue his guilt. T2589, 2651. The State's appellate response to these points is remarkable. While insisting that the pre-*Miranda* conversation with Alleyne was not incriminating, the State then includes it in its Summary of Argument as to why the evidence of Ward's guilt was sufficient! AB24. The State makes no attempt to defend this issue on the merits, relying only on the claim that it is unpreserved. AB34. The State has overlooked that Ward moved pre-trial to suppress Alleyne's testimony. R570-71, 649. The trial court having denied that motion, R649, Ward's objections to the admission of the testimony and the State's use of it in closing were preserved. *See* Fla. Stat. § 90.104(b); *Gosciminski v. State*, 994 So. 2d 1018, 1025 (Fla. 2008). The State also overlooks that Ward objected to the State's initial closing argument about his demeanor and silence, but the objection was overruled.

T2589. While Ward, his objection having been overruled, did not object to its continuation or the State's return to it in rebuttal closing, T2589, 2651, preservation did not require a futile objection. *Gosciminski*, 994 So. 2d at 1025.

D. The State appealed to class prejudice.

In response to Ward's argument that the State repeatedly injected his wealth into this matter, the State argues that the issue is unpreserved and that Ward also introduced financial evidence. AB34-36. As to preservation, the Court is entitled to consider this improper conduct in assessing the harmfulness of the preserved errors. Further, while Ward also introduced evidence of his finances, that evidence was relevant. It related to the Wards' ownership of assets as tenants by the entireties, the protection that provided against Ward's creditors, and the fact that this protection would vanish if Diane died. T2413-25. Ward's expert explained that Ward stood to have millions of dollars in assets become available to his creditors if Diane were to die, T2423, 2425, undermining the State's theory that Ward had a financial motive to kill her. In contrast, the State's improper comments and evidence served no relevant purpose and were designed to arouse class prejudice against Ward.

E. The prosecutors made improper closing arguments.

The State's primary response to Ward's argument that the State made improper closing arguments is to again rely – incorrectly – on lack of preservation. As noted, Ward preserved his objections to the State's arguments by moving for a mistrial. The

State claims, however, that by requesting a curative instruction after his motion for mistrial was denied, Ward waived the issue. AB39. The State cites nothing for this proposition, and it is the opposite of the law. Indeed, a defendant "*must* request a curative instruction or move for mistrial" once an objection is sustained to preserve the issue. *Capron v. State*, 948 So. 2d 954, 956 (Fla. 5th DCA 2007).

The State addresses the substance of only one of its numerous improper arguments. It contends that the argument that the State did not have to tell the jury "exactly" how Diane's death happened, followed by the question, "would we ever, ever, at that point, be able to get a conviction if that was the standard?" T2653, was not improper burden-shifting. AB37. This argument was made in rebuttal closing in an attempt to mitigate the State's failure to provide any theory about how Diane died. By suggesting that the State had no obligation to explain to the jury what happened, it thus minimized both the State's burden to establish the malice required for second degree murder and the State's burden to rebut excusable or justifiable homicide.

Finally, the State argues that the trial court did not abuse its discretion by denying Ward's mistrial motion. AB39-40. In evaluating this question, the Court should consider all of the State's improper comments, objected-to and not. *Martinez*, 761 So. 2d at 1082-1083. It should reverse if it finds that the comments, taken with the other errors here, denied Ward a fair trial. *Ruiz*, 743 So. 2d at 7. This case was, if sufficient at all, extremely thin. The State's misconduct was repeated, pervasive, and directly

related to Ward's theory of defense. The types of errors here have repeatedly been recognized as requiring reversal. *See* IB37-39. Ward's conviction should be reversed based on the prosecutors' misconduct.

III. Evidentiary errors deprived Ward of a fair and impartial trial.

A. The admission of Ward's statements was error.

The State gained admission of Deputy Alleyne's pre-*Miranda* conversation with Ward on the premise that it was not incriminating. R602-03, 608, 649. The State then specifically elicited that Ward did not talk about his wife in that conversation, T1148-49, and used the evidence of what he did not talk about – his silence – to argue his guilt. T2589, 2651. The State argues that Ward's statements were not used against him, but were used only to prove his "demeanor." AB42. This is incorrect. The State did not limit its questions of Alleyne to Ward's demeanor, but specifically asked whether Ward "ever mention[ed] his wife." T1149. Moreover, the State's comments were not only about Ward's demeanor, but about what he did – and did not – talk about. T2589, 2651. Indeed, as noted above, the State continues even on appeal to rely on the conversation with Alleyne to argue Ward's guilt. *See* AB24.[6]

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[6]The Initial Brief discussed cases holding that the admission of lack of remorse or testimonial demeanor evidence violates a defendant's constitutional rights. IB41-42. The State does not respond to Ward's constitutional arguments. Further, the Initial Brief discussed cases prohibiting the State from arguing lack of remorse as evidence of guilt. IB40-41. The State attempts to distinguish these cases as limited to the penalty phase in death penalty cases. AB43. The State is incorrect. In *Jones v. State*, 569 So. 2d 1234, 1240 (Fla. 1990), the court described the prosecutor's comments on

B. The admission of evidence of Ward's lunch with Callahan was error.

Ward explained in his Initial Brief that it was error to admit evidence that he had lunch with a former girlfriend seven months before Diane died because the evidence was irrelevant, and any probative value it might have had was outweighed by the danger of unfair prejudice. IB43-44. In response, the State argues that this meeting showed that the Wards' marriage was not "solid." AB44. As Ward pointed out in his Initial Brief, there was no evidence the lunch meeting was romantic or secret, and it was too remote in time to have any probative value regarding the state of the marriage at the time of Diane's death. IB43-44. The State ignores this point.[7]

C. The admission of expert testimony the witnesses were not qualified to provide was error.

Ward also explained in his Initial Brief that the State was allowed to elicit expert testimony the witnesses were unqualified to give. IB45-47. First, Stephany was

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the defendant's lack of remorse in the guilt-phase closing argument as "impermissibl[e]." Soon after, the court stated in *Cruse v. State*, 588 So. 2d 983, 991 (Fla. 1991), that "[e]vidence of lack of remorse is generally irrelevant and, therefore, inadmissible." Of the cases the State cites, only *Salas v. State*, 972 So. 2d 941 (Fla. 5th DCA 2007), pertains to lack-of-remorse evidence. That case held evidence the defendant stated right after the crime that he felt no remorse was relevant where the defendant claimed at trial that he participated in it under duress. *Id.* at 957-58. That lack-of-remorse evidence was admissible in that unusual scenario does not undermine the rule that such evidence is "generally" inadmissible. *Cruse*, 588 So. 2d at 991.

[7]The State further suggests that because Callahan testified Ward complained Diane spent too much money and Ward's company was in bankruptcy, "money problems ... could have triggered an argument which resulted in the killing." AB44. Of course, an almost infinite variety of events "could have" taken place, but speculation of this nature is no substitute for evidence.

allowed to opine that Diane's death was a homicide because "people will not shoot themselves straight on into the face," even though there is no record basis to suggest he was qualified to give this opinion. IB45. In response, the State makes two points that are not in dispute – that this testimony was relevant and within the scope of cross-examination. AB45. But as to Stephany's lack of qualification to provide such an opinion, the State simply ducks the point. Second, Garavaglia was permitted to opine that this was not an interrupted suicide based on the "foundation" that she had conducted "multiple" autopsies of witnessed suicides. T2099. As explained in the Initial Brief, this was inadequate to qualify her to give this opinion in light of her admission that she had no knowledge regarding interrupted suicides. IB46. On appeal, the State points to no record basis for Garavaglia's qualification to opine on interrupted suicides, merely pointing to her testimony she had conducted autopsies of witnessed suicides.

In the trial of a close case that was marred by numerous instances of prosecutorial misconduct, these multiple evidentiary errors were not harmless.

IV. The refusal to instruct the jury regarding the State's failure to preserve material evidence was harmful error.

Finally, the Initial Brief showed that the denial of Ward's requested instruction on the State's failure to test or preserve Diane's stomach contents was error. IB47-49. Such testing would have confirmed whether Diane had taken a massive dose of

Citalopram shortly before her death, as her blood level indicated, or whether the State was correct that the post-mortem blood level of Citalopram was misleading.

Due process requires the State to preserve "evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). The State argues it was not required to test or preserve the stomach contents on the theory that "there was no reason to believe that the stomach contents had any significance" because the cause of death was known to be a gunshot wound. AB47. This argument ignores the point made in the Initial Brief, IB48, that the State knew immediately after Diane's death that Ward claimed she had tried to kill herself, as well as that she was on Citalopram. Because Citalopram is known to cause increased risks of suicide, hostility, and aggressiveness, particularly when taken in new or increased dosages or in combination with alcohol, T1858, 2194-95, 2205, 2265, whether Diane had taken a high dose of it shortly before her death had great "significance," as is demonstrated by the attention devoted to that question at trial.

Begging the question, the State also argues that there was "no evidence" the results of testing the stomach contents "would have been favorable to" Ward. AB48. That Ward is unable to *prove* what the result of this testing would have been is precisely the point. There is reason to believe, however, that this testing would have shown

Diane had taken an excessive dose of Citalopram:[8] post-mortem blood testing showed she had taken a large dose of Citalopram shortly before her death, T2244, 2246-48; and the stomach contents were the same color as Citalopram pills. T1777, 2203.

The State further argues that the requested instruction was misleading because this case involves failure to test evidence, not its destruction. AB49. The State, however, not only failed to test the stomach contents, but also failed to preserve them so that Ward could have them tested. The State also claims the instruction would convey to the jury that the State had intentionally acted in bad faith. AB49. But the instruction did not convey the State had acted in bad faith, and the law requires no such showing for a defendant to be entitled to an instruction regarding destruction of evidence. Instead, such an instruction is required when it is necessary to protect a defendant's right to a fair trial. *See* IB49. In this close case, where the unpreserved evidence went to a critical issue, the denial of this jury instruction was error and requires reversal.

CONCLUSION

For these reasons, Ward's conviction should be vacated. In the alternative, his conviction should be reversed and the case remanded for a new trial.

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[8]While the State notes, AB48, that Diane's bottle of Citalopram pills contained more pills than had been prescribed, T1430, that was as likely to show that Diane combined bottles as that she was "behind schedule" as the State suggests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by electronic mail and United States Mail on April 22, 2013, to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I certify that this Reply Brief of Appellant James Robert Ward complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

/s/ James E. Felman
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