IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
15-00226-CF
SECTION I

STATE OF FLORIDA

vs.

JOHN N. JONCHUCK, JR. Person ID: 1595820

MOTION FOR NEW TRIAL

The Defendant, by and through undersigned counsel, pursuant to Fla. R. Crim. Pro. 3.600(b)(5), Fla. R. Crim. Pro. 3.600(b)(6), Fla. R. Crim. Pro 3.600(b)(7), and Fla. R. Crim. Pro 3.600(b)(8), respectfully requests this Honorable Court enter its Order granting a new trial, and as grounds therefor would show:

I. THE PROSECUTOR COMMITTED MISCONDUCT BY MAKING THE FOLLOWING STATEMENTS IN OPENING AND THEN OFFERING NO EVIDENCE IN SUPPORT OF THESE STATEMENTS TO THE JURY, RESULTING IN THE SUBSTANTIAL RIGHTS OF THE DEFENDANT BEING PREJUDICED. THE COURT ERRED BY FAILING TO GRANT THE DEFENSE MOTION FOR MISTRIAL BASED ON THIS MISCONDUCT.

a. **Defendant took Phoebe away from Michelle Kerr and would keep Phoebe from her mother.**
b. **Michelle Kerr was starting to get her life together and had the ability to get custody of Phoebe. Michelle Kerr had a new boyfriend, Guy Kisser, who had a job and could provide a home.**
c. **Defendant was receiving Social Security money for Phoebe and felt threatened he was going to lose this money.**
d. **At Thanksgiving, there is a threat to the defendant having the child, to the social security money, and being able to use the child as a way to get into people's houses to have a place to stay.**

e. **Defendant started sending heated text messages to Michelle Kerr after Christmas about him getting custody of Phoebe, getting a lawyer, and that she will never see Phoebe again. These texts continued into the New Year.**

f. **Defendant was jealous of Phoebe for getting gifts.**

g. **The defendant goes to Noemi's house with Phoebe. He is sending her texts and wants to be with her. The defendant wants to stay with Noemi. He is being manipulative with her and she rejects him.**

h. **The defendant committed this murder to punish his mother and Phoebe's mother. He told his mother that he would fuck up the rest of her life. Phoebe's mother wanted her back.**

The State called the following witnesses in their case in chief: William Vickers, Willie Wynn, Jenna Gillis, Matthew Laliberte, Julie Bryan, Gerard Huff, Aaron Rizzo, Michele Jonchuck, Kenny Miller, Christopher Wilson, Thaddeus Coffin, and Michael Carter. The State called Peter Bursten and Emily Lazarou as witnesses to rebut insanity. With the exception of Michele Jonchuck, none of these witnesses had any first-hand information to any of the above statements. While the State did call Michele Jonchuck in their case in chief, they did not attempt to elicit any testimony regarding the fight or threat made to "fuck up her life," they argued in opening was a threat and promise to do harm to Phoebe.

The State did not call Michelle Kerr or Noemi Bresnahan, the only other witnesses that would have potentially admissible testimony about the motives for the murder laid out by the state in opening. Not only was there no evidence introduced by the State to support the above comments, but they actually introduced evidence in conflict with the assertions made in opening. Michele Jonchuck testified that she had been Phoebe's primary caregiver the six months preceding her death; this testimony is in direct conflict with the State telling the jury that John had Phoebe and was afraid of losing her to his mother or Phoebe's mother.

In opening statement the prosecutor may outline the facts which he, in good faith, expects to prove and which are competent to prove. *Paul v. State*, 209 So. 2d 464 (3rd DCA 1968). However, it is improper to make statements to the jury regarding potential evidence that the jury will not see. The fact that the State in the present case never called as witnesses Michelle Kerr or Noemi Bresnahan, although they were listed and subpoenaed for trial, is convincing evidence that these statements were not made in good faith.

In *Jackson v. State*, 818 So. 2d 539 (Fla. 2nd DCA 2002), the Second District Court of Appeal reversed the defendant's convictions based on prejudicial error during the prosecutor's opening statement. In that case the prosecutor indicated in opening statement that the passenger in defendant's car had indicated to the officer that the defendant had contraband in his groin area. The defense objected to hearsay, since the passenger was not a listed witness, and the state reassured the court that the officer would only be describing a gesture made by the passenger rather than hearsay statements. During the trial the officer involved did not testify about a gesture or a statement from the passenger. The prosecutor admitted he had mixed up the facts with those of another case, but the trial court denied the motion for mistrial. The Second DCA held that albeit inadvertently, the prosecutor had improperly suggested to the jury that there was non-record evidence tending to corroborate the state's position the defendant possessed drugs. *Id.* at 542. The State's suggestion that there was other evidence in support of its case, coupled with the failure to offer it and thereby subject it to cross-examination by the defense and evaluation by the jury was prejudicial error. *Id.* In the present case, there was no substantive evidence admitted to support any of the statements above. The cumulative effect of the overwhelming number of statements that were made and then not supported by substantive evidence substantially prejudiced the defendant from receiving a fair trial

II. <u>THE COURT ERRED BY ADMITTING THE FOLLOWING EVIDENCE OF DEFENDANT'S BAD CHARACTER OR PRIOR BAD ACTS, AMONG OTHERS:</u>

a. **Defendant had a history of saying bizarre things to his mom;**
b. **Defendant would use Phoebe to get things from people;**
c. **Defendant would use Phoebe to manipulate Michelle Kerr;**
d. **Defendant had intentionally polished the stairs as a child to cause his uncle to fall down them and then laughed;**
e. **Defendant had bought a specialized printer to make fraudulent checks;**
f. **Defendant had seven or eight in-school suspensions, including one suspension for fighting;**
g. **Defendant previously defaulted on a condo;**
h. **Defendant spent money on drugs;**

i. **Defendant was using drugs as a teenager and years irrelevant to the date of offense;**

j. **Defendant would be nice when he wanted to get something from people;**

k. **Defendant's roommates had a difficult time dealing with him, including lots of conflicts and mayham;**

l. **Defendant had an unauthentic personality;**

m. **Defendant had no empathy for the family pet;**

n. **Defendant broke his laptop when he was a teenager and mad;**

o. **Defendant threw jelly over the staircase railing when he was five years old;**

p. **When the defendant gets frustrated, he acts aggressively;**

q. **From the beginning of life the defendant has shown a pattern of poor emotional control;**

r. **The defendant had problems with sexual identity;**

s. **Was convicted of reckless driving;**

t. **The defendant trashed his father's house at age seventeen.**

Prior to trial defense counsel moved to exclude the introduction of the defendant's propensity to commit crimes and any evidence or testimony of other crimes, wrongs, or bad acts. During the trial, the state, through their experts introduced the above referenced testimony. The evidence was objected to prior to introduction and a limiting instruction was requested. The defendant was extremely prejudiced by the introduction of all of these prior bad acts, wrongs, or crimes. This testimony became a feature of the trial. The evidence elicited by the state and allowed by the court portrayed the defendant as an evil person with a propensity to commit crimes. The defendant was prejudiced because he was not on trial for any of these crimes or wrongs. The prejudice was compounded by the courts' failure to give a limiting instruction.

III. THE COURT ERRED IN FAILING TO GIVE ANY CAUTIONARY OR LIMITING INSTRUCTIONS REGARDING EVIDENCE BEING ADMITTED FOR A REASON OTHER THAN SUBSTANTIVE EVIDENCE OF GUILT.

Florida Standard Jury Instructions contain a limiting instruction to be used when requested, if and when, the evidence outlined in paragraph II is admitted. The court refused to exclude the evidence of other crimes, wrongs, or bad acts, and refused to give the instruction. The defendant

was prejudiced because the jury was not told that the evidence was to be used for one or more limited purposes and considered only as it related to that / those issues. The defendant was prejudiced because the jury was not instructed that this evidence was to be considered only as it related to his mental state at the time of the offense.

IV. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO RE-DEPOSE DR. BURSTEN DURING TRIAL AFTER LEARNING HE HAD CHANGED HIS OPINION.

Prior to Dr. Bursten testifying, the State informed defense counsel that Bursten would be testifying that defendant was in a state of "catathymic violence" at the time the crime occurred. Bursten indicated during a proffer that this was not a change in testimony, just a change in the words used. This was untrue, and the defendant was extremely prejudiced by the court's failure to allow his attorneys adequate time to prepare for this change in testimony, including taking a second deposition of Bursten. Prior to trial we had received a written report from Bursten, took a deposition of Bursten, and had prior testimony of Bursten from the motion in limine regarding the PCL-R. This "cycle" that Bursten testified to, was not referenced in any of those testimonies. Had the defense been aware of this testimony previously or been allowed to gather more information through deposition, defense counsel would have filed a request for a Frye hearing. It is defense counsel's belief that this cycle is a Freudian theory that is not supported by any research.

V. THE COURT ERRED BY INTRODUCING A STATEMENT DEFENDANT MADE WHEN HE WAS TWELVE YEAR OF AGE, "IF I EVER GET IN BIG TROUBLE, I AM GOING TO CLAIM INSANITY."

The State's experts both testified that the defendant told a childhood friend, Melody Dishman, that "if I ever get in big trouble, I am going to claim insanity." During a mid-trial deposition of Dishman, taken prior to the experts' testimony, it was revealed by Dishman that the statement was made when the defendant was twelve years of age. Despite the fact that the statement was made over a decade before the alleged crime, the witnesses were allowed to testify that it was relevant to his state of mind at the time of offense. The State was also allowed to cross-examine

the defense experts regarding this statement in an attempt to attack the credibility of their opinion regarding the defendant's mental state some thirteen years later.

This statement was allegedly made by the defendant to Dishman. Dishman was not called as a witness to testify by the State, though she was listed as a witness and under subpoena. Instead, this evidence was introduced through hearsay, with witnesses saying that the defendant told Dishman, who then told police and / or the experts. This constituted double hearsay. This also violated the defendant's right to Confrontation. Because the court allowed the state to introduce this improper evidence through double hearsay, the defense was not able to attack the credibility of Dishman through cross-examination. The defendant was prejudiced by this testimony because it was offered and argued to the jury to show defendant's deceitfulness and propensity to commit criminal acts without connection to the material issue of the defendant's mental state at the time of offense.

VI. THE COURT ERRED IN ADMITTING THE SEVEN AUTOPSY PHOTOS OVER DEFENSE OBJECTION

The cause of death in this case was not in dispute. The photographs admitted provide no evidence to aid the jury in determining if the deceased died as a result of drowning and / or hypothermia. After defense objection to the introduction of the autopsy photos, the court conducted a proffer outside the presence of the jury. During that proffer, the Medical Examiner, Dr. Christopher Wilson, testified about the relevancy of each of the proposed photographs. He testified that none of the offered photos were necessary to explain his testimony, the manner of death, or the location of the wounds. The Florida Supreme Court has previously ruled that to be relevant, a photo of a deceased victim must be probative of an issue that is in dispute. *Almeida v. State*, 748 So.2d 922 (Fla. 1999). In *Almeida*, the Court found it was error to admit autopsy photographs based on medical examiner testimony that the photo was relevant to show the trajectory of the bullet and nature of the injuries, because neither of those points were in dispute. *Id.* At 930. In the instant case, the cause of death was not in dispute and the photos were not necessary to explain the medical examiner's testimony.

The prejudice to the defendant by the introduction of the irrelevant photographs was compounded by the prosecutors' frequent reference to and description of the autopsy photographs during their closing argument. Additionally, the defendant was prejudiced by the

number of autopsy photographs the court allowed. The State introduced seven photographs depicting a deceased child in which the cause and manner of death were not in dispute. The only issue in dispute in this case was the defendant's state of mind at the time of offense. The autopsy photographs offered no evidence relevant or probative to that issue, and thus were highly prejudicial.

VII. THE COURT ERRED IN ADMITTING THE TESTIMONY REGARDING USE OF THE PSYCHOPATHY CHECKLIST REVISED (PCL-R)

Prior to and during trial, defense counsel objected to the introduction of evidence regarding the PCL-R based on the fact that the PCL-R does not pass *Frye* for determining mental state at time of offense, is not relevant nor useful to determine the mental state of the defendant at the time of offense, and is highly prejudicial. The PCL-R is used to determine whether an individual is a psychopath. The testimony and evidence admitted pursuant to the PCL-R allowed the state's experts to say that the defendant was a pathological liar, remorseless, unable to show empathy, glib, superficial, grandiose, opinionated, cocky, readily quits any tasks, lies frequently, is deceitful, is capable of fabricating elaborate accounts of his past, cunning and manipulative, unfaithful to his intimate partners, cynical, selfish, leads a parasitic lifestyle, is irresponsible, and other general characteristics of the defendant's psychopathic traits. Additionally, the court allowed Bursten and Lazarou to testify about specific prior bad acts in explaining the PCL-R.

According to the state's expert, Bursten, "the PCL-R is not based on a year or two years. It is based on, to the best the examiner can decipher, someone's general functioning over a prolonged period of time." The purpose of the PCL-R is to catalog an individual's negative personality traits over a long period of time and not to determine an individual's mental status at a particular time. The defendant was prejudiced by the prosecutor's use of the PCL-R to describe a multitude of negative and highly prejudicial character traits without offering relevant information regarding the material issue in question – the defendant's mental state at the time of offense. Bursten testified that the psychopathic traits identified in the testimony of Bursten and Lazarou were neither consistent nor inconsistent with insanity. Therefore the prejudice to the defendant was great and the probative value was negligible.

The Court attempted to lessen the prejudicial effect by limiting the testimony about the actual scores Bursten and Lazarou found for the defendant. Unfortunately, this only caused greater

harm to the defendant. The score reached by Bursten and the score reached by Lazarou were different than each other, and both had changed over time. This evidence would be crucial to attack the credibility and reliability of this instrument and witnesses, but because the court decided that only a couple of the checklist criteria would not be discussed, defense was unable to bring out this information in front of the jury.

The Court reserved ruling prior to trial, and also mid-trial, about Lazarou testifying about use of the PCL-R. The Court then allowed only the state to proffer testimony during this hearing. The defense was shut down before even getting into Lazarou's lack of training on the PCL-R. The defense motion to exclude this evidence was based on not passing *Frye* for this purpose, lack of relevancy, and the danger of unfair prejudice. The Court cannot possibly conduct an analysis that requires weighing the probative value against the prejudicial effect, without letting the defense cross-examine the witness

VIII. THE COURT ERRED IN ALLOWING THE JURORS TO INTERACT DIRECTLY WITH THE WITNESSES IN ASKING QUESTIONS.

The Florida Supreme Court has outlined a process for jurors to ask questions of witnesses during trial. This process is outlined in the standard jury instruction 2.1(c), and requires that the questions be written down by the juror, discussed between the court and attorneys, and not further discussed if the question is not ultimately asked of the witness. In our case, this process did not occur. There were numerous occasions where a juror and witness were exchanging words back and forth, with all other jurors obviously present to hear. This was improper and prejudiced the defendant from receiving a fair trial.

IX. THE COURT ERRED BY REFUSING TO ALLOW TESTIMONY REGARDING DR. LAZAROU'S INAPPROPRIATE ATTIRE DURING HER EVALUATION OF THE DEFENDANT.

During Lazarou's evaluation of the defendant in October 2017, the attorney for the state forensic hospital in which the defendant was housed indicated that Lazarou would have to cover herself in more appropriate dress or leave the facility. During trial, Lazarou bolstered her credentials with testimony that she worked at numerous forensic facilities and was familiar with their policies and practices. Additionally, she indicated the defendant was difficult during her

evaluation. The defense attempted to cross examine the witness regarding this issue to impeach her credentials and also offer an alternative explanation for the defendant's demeanor or level of cooperation in the evaluation. The court would not allow the defense to cross-examine the witness on this issue. Additionally, the Court refused to allow the defense to proffer this line of questioning outside the presence of the jury. The defendant was prejudiced because he was denied the opportunity to discredit the witness regarding her credentials and the prejudicial impact her attire would have had on the evaluation.

X. THE COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR FINAL REBUTTAL CLOSING ARGUMENT.

Common law and the Florida Rules of Civil Procedure grant the final closing argument to the party bearing the burden of proof. In this case, the affirmative defense of not guilty by reason of insanity operates to shift the burden of production and persuasion to the defense. Therefore, the defendant should have been provided the final rebuttal closing argument. In this case, the error was compounded by the State arguing to the jury in their final closing that the defense bore the burden of proof in this case and had failed to meet that burden.

XI. THE COURT ERRED IN FAILING TO MODIFY THE FINAL PARAGRAPH OF STANDARD JURY INSTRUCTION 3.6 (a) AS REQUESTED

The Court's instruction to the jury that a verdict of not guilty by reason of insanity "does not *necessarily* mean he will be released from custody," incorrectly implied to the jury that the defendant would be released. The instruction minimizes the seriousness of a not guilty by reason of insanity verdict and fails to inform the jury that the defendant would be subject to the Court's jurisdiction / supervision for the rest of his life.

The error was compounded and the defendant further prejudiced when the State suggested to the jury that the defendant would be released into the community during the direct examination of Emily Lazarou and in final closing argument. During Lazarou's direct examination, the State elicited testimony that Lazarou had previously allegedly supervised a "NGRI clinic." The State then gratuitously followed up with a question about whether that involved dealing with individuals who had previously been found not guilty by reason of insanity and subsequently released into the community, which was answered in the affirmative. This information was not

relevant as to any material issue in our case. It was not until cross-examination that it was revealed that this clinic also housed people involuntarily committed after being found not guilty by reason of insanity. This testimony appears to have been elicited for the sole purpose of suggesting to the jury that the defendant would be released into the community if that is the verdict the jury were to render. In rebuttal closing argument, the prosecutor again brought up this testimony.

Wherefore, the errors made by the trial court denied John Jonchuck Jr. the right to a fair trial, and Defendant respectfully requests this Court grant his motion for new trial.

NOTICE OF HEARING

YOU ARE NOTIFIED that the above will be heard before the Honorable Chris Helinger, County Justice Center, 14250 49th Street North, Clearwater, Fl 33762, on _____, at _____.

I do certify that a copy hereof has been furnished by email/physical delivery to the State Attorney, County Justice Center, Clearwater, Florida, on April 26, 2019

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