IN THE SUPREME COURT OF FLORIDA

OSVALDO ALMEIDA,

Appellant/Cross-appellee,

vs. Case No. 89,432

STATE OF FLORIDA,

Appellee/Cross-appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CROSS-REPLY BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Cross-appellee, OSVALDO ALMEIDA, was the defendant in the trial court below and will be referred to herein as "Cross-appellee." Cross-appellant, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." Reference to the record will be by the symbol "R", with the exception that reference to the transcripts will be by the symbol "T", followed by the appropriate page number(s). Occasionally references are made to the page and line of transcript by use of a slash, for example page 10, line 21 would be cited as 10/21. Reference to cross-appellee's answer brief will be by the symbol "AB."

SUMMARY OF ARGUMENT

The trial court abused his discretion by not allowing the State to present evidence of the prior homicides during the guilt phase, because such evidence was sufficiently similar to the instant offense and was relevant to prove premeditation and to negate cross-appellee’s insanity defense.

ARGUMENT

WHETHER THE TRIAL COURT ABUSED HIS DISCRETION BY NOT ALLOWING THE STATE TO INTRODUCE EVIDENCE OF TWO PRIOR MURDER CONVICTIONS TO PROVE PREMEDITATION AND IN REBUTTAL TO APPELLANT'S INSANITY DEFENSE.

Cross-appellee argues that this issue has not been preserved for appeal but clearly it has. Pretrial, the State argued that this *Williams* rule evidence was admissible to prove intent/ premeditation in its case in chief and to rebut a voluntary intoxication and/or insanity defense (TV V, 401/15-414/12). Defense counsel argued pretrial that this evidence was not admissible in the State's case in chief but might be admissible to rebut a defense theory of insanity or intoxication (TV V, 414/18-419/9). Although the record does not reflect the trial court's pretrial ruling, during rebuttal the prosecutor reminded the trial court that he had denied the State's request to use this evidence in its case in chief (TV XVI, 2010/1). Neither the trial court nor defense counsel indicated that this was an incorrect assertion. During the defense case, Doctor Ross Seligson testified that in his opinion at the time of the offense appellant was suffering from a mental disease to the point that he was not able to determine right from wrong (TV XV, 1739, 1744-45). Dr. Seligson diagnosed appellant with residual schizophrenia and alcohol abuse (TV XV, 1745). Before cross examining Dr. Seligson, the prosecutor again moved to admit the

Williams rule evidence of the other homicides based in part on Dr. Seligson's diagnosis (TV XV, 1770). Contrary to cross-appellee's assertion (RB 33), during rebuttal the prosecutor did again renew his request to have this evidence admitted to rebut the insanity defense when he stated:

> certainly from the doctors' testimonies that testified for the defense, the mental illness that was placed before the jury was not acute but chronic, specifically of Dr. Seligson indicating that in his opinion the defendant suffered from schizophrenia.

(TV XVI, 2010/8-14). The prosecutor also again argued that this evidence was relevant to prove premeditation (TV XVI, 2010/25). After defense counsel was heard, the trial court again denied the State's request (TV XVI, 2012/22).

Cross-appellee also argues that *Traylor v. State*, 498 So. 2d 1297 (Fla. 1st DCA 1986), cited by cross-appellant, should not be persuasive, since this Court ruled in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), that it was error to admit the evidence of the collateral crime, "albeit on different grounds" (RB 34). What this Court ruled, however, was that Traylor's confession to the Alabama homicide was inadmissible. *Traylor* at 972. The similar fact evidence, which was the subject of the First District's opinion, was not this confession alone but also included live testimony as to the factual circumstances of the Alabama murder. *Traylor* at 1301. Therefore, this Court's subsequent *Traylor* opinion did not overrule the pertinent holding of the First District Court of Appeals. Further, this Court

addressed this issue in *Finney v. State*, 660 So. 2d 674 (Fla. 1995) holding that overall similarity between the facts of the two offenses generally is necessary before the other crime evidence is considered relevant to the issue of identity. However, such is not the case when the other crime evidence is used, for example, to prove motive.

Finally, cross-appellee argues that the *Williams* rule evidence in this matter was not sufficiently similar, because unlike this homicide he committed the two prior homicides in self-defense (RB 34). Cross-appellee indicates that one prostitute (Marilyn Leath) was robbing him, and the other prostitute (Chiquita Counts) was demanding more money (RB 34). He apparently believes that this justified the use of his .44 Magnum Smith & Wesson. However, an individual can use deadly force to defend himself only when he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony. Fla. Stat. § 776.012. Certainly the fact that Chiquita Counts was demanding more money does not justify deadly force. In regard to Marilyn Leath, when appellant gave his taped confessions he indicated that when he told her to get out of the car she called to her sister, who was nearby with a knife, “just in case” (TV XVIII, 2226/18-2227/1). These facts do not support the notion that harm was imminent. Furthermore, the

record shows that in both of these homicides appellant broke off immediate contact with the victims, turned his car around and drove back up to the victims before shooting them. It was not reasonable for appellant to believe that deadly force was necessary to prevent imminent death or great bodily harm to himself or another. Contrary to appellant's assertion that these offenses are different because they were committed in self-defense, they are alike because they were all committed because the victims angered and upset appellant. They were also similar in the various ways explained in cross-appellant's initial brief.

Since all three offenses were sufficiently similar and the other crime evidence was relevant to prove premeditation and to rebut cross-appellee's insanity defense, the trial court abused his discretion by disallowing the admission of the *Williams* rule evidence.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was furnished by U.S. mail to Gary Caldwell, Esq., Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this _____ day of May, 1998.

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DAVID M. SCHULTZ
Assistant Attorney General
Of Counsel