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

APPEAL NO.: 5D15-1496

WAYNE ROBERT GREENLAW,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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PREFACE

This is an appeal from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, the Honorable Margaret W. Hudson presiding. The appellant, Wayne Robert Greenlaw, was the Defendant in the proceeding below and will be referred to as "Defendant" in this brief. The appellee, the State of Florida, was the plaintiff in the proceeding below and will be referred to as "State" in this brief.

The Defendant is appealing the trial court's judgment and sentence in this criminal case. The record will be cited as [R. (page number)]. The trial transcript will be cited as [Tr. (page number)].

STATEMENT OF THE CASE AND FACTS

After a jury trial, the defendant was convicted of first degree murder (count one) and shooting into a building (count two) [R. 2448-2450]. The defendant was sentenced to life imprisonment on count one [R. 2452], with a 15 year sentence on count two, to run concurrently [R. 2454, 2457].

The defendant was tried along with his brother, who was also convicted. That appeal is also pending with this Court. See Ray Curtis Greenlaw v. State, 5D15-1444.

The issue on appeal in this case stems from jury selection. As stated in the defendant's motion for new trial:

> The trial Court erred in denying the Defendant's Motion to discharge the entire venire in day one of jury selection due to the fact that Juror Number 49 indicated in the presence of the entire venire that she learned of the facts of the case on Facebook. She also indicated that what she had learned would influence her and that it proved that the Defendants were guilty.

[R. 2462]. The trial court denied the motion [R. 2464].

Jury selection began on January 26, 2015 [R. 668]. The trial court asked

whether anyone knew anything about this case or read something in the newspaper that would influence your decision in this case [R. 753]. Venirewoman 49 responded that she heard something about the case on Facebook and what she read would influence her decision [R. 754].

The trial court inquired further and asked Venirewoman 49 why she thinks she would be influenced, without going into specifics. She responded that: "It, more or less, proved to me that they did it, without a doubt." The trial court replied, "all right, thank you" [R. 754-755]. The entire venire panel heard this exchange.

Venirewoman 49 stayed in the courtroom and was subsequently questioned about her prior jury service and other experiences [R. 777-778, 781, 789-790]. The defense moved to strike the entire panel [R. 819]. The trial court asked on what basis, and the defense responded as follows:

> Based on the comments of Juror No. 49. She told us and everyone that she heard this from Facebook, read it on Facebook, and that the defendants were guilty. And I don't think anybody that heard that is going to be able to get that out of their mind, that she already found them to be guilty in this case. So I think that irreparably taints this panel, and I am going to ask the judge

to strike this entire panel.

[R. 819].

The State responded that it did not think it was an irreparable taint. "I don't dispute what was said, but I think we all know Facebook is a polarized forum where people view their private thoughts for people to share. It would be no different than someone coming in and saying, 'I've heard about this, and I believe that he's innocent' or 'I believe that he's innocent' or 'I believe that he's guilty.'" [R. 819-820].

The State continued that the comment may irreparably taint the juror, but it does not irreparably taint the entire panel. The issue can be addressed with a curative instruction [R. 820].

The defense responded that if she had just said "I read this in Facebook and I don't think I could be fair," that would not be a problem. But this is not what she said. She said what she read would influence her, it "convinced me that they did it." She verbalized that to everybody who was sitting here [R. 820-821].

The defense continued and stated that the key is that she did not keep the comments about the fact that they did it to herself. This is the problem. "[W]e have someone telling the jurors that our clients committed murder" [R. 821].

The trial court ruled: "Well, first of all, I'm going to strike Juror 49. I'm

going to deny the motion to strike the entire panel . . . I agree with [the prosecutor]. There's no difference between someone reading a newspaper article and coming in and saying, 'Based on what I read in the paper, I think it proves that they did it' . . . But motion is denied" [R. 822].

The trial court engaged the panel on the Facebook comment [R. 867-868]. The court asked the panel if they thought that anything on Facebook was evidence and the panel responded collectively that the answer was "no." The trial court also asked whether anyone would be influenced by Juror 49 stating her position. The venire collectively answered "no" [R. 868]. The defendant timely filed his notice of appeal and his initial brief follows.

SUMMARY OF THE ARGUMENTS

The jury pool was irreparably tainted when a prospective juror told the entire panel that she found information about the case and that she knew the defendant did it, "without a doubt." The defendant's due process right to a fair trial was infringed upon as a result.

ARGUMENT: THE TRIAL COURT ERRED WHEN IT FAILED TO STRIKE THE ENTIRE VENIRE BASED UPON THE PREJUDICIAL COMMENTS OF ONE PROSPECTIVE JUROR

The defendant was denied his right to a fair jury trial under the United States and Florida Constitutions. The trial court should have granted the defense's request to strike the entire jury panel when a prospective juror said that she found information about the case and that she knew the defendant did it, "without a doubt."

Under Article I, section 16, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.251, the defendant has a constitutional right to trial by a fair and impartial jury. Richardson v. State, 666 So.2d 223, 224 (Fla. 2d DCA 1995). See also Sixth Amendment, U.S. Constitution.

"The decision on whether to dismiss any or all jurors lies in the sound discretion of the trial judge . . . It is within the discretion of the trial court to determine whether remarks made by veniremen during the examination of the panel are prejudicial; and the trial court's decision not to quash the panel will not be disturbed absent an abuse of discretion." Reppert v. State, 86 So.3d 525, 526 (Fla. 2d DCA 2012) (citations and quotations omitted).

In a directly analogous case, the court in Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983), held that the panel of prospective jurors was unfairly prejudiced and should have been stricken when they were made aware of the defendant's arrest for an unrelated crime. See also Richardson, 666 So.2d at 224 (panel should have been stricken when it became aware that the defendant was a convicted felon who previously served time).

When a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire. Reppert, 86 So.3d at 526, *citing* Richardson and Wilding. In the case at bar, juror number 49's comments crossed the line because they indicated that she had inside knowledge of the defendant's guilt.

The trial court's attempt to collectively cure the taint with the entire panel falls short under the circumstances of this case. There is a reasonable doubt as to their ability to serve as fair and impartial jurors, "notwithstanding their assertions to the contrary." Overton v. State, 757 So.2d 537, 539 (Fla. 3d DCA 2000).

In Reilly v. State, 557 So.2d 1365, 1367 (Fla. 1990), the court held that although the juror subsequently gave the right answers with respect to whether or not he could be impartial, it was unrealistic to expect him to entirely disregard his knowledge of a confession no matter how hard he tried.

This is also true herein. It is unrealistic to expect the panel to disregard that another prospective juror apparently discovered a "smoking gun" which conclusively and "without a doubt" proved the defendant's guilt.

The trial court's decision to cure this with a "shotgun" approach and not individual questioning fails to rehabilitate the entire panel. See Dippolito v. State, 143 So.2d 1080, 1085 (Fla. 4th DCA 2014) (show of hands insufficient to protect against pretrial publicity). The uniform questioning (and no amount of individual questioning) could "unring the bell" in this case.

The State cannot meet its burden to prove beyond a reasonable doubt that the error in this case was harmless and did not contribute to the guilty verdict See State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). This test is utilized on this jury issue. See Jackson v. State, 729 So.2d 947, 951 (Fla. 1st DCA 1998). The jury was predisposed to find the defendant guilty in this case. See Dippolito, 143 So.3d at 1086.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the Defendant, WAYNE ROBERT GREENLAW, respectfully requests this Honorable Court to reverse the trial court's judgment and sentence in this case and remand for a new trial with an untainted jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to the Office of the Attorney General at: CrimAppDab@myfloridalegal.com on this 21st day of September 2015.

/s/ Ryan Thomas Truskoski

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2).

/s/ Ryan Thomas Truskoski

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