Filing # 92550935 E-Filed 07/15/2019 01:02:43 PM

IN THE SUPREME COURT OF FLORIDA
Case No. SC19-140

ERIC KURT PATRICK
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

NEAL A. DUPREE
Capital Collateral Regional Counsel-South
Florida Bar No. 311545

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177

CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH
1 East Broward Blvd., SUITE 444
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

RECEIVED, 07/15/2019 01:03:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION.....1

ARGUMENT IN REPLY.....1

CONCLUSION.....6

CERTIFICATES OF SERVICE AND FONT 7

TABLE OF AUTHORITIES

Cases

Patrick v. State, 246 So. 3d 253 (Fla. 2018) 1, 2

INTRODUCTION

Mr. Patrick submits this Reply to the State's Answer Brief. Mr. Patrick will not reply to every argument raised by the State. However, Mr. Patrick neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Patrick expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

At the outset, the State fails to recognize this Court's rejection of the idea that the juror was not biased against the defense because Mr. Patrick is not homosexual. Instead, the State begins by stating that Juror Martin said he would be biased if the perpetrator was gay and Mr. Patrick repeatedly told the police that he was not gay. (Answer Brief at 13). The fact that Mr. Patrick is not homosexual does not "eliminate the bias that this juror said he would feel." *Patrick v. State*, 246 So. 3d 253, 264 (Fla. 2018). Additionally, the State mischaracterizes the State's questions at voir dire indicating that the prosecutor, when questioning juror Martin about his feelings on homosexuality, referred to the victim as homosexual. This is inaccurate. While at one point during the relevant questioning, the State asked Martin "who can be the victim of a crime," the prosecutor's initial question about homosexuality was much broader, asking:

> Would it change anybody's view or any of your answers or your ability to be fair and impartial if during the course of the trial ***any issues regarding homosexuality came to play***, some people have strong emotions about that, some people may say that affects their ability."

(RT. 418). The State continued its explanation of what was being asked:

> To be honest with you, if there are any deep seeded biases, prejudices, emotions regarding homosexuality and you think if that is an issue with anyone in this case that I won't be fair, that's going to make a difference to me we need to know that and if you want to go sidebar just one second if you do we need to go sidebar, we'll go sidebar.

(Id.). Most importantly, the prosecutor ultimately asked Martin "[i]f ***homosexuality in any way comes into play in this case with any, anybody involved*** would you not follow the law on that?" (RT. 424.). The prosecutor's questions were not only about the victim. Furthermore, even had the State been correct that the victim was identified as homosexual, "the fact that the juror's bias would have extended to the victim does not refute the bias he acknowledged or render him impartial." *Patrick,* 246 So. 3d at 264.

The State's argument is replete with mischaracterizations of both the record at trial and the record now before this Court. In particular, the State attributes testimony to co-counsel Dorothy Ferraro that she simply did not give. Contrary to the State's assertion that both Reres and Ferraro thought Martin was "golden" for the penalty phase, Ms. Ferraro said no such thing. Similarly, Ms. Ferraro did not indicate that Martin was a "good defense juror." (Answer Brief at 14). In fact, Ms.

Ferraro only "guess[ed]" from the record that Juror Martin was at least an "open-minded juror" when it came to the death penalty. (PCR2. 211-212). Ms. Ferraro remembered "absolutely nothing" about Juror Martin from *voir dire*, and she had no independent recollection of what any juror said during *voir dire*. (PCR2. 209). She also could not recall why Juror Martin was not struck from the venire panel and could only speculate as to why. (Id.). She conceded that she did not remember what her thought process was during *voir dire*. (PCR2. 212).

Despite this Court's opinion finding to the contrary, the State continues to argue that Mr. Patrick "cannot show the necessary prejudice from having Martin sit on the jury during the guilt phase." (Answer Brief at 18). Reciting the evidence of Mr. Patrick's guilt, the State ultimately relies on the fact that Mr. Patrick did not testify during the guilt phase so Martin could not have discounted in any way his testimony. This argument is entirely disingenuous where the State presented Mr. Patrick's sworn statement to the police during the guilt phase. It also ignores entirely the trial record. As Mr. Patrick argued in his initial brief, the entire defense centered on the credibility of Mr. Patrick's statement. Trial counsel admitted Mr. Patrick's guilt in the opening statement, told the jury that they would hear Mr. Patrick's truthful admission and argued only that the jury should find the crime was a lesser degree of murder because Mr. Patrick did not intend to kill the victim. (RT. 1232, 1234, 1236). So, regardless of the evidence of guilt against Mr. Patrick, the

circumstances of the relationship between Mr. Patrick and the victim, and the events that lead to the death of the victim, were critical to the defense. It was Mr. Patrick's statement that provided these details.

Despite Mr. Reres comments that he was not concerned "that the jury would disbelieve [Mr.] Patrick's statements in his confession because it was clear to all that he told the truth," the trial record clearly reflects otherwise. The veracity of Mr. Patrick's statement was a point of contention in opening and closing arguments and the State even had a jail house snitch testify to refute that Mr. Patrick's statement reflected the truth. Contrary to Mr. Reres testimony otherwise, based on the trial record it was imperative for the jury to believe Mr. Patrick and believe the events as they were described by Mr. Patrick in order to secure the jury's return of a lesser degree of murder.

The State offers that jurors Montenegro, Elovitz, Holland and Lindo, were excused for cause due to their feelings with respect to the death penalty. However, with the exception of Holland, the record offers no explanation for the reasons for the cause challenges. Further, while Ms. Montenegro was distraught about the case for personal reasons, one of those reasons was that she had learned her father was gay. (RT. 1120). It was after disclosing this during a sidebar that she became even more distressed. The judge only indicated that she would not allow any more questions of Ms. Montenegro after counsel indicated they had no more questions.

(RT. 1121). Regardless of whether Mr. Reres knew the law with respect to death qualification, these jurors also could not sit on this jury because each expressed they could not be impartial if they knew homosexuality was involved in this case. Mr. Reres knew this too as evidenced by the record and his response to the State's challenge for cause with respect to juror Koehne. With respect to juror Koehne, when the State moved for cause citing his bias towards homosexuals, Mr. Reres responded "***legally*** I think the State is correct, I would have no objection." (RT. 773)(emphasis added).

Simply concluding that that there is a myriad of reasons why attorneys choose or do not choose jurors does not mean there was a reasonable strategy, particularly when faced with a juror so biased against homosexuals. Mr. Reres indicated "it's not as if you can just strike any one you want," rather:

> You have to look who's left on the panel, where you would go from there, how many strikes you have and how many strikes the State has, is this juror perhaps better than somebody you'll get stuck with if you strike them.

(PCR2. 184). Even given these considerations it is not reasonable to peremptorily strike two jurors who expressed very favorable views with respect to recommending a life sentence during the penalty phase in favor of keeping juror Martin who expressed actual bias. Yet, because Mr. Reres had no recollection of voir dire and no recollection of Jurors Amparo or Viscarra, who were favorable penalty phase jurors, he could not provide a reason for keeping Martin over them. Speaking in

generalities and speculating does not amount to a reasoned trial strategy. Furthermore, the State ignores that trial counsel was incorrect at the conclusion of voir dire with respect to his remaining peremptories:

> Subject to the numerous objections posed by Defense in the course of this I'm unable to accept the panel at this point in time, we have no additional strikes nor am I requesting additional peremptories.

Although Mr. Reres indicated he had no more strikes, the defense in fact had three. Mr. Reres acknowledged as much at the evidentiary hearing. (PCR2. 187). Thus, whatever strategy he speculated to, it is refuted by the totality of the record.

CONCLUSION

Based on the foregoing arguments, the evidence and testimony presented during this evidentiary hearing and the entirety of his postconviction proceedings, as well as the record at trial, Mr. Patrick submits that he was prejudiced by trial counsel's deficient performance where an actually biased juror was not challenged for cause. This Court should grant Mr. Patrick a new trial.

Respectfully submitted,

/s/ Suzanne Keffer
SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177
keffers@ccsr.state.fl.us

Capital Collateral
Regional Counsel - South
110 S.E. 6th Street, Ste. 701

Ft. Lauderdale, FL 33301
Telephone: 954-713-1284

COUNSEL FOR APPELLANT

CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 15th day of July, 2019, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

/s/ Suzanne Keffer
SUZANNE KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177
keffers@ccsr.state.fl.us