

IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781 AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

AMENDED MOTION FOR NEW TRIAL

Defendant, Donald Smith, through his undersigned attorney, W. Charles Fletcher, pursuant to Rules 3.580, 3.590 and 3.600, Florida Rules of Criminal Procedure respectfully requests this Honorable Court to grant a new trial in the above-styled cause. Defendant states the following grounds for this motion:

1. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of the State's case.
2. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.
3. The verdict is contrary to the weight of the evidence.
4. The verdict is contrary to the law.

5. The Court erred when it denied the Defendant's Motion in Limine wherein the defense sought to preclude testimony regarding a bundle of rope that was placed in the shopping cart at Walmart. The defense noted that the rope was ever purchased and was in fact, left inside the Walmart. Allowing testimony regarding the rope would cause the jury to speculate about its intended purpose. At the hearing on the Motion in Limine the State indicated to the Court that the evidence regarding the rope was relevant because the child victim's mother said it was something that Mr. Smith had placed in the shopping cart. During the State's opening statement, the state referred to it as evidence of what Mr. Smith was intending to do.

6. The Court erred when it denied the Motion in Limine seeking to prevent the admission into evidence the photographs taken by the medical examiner and to only allow testimony by the medical examiner as to the child victim's injuries. The defense contended that the photographs were too gruesome and would cause the jury to decide the case based on emotion rather than the law. At trial, not only did several jurors cry during the introduction of the photographs, but the

- medical examiner who took the photographs broke down and sobbed, and asked the court for a break.
7. The Court erred when it denied the Motion to Suppress the jail wire containing a recorded conversation between the defendant and another inmate.
 8. The Court erred when it denied the Motion in Limine regarding the contents of the jail wire.
 9. The Court erred when it denied the Motion for Change of Venue.
 10. During the state's opening statement, the prosecutor told the jury that "this was a mother's worst nightmare." The defense objected to the improper comment as argumentative and this Court overruled the objection. The statement by the state was clearly intended to invoke the anger of the members of the jury in an effort to have them decide the case on emotion rather than on an analysis of the facts and a subsequent application of the law. After the Court overruled the objection the state said it again, even louder.
 11. During the testimony of the medical examiner, the medical examiner testified that she had over 35 years of experience and had conducted thousands of autopsies. While reviewing the photographs of the child victim before the jury she became emotional, started to cry, and asked for a break. The defense

moved for a mistrial based on the outpouring of emotion by a professional state witness whose interests are clearly in line with the state. The Court denied the motion in error.

12. The state committed fundamental error during its closing argument when it stated:

"Even in death, through the irrefutable physical evidence that was left behind...the injuries to her body, the biological evidence he left on her and inside of her, through that evidence she has a voice. And from the grave she is crying out to you ... Donald Smith raped me (displaying the DNA swabs from the victim's vagina). Donald Smith sodomized me (displaying the DNA swabs from the victim's anus). Donald Smith strangled me until every last breath left my body (Displaying DNA swabs from the victim's neck)."

To argue before the jury that even in death , the victim has a voice, and that she is crying out from the grave, "to you" (referring to the jury) is improper argument. Under

Florida law, "wide latitude is permitted in presenting opening and closing statements to a jury, and comments by the prosecutor will merit a mistrial only when they deprive the defendant of a fair and impartial trial, materially contribute to the conviction, are so harmful or fundamentally tainted as to require a new trial, or are so inflammatory they might have influenced the jury to reach a more severe verdict than it would have otherwise rendered. *Miller v. State*, 161 So.3d 354, 382 (Fla. 2015). Suggesting that the 8 year old victim was "crying out from the grave" was clearly intended to appeal to the sympathy of the jury and invite an emotional response, and its prejudicial effect vitiated both the guilt and subsequent penalty phases of the trial. Closing arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985).

WHEREFORE, Defendant respectfully requests this Honorable Court to grant a new trial for the reasons cited herein.

I HEREBY CERTIFY that a copy of the above and foregoing Amended Motion for New Trial has been furnished to the Office of the State

Attorney, by electronic filing this 30th day of April 2018.

Respectfully submitted,
Law Offices of W. Charles
Fletcher, P.A.

/s/ W. Charles Fletcher

W. Charles Fletcher, Esquire
Florida Bar No.: 0125792
8833 Perimeter Park Blvd.
Suite 104
Jacksonville, Florida 32216
Tel: (904) 314-0233
Attorney for Defendant
Williamfletcher96@yahoo.com