IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE, :

Appellant, :

vs. : Case No. 84,472

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

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

STATEMENT OF THE CASE AND FACTS

Appellee faults Appellant for failing to include the facts from the suppression hearings in his statement of the facts. Brief of Appellee, page 2-6. Appellant saw no reason to include the proceedings where his motion to suppress statements given to FBI Agent McGinty was granted. The State has not cross-appealed this ruling of the trial judge. Why waste this Court's time with facts and testimony which are not germane to any of the points to be decided on appeal?

Appellee also offers speculation that the bullets which went through Livia Romero lodged in Porche's elbow to conclude that the physical evidence was consistent with Romero's testimony. Brief of Appellee, page 9. It should be remembered that the trial judge disallowed the State's attempt to present this theory to the jury because it could not be sustained within a reasonable degree of medical certainty (T1153-69). Also, the bullet which went through the left side of Porche's jaw and came out through his right ear was never recovered (T1175).

Appellee does not even try to explain Romero's illogical testimony about the shooting of Porche in the back of the Blazer which placed Valentine outside the rear entrance to the vehicle, leaning in over the bodies of Romero and Porche (both on their left sides and facing forward) (T572, 579-81). From this position, Valentine allegedly shot Porche in his left jaw and later in the eye (T579-81). If this is what actually occurred, the shooter would have been firing the pistol first into the bottom side of

Porche's face and then his right eye (T579, 581, 1175). Both shots would have been accomplished with the pistol at arm's length and pointed in the shooter's own direction - a risky and unlikely feat.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED BY RULING THAT THE HUSBAND-WIFE PRIVILEGE OF SECTION 90.504, FLORIDA EVIDENCE CODE, WAS INAPPLICABLE WITH RESPECT TO THE COUNTS WHERE FERDINAND PORCHE WAS THE VICTIM.

Appellee argues extensively that Appellant waived his marital communications privilege in various ways. Brief of Appellee, page 15-6, 23. However, the trial court has never ruled on the waiver question at all. Accordingly, as in the two Bolin cases, 650 So. 2d 19 and 650 So. 2d 21 (Fla. 1995), this Court should not attempt to determine whether or not a waiver could be found on such an undeveloped record. If this Court believes that waiver is a genuine issue, then this case should be remanded for an evidentiary hearing in the trial court before Valentine is retried.

Appellee also contends that the Husband-Wife evidentiary privilege should not apply to communications between Valentine and Romero which occurred after the time that Romero claimed to have divorced him. Brief of Appellee, page 19-20. Appellee writes:

> it is clear that the parties did not subjectively believe that they were married at the time and therefore the statements could not have been intended as confidential marital communications.

Brief of Appellee, page 19. The only authority she cites for this "subjective" view of the privilege is Proffitt v. State, 315 So. 2d 461 (Fla. 1975). However, Proffitt is totally inapposite. The question there was whether a person sharing the mobile home with

Proffitt and his wife could testify to conversations between the two that she overheard. This Court held that the marital privilege was lost because husband and wife "were speaking in a manner and place where they had a reasonable chance of being overheard and they knew of that possibility at that time". 315 So. 2d at 465.

At bar, however, the issue is not testimony of a third person but whether one of the parties to the conversation, the wife, can testify to what her husband told her when the character of his statements did not fit the "hallowed confidence" model which Appellee seems to think essential. Brief of Appellee, page 20. The evidentiary privilege has never been interpreted to cover only "worthy" communications as opposed to "unworthy" communications. The fact that no one else testified to hearing Valentine's statements to his wife is sufficient to establish their confidential status.

The same reasoning applies to the letters which Valentine wrote to his wife while she was in prison. It is true that prison officials could have intercepted and read the letters. If a prison employee was testifying at trial about what Valentine wrote, we would have a different scenario. However, the fact that any written or oral communication to a prisoner may be intercepted does not mean that the writer did not intend the message to be confidential. The husband may not be able to prevent a prison employee from disclosing the contents, but he should be able to bar his wife's testimony about letters addressed to her. Otherwise, a

prison sentence would also be, in effect, a dissolution of marriage.

The core of the issue is the ruling by the trial judge that the spousal privilege does not apply when a defendant is charged with multiple offenses, some of which were committed against the spouse. Appellee only offers some ways around the ruling. First, she suggests that the State could force the defendant to waive the privilege simply by trying the charges committed against Livia Romero where the privilege would not be applicable. That testimony would then be public record and therefore no longer privileged under established precedent. Brief of Appellee, page 24-5. This argument ignores the necessity that a waiver by the defendant be voluntary. Valentine has never voluntarily given up the husband-wife privilege.

Secondly, Appellee asserts that the child of Ferdinand Porche and Livia Romero was a victim of the crimes within the purview of Article I, section 16(b) of the Florida Constitution. In her view, this means that subsection (3) (b) of §90.504 kicks in to deny Appellant the privilege. Brief of Appellee, page 25-6. This argument ignores the plain language of subsection (3) (b) itself which states that there is no privilege:

> In a criminal proceeding in which one spouse is <u>charged</u> with a crime committed at any time against ... the person or property of a child of either.

At bar, Valentine was never <u>charged</u> with any crime against the child.

In conclusion, Appellee has not been able to give any valid reason why this Court should not recognize Professor Ehrhardt's

construction of the 1978 legislative amendment to the Evidence Code. He maintains that its effect was to recognize the husband-wife privilege when the defendant is charged with an offense against a non-spouse even when this offense was committed during the same incident as an offense against the spouse. Ehrhardt, Florida Evidence § 504.5 (1995). Accordingly, Valentine should have been tried separately for the counts where Ferdinand Porche was the victim. The error means that Valentine's convictions on Counts 3 and 5 of the indictment must be vacated as well as the sentences imposed.

ISSUE II

THE TRIAL JUDGE SHOULD HAVE GRANTED VALENTINE'S MOTION TO SUPPRESS STATEMENTS MADE SUBSEQUENT TO HIS ILLEGAL ARREST DURING INTERROGATION BY DETECTIVE FERNANDEZ.

Appellee argues that this issue is not preserved for review because Appellant did not renew his motion to suppress statements given to Detective Fernandez immediately prior to when Fernandez testified about the statements in front of the jury. Brief of Appellee, page 28-9. The record shows that Appellant's motion to suppress statements was heard and denied during the trial itself (T1040-60). Therefore, the case authority cited by Appellee, Correll v. State, 523 So. 2d 562 (Fla.), cert. den., 488 U.S. 971 (1988), is not on point because Correll deals with failure to preserve an adverse ruling on a pretrial motion by renewing the objection at trial. See also, Rounds v. State, 382 So. 2d 775

(Fla. 3d DCA 1980) (failure to object at trial to admission of statements subsequent to denial of pretrial motion to suppress).

The question is entirely different when an adverse ruling occurs during trial. See, Heath v. State, 648 So. 2d 660 at 665 (Fla. 1994), cert. den., 115 S. Ct. 2618 (1995) (issue preserved when court was adequately informed as to nature of statement and made a ruling). The fact that the prosecution presented other witnesses between the time that the judge ruled on Appellant's suppression motion (T1060) and Detective Fernandez took the stand (T1274) does not mean that Appellant must ask the trial judge to revisit the ruling in absence of a reason to do so. The contemporaneous objection rule is not meant to be a trap for the unwary; it exists to ensure that the trial court has an opportunity to rule on evidentiary issues at a time when error can be corrected.

Appellant would also like to correct any misconception arising from Appellee's statement on page 36 of her brief that "McGinty was aware of the outstanding local charges against the appellant". There were no New Orleans (local) charges against Valentine. McGinty testified that he was aware of the Florida charges which were the basis for this prosecution (T261-2, 273).

ISSUE III

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO STRIKE THE FOOTPRINT EXHIBITS BECAUSE THE EXPERT'S OPINION WAS SO SPECULATIVE THAT IT COULD NOT REASONABLY LINK THE PRINTS TO VALENTINE.

Appellee contends that this issue is procedurally barred because Appellant did not move to strike the footprint exhibits until after they were admitted into evidence and the State had concluded its case. Brief of Appellee, page 40. However, the record shows that Appellant objected from the beginning to footprint comparison evidence. When the State first offered the footprint castings Exhibit 82, the court sustained defense counsel's relevancy objection (T1112-4). When the State tendered Ed Guenther as an expert in shoe print analysis, defense counsel objected because "I can't figure out what this guy is going to do" (T1188). He then objected to Guenther's qualifications as an expert because "The most he can do is speculate" (T1192). After the court overruled this objection and allowed Guenther to testify, counsel once again objected to Exhibit 82 on the ground of relevancy (T1194). The court admitted the exhibit over objection (T1195).

It was not until after the conclusion of Guenther's testimony that Appellant could definitely determine that the footprint evidence lacked probative value. Perhaps the optimum time for Appellant's motion to strike would have been immediately following his crossexamination of Guenther (T1353). However, the fact that

one more witness testified before the motion was made does not make the motion to strike untimely. The purpose of the contemporaneous objection rule is not to create a procedural trap for the unwary, but merely to ensure that error is brought to the attention of the trial court at a time when it can be corrected. Appellant's motion to strike met this standard.

Appellee further submits that testimony about fingerprints of no comparison value is "routinely admitted to demonstrate the thorough nature of the police investigation". Brief of Appellee, page 43. However, such fingerprints are never admitted into evidence for the jury to speculate that the defendant might have made the prints. At bar, Appellant would not have objected to testimony that footprint casts were made, but could not be meaningfully compared to Valentine. Instead, the casts were admitted into evidence and the jury was told that the shoes that made the prints were somewhere between size 10 and size 13. The jury might have speculated that Appellant wore shoes in that size range and that he left the prints. Appellant was prejudiced by this speculative inference and should be granted a new trial without the footprint comparison evidence.

ISSUE IV

THE TRIAL COURT'S REFUSAL TO APPOINT AN EXPERT IN JURY SELECTION WAS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE.

Appellee's response to Appellant's argument that the jurors could have been influenced by the ongoing O.J. Simpson trial is basically to nitpick at the details. Of course Valentine was never a prominent athlete in the United States, or comparable to O.J. Simpson in achievement. Nevertheless, the basic factual scenario was very similar.

It seems incongruous for the State to acknowledge that the Simpson trial was the "Trial of the Century" (Brief, page 47) and yet maintain that the outcome of Valentine's trial could not have been affected by juror attitude towards Simpson. It should also be noted that the trial judge took judicial notice of the pervasive publicity relating to the Simpson proceedings (S153). Defense counsel frankly admitted that he felt "at a loss" and incompetent to select an impartial jury without advice on how to explore juror attitudes about the Simpson trial (S146-7). The trial judge acknowledged that a jury selection expert "would be of assistance and probably a comfort to the trial counsel", but found the expenditure unnecessary (S150).

Other courts have recognized that so-called "spillover" evidence (evidence of a criminal act committed by someone else) can deprive a defendant of a fair trial. For instance, in United

States v. Castro, 829 F. 2d 1038 (11th Cir. 1987), a joint trial was held on separate conspiracy charges. The defendant Castro was only implicated in one of the conspiracies. In reversing his conviction, the court held that he was prejudiced by "the spillover effect of being tried jointly" with members of the other conspiracy. 829 F. 2d at 1046.

While Valentine was not tried jointly with O.J. Simpson, the facts of the Simpson case were well-known to most, if not all, of the prospective jurors at bar. It is this possibility for prejudice by "spillover" from the Simpson trial which should have caused the trial court to attempt some type of remedial effort.

Appellee's argument that Appellant waived this issue by accepting the jury actually selected misses the mark. Because defense counsel had no advice on how to ferret out which prospective jurors might be adversely affected by the Simpson publicity, the subject was ignored when he selected Valentine's jury. Also unavailing is Appellee's assertion that defense counsel's reference to Simpson during closing arguments meant that he was "not afraid to invite the jury to compare the cases". Brief of Appellee, page 53. Because counsel knew that the jurors would have been comparing the cases anyway, a decision that the best strategy was to take the bull by the horns does not mean that Valentine couldn't be prejudiced by the comparison.

Finally, the possibility that Valentine was tried by a jury that was not impartial cannot be discounted. It would have been a small financial outlay for the legal system to employ a profession-

al jury consultant. Certainly, the possible undermining of public confidence in the outcome of a capital trial is a factor which greatly outweighs the proposed expense. Valentine should be granted a new trial.

ISSUE V

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO GRANT DEFENDANT THE CONCLUDING ARGUMENT TO THE JURY BECAUSE HIS PRESENTATION OF ALIBI WITNESSES CAUSED HIM TO LOSE THIS VALUABLE PROCEDURAL RIGHT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Appellant will rely upon the argument presented in his initial brief on this issue.

ISSUE VI

THE TRIAL COURT ERRED BY GIVING THE STANDARD REASONABLE DOUBT INSTRUCTION RATHER THAN THE ONE PROPOSED BY APPELLANT BECAUSE THE LANGUAGE OF THE STANDARD INSTRUCTION ALLOWS THE JURY TO CONVICT A CRIMINAL DEFENDANT WHERE A REASONABLE DOUBT EXISTS, CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant will rely upon the argument presented in his initial brief on this issue.

ISSUE VII

APPELLANT'S CONVICTION FOR ATTEMPTED MURDER IN THE FIRST DEGREE SHOULD BE VACATED BECAUSE IT MAY REST ON A THEORY OF ATTEMPTED FELONY MURDER - A NONEXISTENT OFFENSE.

Since Appellant's initial brief and Appellee's answer brief, this Court has decided State v. Wilson, Case No. 86,680 (Fla. July 3, 1996) [21 Fla. L. Weekly S292]. Wilson holds that when a defendant has been convicted of the nonexistent offense of attempted first degree felony murder, the proper remedy is retrial "on any of the other offenses instructed on at trial".

Appellee argues that retrial is not necessary because the prosecutor only relied upon the evidence of attempted premeditated murder in his argument to the jury. Brief of Appellee, page 62. In effect, she is stating that the verdict of "guilty of attempted first degree murder as charged" (T1792, S7) is not ambiguous even though the trial judge instructed the jury on attempted first degree felony murder as well as attempted premeditated murder.

The correct position is that taken by the Third District in Meeks v. State, 667 So. 2d 1002 (Fla. 3d DCA 1996) and Destra v. State, 673 So. 2d 992 (Fla. 3d DCA 1996). In Meeks, the court ordered retrial on attempted premeditated murder where the facts could support a guilty verdict on either theory and the jury verdict did not specify on which theory they had convicted the defendant. Similarly, in Destra, the court approved the State's confession of error under the same circumstances.

Appellee further maintains that even if Appellant is retried for the attempted homicide of Livia Romero, the prior violent felony aggravating circumstance need not be struck because he was convicted of other violent felonies during this episode. Brief of Appellee, page 63-4. This argument ignores the fact that the sentencing judge found only the contemporaneous attempted murder of Livia Romero qualified as a prior violent felony (R491). Reversal of the conviction mandates that the aggravating circumstance be struck as well. Thompson v. State, 647 So. 2d 824 (Fla. 1994); Long v. State, 529 So. 2d 286 (Fla. 1988).

Moreover, the error in finding the prior violent felony aggravating circumstance cannot be held harmless. The judge undoubtedly considered the facts surrounding the shooting of Livia Romero when imposing sentence. Therefore, the case at bar is parallel to that of Merck v. State, 664 So. 2d 939 (Fla. 1995) (testimony about shooting a laundromat operator in the face tainted the jury's death recommendation).

ISSUE VIII

THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROVED.

In her argument on this issue, Appellee makes an unwarranted assumption when she declares that "the appellant traveled hundreds of miles in order to commit these acts". Brief of Appellee, page 66. While the record shows that Valentine spent much

after the homicide in New Orleans, the only testimony about his whereabouts in September 1988 came from the defense witnesses who placed him in Costa Rica at the time of the homicide. Furthermore, one of the recorded telephone conversations from Valentine to Romero originated in Tampa (R842, 847). The record certainly doesn't rule out the possibility that Appellant might have had a reason to be in Tampa other than to kill Porche.

Another point worth clarifying is Appellee's assertion on page 67 of her brief that "appellant's own statements indicated that this killing was an act of revenge". This is simply what Livia Romero testified that Valentine supposedly told her during the incident (T529). She further testified that Valentine cut her clothing off and threatened to "cut [her] reproductive organs so that [she] wouldn't have ... any more children" (T519). He pulled photographs of Ferdinand Porche and Romero's mother out of their frames and tore them into pieces (T558-64). Yet Appellee reaches the bewildering conclusion that there was an "absence of any evidence of an emotional frenzy or passionate rage in this case". Brief of Appellee, page 68.

The case authorities cited by Appellee with respect to the cold, calculated aggravating factor are all distinguishable from the facts of this case. For instance, in Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. den., 128 L. Ed. 2d 678 (1994), the defendant was angry with his former girlfriend, but killed her innocent five-year-old child for spite. Klokoc v. State, 589 So. 2d 219 (Fla. 1991) and Occhicone v. State, 570 So. 2d 902 (Fla.

1990) are other examples where the defendant transferred an emotional upset with his paramour into killing other family members to "get even". Such circumstances are correctly viewed as more ruthless and cold than the hot-blooded killing of a unfaithful lover or her new paramour.

Of the other cases cited by Appellee, the defendant in Brown v. State, 565 So. 2d 304 (Fla. 1990) was more motivated by witness elimination than passion. The defendant in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) "was fed up" with the roommate who shared the trailer with him and his wife. A week before the actual murder, the defendant rehearsed the entire event except for strangling the victim. The only case cited by Appellee which presents any meaningful comparison with the case at bar is Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. den., 500 U.S. 1110 (1991).

In Porter, the defendant left town and when he returned a few months later, his former girlfriend had a new live-in lover and didn't want to see him. Eventually, the defendant broke into the former girlfriend's residence and shot both her and the new lover to death. In explaining the applicability of the CCP aggravating circumstance, the majority opinion[1] stated:

> Porter had previously threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another

[1]Four justices joined in the per curiam opinion. One justice concurred in result only, without written opinion. Two justices dissented and would have found CCP inapplicable.

> friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance.

564 So. 2d at 1064.

The facts at bar simply do not rise to this level of methodical prearrangement. Although there was evidence of prior threats, Valentine did not watch Romero's house and wait for a suitable opportunity. There was no evidence that Valentine told anyone in advance; nor that he had to go to great lengths to get a pistol. While Romero testified that Valentine had an accomplice named "John", it is uncertain whether "John" knew that the incident would result in a homicide. In short, the evidence of cool reflection was much greater in Porter than in the case at bar.

The cases that Appellant offered for comparison in his initial brief viz., Douglas v. State, 575 So. 2d 165 (Fla. 1991); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); and Santos v. State, 591 So. 2d 160 (Fla. 1991); are more on point than the authorities cited by Appellee. Consequently, this Court should hold that the State did not prove the applicability of the cold, calculated and premeditated aggravating circumstance beyond a reasonable doubt.

ISSUE IX

THE SENTENCING JUDGE FAILED TO FIND SEVERAL MITIGATING CIRCUMSTANCES WHICH APPELLANT HAD ESTABLISHED BY A REASONABLE QUANTUM OF EVIDENCE.

In her brief, Appellee has totally distorted the testimony of Frances Valentine when she writes:

> She [Frances Valentine] noted that when the appellant returned to Costa Rica as an adult, he did not especially help the family financially (T1833). She stated that he has never given money to the family for Giovanna... (T1836-7).

Brief of Appellee, page 76. What the witness actually said follows:

> Q. Did Terry help or assist the family financially?
> A. Our family?
> Q. Yes.
> A. Yes. All of us had responsibilities in our family. There was a large family. We always start to work and we had to help the family with the expense and Terry was one of those.
> Q. As an adult during his return trips to Costa Rica, has he helped the family financially? Has he helped them with money that you know of?
> A. Not -- not especially. Sometimes he used to take small presents, but he took care of his daughter, his daughter.
> Q. How has he taken care of his daughter? Tell us about his relationship with his daughter Giovanna.
> A. Well, he loves her. He loves her. He would financially take care of her through the rent. He had properties in Costa Rica and the rent of those houses is what help, help her out.
> * * * * * * * *
> Q. Is he her sole support?
> A. Yes sir.

(T1833-4). The witness was then questioned about Livia Romero's relationship with Giovanna:

> Q. Has Livia ever brought anything to you for Giovanna?
> A. Once before the last trial, she brought her a skirt and a blouse. The skirt didn't fit her, so I gave it back to her to bring the right size, and she never come back. Once, only that once she gave something for her.
> Q. Has she ever left you any money to help you and the family with Giovanna?
> A. Never.
> Q. Have you ever seen Terry mistreat Giovanna in any way?
> A. No, no.

(T1836). These excerpts from the record clearly show that it was Livia Romero, not Appellant, who "has never given money to the family for Giovanna". The sentencing judge should have found a mitigating factor in Valentine's care and support for his daughter Giovanna.

Finally, Appellee claims that any error in the sentencing findings would be harmless because a different sentence would be unlikely on remand. Brief of Appellee, page 77. This assertion ignores the fact that death sentences are seldom imposed (and usually reversed when they are) in cases where a lovers' triangle was the motivation for the homicide. The circumstances at bar are almost identical to those of Irizarry v. State, 496 So. 2d 822 (Fla. 1986). In Irizarry, the defendant broke into his ex-wife's residence, hacked her to death with a machete, and severely injured her new paramour. Irizarry had prearranged the alibi of being at his employer's vacation house in a different town when the homicidal incident took place. The mitigating circumstances were

the same as those found in Valentine's first trial. When this Court vacated Irizarry's death sentence, it wrote:

> the jury could have reasonably believed that appellant's crimes resulted from passionate obsession. In fact, the jury recommendation of life is consistent with cases involving similar circumstances.

496 So. 2d at 825. Later, in Amoros v. State, 531 So. 2d 1256 (Fla. 1988), this Court vacated the death sentence is another homicide motivated by passionate obsession, citing Irizarry for the proposition that "the imposition of a life sentence appears to be proportionately correct". 531 So. 2d at 1261.

Accordingly, this Court should recognize that no error in the trial court's findings can be held harmless with regard to Valentine's death sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of August, 1996.

Respectfully submitted,

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