IN THE SUPREME COURT OF FLORIDA

J. B. PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal Case No. 63,177

Trial Case No. 82-354-CF
(Lake County Case No.
82-912-CF-A-01)

INITIAL BRIEF OF APPELLANT

On Appeal From the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For Martin County, Florida [Criminal Division].

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STATEMENT OF THE CASE.

The Appellant, J. B. Parker, was arrested on May 5, 1982. A Grand Jury later returned an indictment against Parker and three other co-defendants, charging them with premeditated murder in the first degree; robbery with a firearm; and kidnapping (R. 1547). Defendant Parker's Motion for a severance of his trial from that of his co-defendants was granted (R. 1616). The Defendant then moved for a change of venue (R. 1630-1631) because of extensive pre-trial publicity, and the Motion was granted (R.1647).

The Defendant was tried before a jury in Tavares, Florida, located in Lake County, on January 3, 1983. The jury returned a verdict of guilty of murder in the first degree, kidnapping and robbery with a firearm (R. 1201-1202, R. 1692). The Court then reconvened the jury to render an advisory sentence of death or life imprisonment. At the conclusion of the proceedings, the jury published an advisory sentence imposing the death penalty (R. 1504-1506, R. 1704).

Thereafter, the Court accepted the recommendation of the jury and sentenced the Defendant to death (R. 1507, R. 1708). In addition, the Court entered consecutive ten year sentences for the robbery and kidnapping convictions (R. 1507, R. 1709-1710). The Defendant filed a timely appeal of the convictions and sentences on January 31, 1983.

STATEMENT OF THE FACTS.

On the afternoon of April 26, 1982, the Defendant, J. B. Parker, met with John Earl Bush, Alfonso Cave, and Terry Wayne Johnson in Fort Pierce, Florida, for the purpose of having a few alcoholic beverages. After stopping at a couple of local bars, John Earl Bush suggested the four of them get in his car and ride to Palm Beach (R. 969). The Defendant agreed to go along and, in the meantime, had fallen asleep in Bush's car. When he awoke, they had reached Martin County at approximately 11:00 p.m. and stopped briefly at a Little General Store on North U.S. One in Stuart (R. 973). For the next several hours they rode around in Stuart which included a stop at the home of Bush's girlfriend to borrow some money.

Finally, they headed back to Fort Pierce and Bush, again, stopped at the Little General Store on North U.S. 1 where Frances Slater was working (R. 977-978). Bush and Cave went into the store, and Cave put a gun to the head of Frances Slater (R. 979). In the meantime, Bush went behind the counter and grabbed a sack (R. 980). Bush and Cave then came out of the store and put Frances Slater in the back seat of BUSH's car.

Bush drove away South on U.S. 1 before heading toward Indiantown. It was then that Bush stated he was going to kill the girl because he has already been in prison and was not going back (R. 983). The Defendant repeatedly insisted that they just let the girl go and not hurt her. When they were further down the roadway and saw no oncoming traffic coming,

Bush pulled over to the side of the road and told Cave to take the girl out of the car. Bush then got out and took Slater around the back of the car by himself (R. 986). The Defendant saw Bush stab her with a knife. The Defendant then turned his head away when he heard a gunshot fired by Bush (R. 986). Bush got back into the car and drove away.

A few days after Frances Slater was found dead, Bush made a statement to the police implicating the Defendant along with the other co-defendants. On May 5, 1982, various Fort Pierce police officers arrived at the Defendant's home and asked him to go down to the Office of the State Attorney with them. The Defendant agreed and spoke with a Detective Charles Jones of the Martin County Sheriff's Department. The Defendant was scared and told the Detective he was at home the night of April 26, 1982 (R. 994). Parker was subsequently arrested and taken to the Martin County jail where he was incarcerated.

Later on that day, Parker requested to speak with Sheriff Holt (R. 740), because he was being accused of something he did not do (R. 744). At that time, Steven Greene, then working as an intern with the Office of the Public Defender in Martin County, arrived at the Martin County Detention Center and spoke with the Defendant before he could make any statements (R. 744). The Defendant was advised of his constitutional rights before the Sheriff proceeded to tape record their conversation (R. 751). Three times during the taking of the statement, however, the Defendant indicated that he wanted to find out if his mother had obtained an attorney for him (R. 777-779). The

Sheriff and other police officers present did not stop the questioning at that time, nor did they allow the Defendant an opportunity to get in touch with his mother to see if a lawyer had been obtained for him. Additionally, the Defendant refused to sign the Waiver of Rights form which was an indication of his exercise of his right to remain silent. Furthermore, Steven Greene was not a member of the Florida Bar and the Defendant was not made aware of the fact that Mr. Greene was not an attorney. The taped statement was subsequently admitted into evidence at trial (R. 772) over the objection of the Defendant who renewed his Motion to Suppress at Trial.

During the course of the trial, the Prosecution called Georgeanne Williams, Bush's girlfriend. She testified that, while she was visiting Bush in jail, the Defendant told her that he shot Frances Slater (R. 883). She also testified she has lied to her mother about Bush serving a prison term for five years (R. 898-899). The Defendant attempted to attach the veracity of Georgeanne Williams' statement by showing that she was not telling the truth in light of the fact that she had previously lied to her own mother about Bush's prior criminal record. However, the Defendant was precluded by the Trial Court from cross-examining the witness as to whether she had ever been arrested for petty larceny (R. 875-876) which would show her predisposition for dishonesty and that she was not truthful in view of the fact that her mother had previously testified at a deposition that the witness never told her about her arrest.

The Prosecution also called Nealie Bell Williams and Sandra Williams, the mother and sister of Georgeanne Williams, who both testified that Georgeanne had told them the Defendant confessed to her that he had shot Frances Slater (R. 918, R. 923). The Defendant objected to the testimony of Nealie Bell Williams and Sandra Williams on the basis that any attempt to rehabilitate Georgeanne Williams' testimony by evidence of a prior consistent statement could only be done, under the facts of this case, if the statement was made at a time prior to the existence of a fact which would indicate a biase or a motive to falsify (R. 914). The Defendant argued that Georgeanne Williams had a motive to lie and to falsify prior to the time she made this statement to her mother and sister, by virtue of placing her boyfriend, John Earl Bush, in a better light as her mother had indicated she was very upset when she found out about Bush's criminal record. The Court denied Defendant's objection and allowed the State to introduce the testimony of Georgeanne Williams alleged prior consistent statement (R. 917).

At the conclusion of the evidence, the State attempted to speculate in its closing argument as to why the Defendant requested to make a statement to Sheriff Holt. In doing so the Prosecutor made highly prejudicial remarks obviously inferring that the Defendant found out that co-defendant, Bush had told the authorities that Parker shot the girl. The Defendant then moved for a mistrial based upon the Court's prior Order to prevent the State from bringing out what any of the co-defen-

dants had indicated to the effect that Parker shot the girl (R. 26). In denying the Defendant's Motion for Mistrial the Court stated: "Why couldn't they (the jury) come up with three different conclusions, there were three of them in there? Motion denied." (R. 1155-1156).

In presenting jury instructions to the Court the Defendant requested the Court to read a jury instruction on Independent Acts of Others which was taken from a 1982 Florida Supreme Court Case (R. 942-943). The State objected to the instruction as requested and presented its own modified version to the Court (R. 999-1005). The Court denied the Defendant's jury instruction on Independent Acts of Others and approved the modified version (R. 1005).

During the penalty phase, the Defendant specifically waived all mitigating circumstances of no significant prior criminal history for the purpose of precluding the Prosecution from introducing evidence of the Defendant's prior criminal activity (R. 1205-1206). Despite the Defendant's waiver, the Court allowed the State to present evidence of the Defendant's criminal history through the improper impeachment of a witness by bringing out specific prior acts of the Defendant (R. 1280-1307).

Finally, the Court instructed the jury with regard to aggravating and mitigating circumstances. The Defendant objected to three of the five aggravating circumstances given to the jury for their consideration on the basis that there was insufficient evidence from which the jury could find the

existence of these aggravating circumstances (R. 1403-1412, R. 1427-1428).

After their deliberation, the jury delivered an eight to four advisory sentence of death for the Defendant. The Court accepted the recommendation of the jury and sentenced Parker to death (R. 1507). The Court also sentenced the Defendant to consecutive ten-year sentences for his conviction of armed robbery and kidnapping. From this conviction and sentence, Defendant, Parker, has appealed.

POINT I

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE, OVER THE DEFENDANT'S OBJECTION, TO INTRODUCE INTO EVIDENCE THE TESTIMONY OF NEALIE BELL WILLIAMS AND SANDRA WILLIAMS TO SHOW THAT STATEMENTS MADE TO THEM BY THE WITNESS GEORGE-ANNE WILLIAMS WERE CONSISTENT WITH THE TESTIMONY GIVEN BY HER AT THE TRIAL.

In Florida, the general rule is that a witness' testimony may not be corroborated by his own prior consistent statement. Van Gallon v. State, 50 So.2nd 882 (Fla. 1951); McRae v. State, 383 So.2nd 289 (Fla. 2nd DCA 1980). The Florida Evidence Code, however, has recognized exceptions to this rule. The exception pertinent to this issue is provided in Section 90.801(2)(b), Florida Statutes stating:

> "(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> * * * *
>
> (b) Consistent with his testimony and is offered to rebutt and express or implied charge against him of improper influence, motive, or recent fabrication...."

Existing Florida Law is in accord with the Evidence Code as shown in Van Gallon where the Court stated:

> "We recognize the rule that a witness' testimony may not be corroborated by his own prior consitent statement and the exception that such a statement may become relevant if an attempt is made to show a recent fabrication. The exception is based on the theory that, once the witness' story is undertaken, by imputation, incinuation, or direct evidence, to be assailed as a recent fabrication, the admission of an earlier consistent statement rebutts the suggestion of improper motive and the challenge of his integrity."

This Rule has been followed in Sosa v. State, 215 So.2nd 736 (Fla. 1968) and Jackman v. State, 140 So.2nd 627 (Fla. 3rd DCA 1962).

Another case in which the defense counsel objected to the introduction of a prior consistent statement is McElveen v. State, 415 So.2nd 746 (Fla. 1st DCA 1982), which explains that:

> "The exception involving impeachment by bias or corruption or improper motive is only applicable where the prior consistent statement was made 'prior to the existence of a fact said to indicate biase, interest, corruption or other motive to falisfy.' Kellam v. Thomas, 287 So.2nd 733, 734 (Fla. 4th DCA 1974)."

In the case at bar, during Defendant's cross-examination of the witness, Georgeanne Williams, defense counsel emphasized that Georgeanne Williams was the girlfriend of Co-Defendant, John Earl Bush, and that she lied to her family about Bush's prior criminal history in order to continue dating him (R. 898-899), thereby suggesting that Georgeanne Williams had an improper motive to falsify and to lie to try and put John Earl Bush in a better light involving this case. That is, before the witness, Georgeanne Williams, told her mother and sister that the Defendant, Parker, allegedly confessed to her that he shot Frances Slater, Georgeanne had a motive to lie.

Subsequently, when the State attempted to rehabilitate Georgeanne Williams' testimony by introducing evidence of her prior consistent statement made to her mother and sister, the Defendant properly objected on the grounds that you can only rehabilitate a witness who has been impeached through evidence of a prior consistent statement, if the impeachment is based upon a recent fabrication (R. 914). The record clearly establishes sufficient facts to indicate bias interest or other

motive to falsify existed prior to the consistent statement introduced by the State.

Therefore, the Trial Court erred in admitting evidence of a prior consistent statement made by the witness Georgeanne Williams which could foreseeably result in prejudicial harm should the jury improperly attach testimonial value to the inadmissable statement as substantive evidence tending to prove the fact in issue (i.e., in this case, whether the Defendant, Parker, confessed to the murder of Frances Slater), rather than accepting such evidence merely for the purpose of testing the credibility of the witness.

Consequently, because of the prejudicial admission of the prior consistent statement, the Defendant's conviction should be reversed and the case remanded for a new trial.

POINT II

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUESTED JURY INSTRUCTION ON INDEPENDENT ACTS OF OTHERS.

The defense requested that the Trial Court give an instruction to the jury on independent acts (R. 942-943). The Trial Court rejected the instruction an approved a modified version (R. 1005). The requested instruction was:

> Independent Acts of Others: "If you find that the kidnapping and murder of Frances Julia Slater were committed by a person or persons other than J. B. Parker, and that the kidnapping and murder were totally independent acts of someone other than J. B. Parker, and if you further find that J. B. Parker did not participate in the kidnapping and murder and it was outside the scheme or design of the robbery of Frances Julia Slater, then you should find J. B. Parker not guilty of first degree felony murder (R. 942-943)."

This Court recently held in Bryant v. State, 412 So.2nd 347 (Fla. 1982), that where there is any evidence introduced at trial which supports a theory of the defense, a defendant is entitled to have a jury instruction on the law applicable to this theory, if requested.

The Defendant in this trial testified that after Cave and Bush took Frances Slater out of the store and put her in Bush's car, the Defendant repeatedly told Bush not to hurt the girl and let her go (R. 983, R. 986). This testimony was also consistent with the Defendant's taped statement. The record reflects that Frances Slater was subjected to a robbery, kidnapping and murder, and there was evidence from which the jury could have concluded that the Defendant, Parker, withdrew from the criminal enterprise prior to the kidnapping and death of the victim. During his argument to the jury, Defense

Counsel made clear his position as to the theory of independent acts (R. 1176), alleging that the death of Frances Slater was not caused by any acts committed during the perpetration of the robbery but rather was caused solely by acts committed after the robbery of which the Defendant, Parker, was an unwilling participate.

In Bryant the Court noted that the act resulting in the victim's death must be in furtherance of the common design or unlawful act the parties set out to accomplish and stated:

> "Since it is the commission of a homocide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first degree murder, Fleming v. State, 374 So.2nd 954 (Fla. 1979), there must be some causal connection between the homocide and the felony. In the present case, if the jury finds that the death was not caused or materially contributed to by any acts during the perpetration of the robbery, but rather was caused solely by acts committed during the perpetration of the sexual battery, if the jury finds that Bryant was actually or constructively present during and did not participate in the perpetration of the sexual battery, and if the jury finds that the sexual battery was an independent act of another and not a part of Jackson and Bryant's common scheme or design, then it may not find Bryant guilty of first degree felony murder. This is a factual issue to be determined by the jury pursuant to proper Court instructions consistent with this opinion."

In conclusion, this Court held that, since there was evidence to support Bryant's theory of defense, the requested instructions on independent acts should have been given.

If the jury in this case believed the Defendant, they could have found him guilty of robbery of the victim, but not guilty of kidnapping and premeditated murder. Since there was evidence to support the Defendant's theory of defense, the

requested instructions should have been given. Failure to give this instruction constitutes reversible error. Bryant supra; Hunter v. State, 389 So.2nd 661 (Fla. 4th DCA 1980); Johnson v. State, 423 So.2nd 614 (Fla. 1st DCA 1982). Consequently, the conviction of kidnapping and murder in the first degree should be reversed and the cause remanded for a new trial.

POINT III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT THE RIGHT TO CROSS-EXAMINE THE WITNESS, GEORGEANNE WILLIAMS, REGARDING HER ARREST FOR PETTY LARCENY FOR THE PURPOSE OF DISCREDITING HER TESTIMONY.

The State's criminal case against the Defendant was largely based upon the testimony of their witness, Georgeanne Williams. She testified that the Defendant confessed to her that he shot Frances Slater (R. 883). During cross-examination the Defendant attempted to discredit her testimony by showing she is a liar. The record shows that Georgeanne Williams admitted lying to her own mother about her boyfriend, co-defendant, John Earl Bush's, prior criminal history. However, the Defendant was precluded from asking the witness whether she had ever been arrested for petty larceny (R. 875-876) which would also show she is a liar because her mother testified at a deposition that Georgeanne never told her about her arrest.

It is a well-recognized rule that limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error, especially where the cross-examination is directed to the key prosecution witness. Stradtman v. State, 334 So.2nd 100 (Fla. 3rd DCA 1976); Kirkland v. State, 185 So.2nd 5 (Fla. 2nd DCA 1966); Coco v. State, 62 So.2nd 892 (Fla. 1953); and see also Gordon v. United States, 334 U.S. 414, 73 S.Ct. 369, 97 L. Ed. 447 (1953). In Kirkland v. State, the Appellate Court reaffirmed the rule that:

> "For the purpose of discrediting a witness, a wide range of cross-examination is permitted, as a matter of right, in regard to his motives, interests, animus, as connected with the cause or with the parties thereto, upon which matters he may be contradicted by other evidence...."

The testimony of Georgeanne Williams was crucial to the State's case. She was the only witness presented by the State who allegedly heard the Defendant confess to the murder of Frances Slater. Therefore, the Defendant's right to impeach and attack the credibility of this witness was of utmost importance.

It is well-settled that all witnesses are subject to cross-examination for the purpose of discrediting them by showing bias, prejudice or interest, and this is particularly so where a key witness is being cross-examined. Jones v. State, 385 So.2nd 132 (Fla. 4th DCA 1980); Hannah v. State, 432 So.2nd 631 (Fla. 3rd DCA 1983).

The Court would not allow the Defendant to ask Georgeanne Williams if she had ever been arrested for petty larceny on the grounds that you cannot attack the credibility of a witness by bringing out a previous arrest unless the witness has been convicted of a crime punishable by death or imprisonment in excess of one year, or if the crime involved dishonesty or a false statement, Florida Statue 90.610 (R. 873-876). In objecting, the Defendant stressed the fact that the only reason he wanted to ask Georgeanne Williams about her arrest was to impeach her credibility by showing that she is a liar (R. 871-872) and not for the purpose of impeachment by evidence of a prior conviction (R. 874). The Defendant's attack on

Georgeanne Williams was that she was not telling the truth and attempted to prove this by showing that she lied to her mother and father about certain things (R. 871). Defendant's proffered scope of cross-examination of Georgeanne Williams clearly focused on the fact that she was considerably less than truthful, thus going to her credibility.

Denial of effective cross-examination to impeach the credibility of the State's witness is constitutional error in light of the Sixth Amendmenth Right to confrontation of witnesses, requiring reversal unless error is harmless beyond a reasonable doubt. see Hannah, supra and the cases cited therein. This matter should be reversed and remanded for a new trial.

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS ADMISSION AND ALLOWING THE STATE TO INTRODUCE THE TAPED STATEMENT OF THE DEFENDANT AS EVIDENCE.

The United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2nd 694 (1966), declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. The Court stated that if an accused person "indicates in any manner and at stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning." Id. at 444-445 86 S.Ct. at 1612. In Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2nd 197 (1979), the Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se and invocation of his Fifth Amendment rights, requiring that all interrogation cease."

In State v. Prosser, 235 So.2nd 740 (Fla. 1st DCA 1970), the Court affirmed the granting of a Motion to Suppress Statements made to the police when evidence showed Defendant wished to remain silent or consult with an attorney. Quoting Miranda with approval, the Court stated:

> "Interrogation must cease if, after warnings have been given, the Defendant indicates in any manner that he wishes to remain silent or that he wishes to consult with an attorney."

Recently, the Supreme Court of Florida in Cannady v. State, 427 So.2nd 723 (Fla. 1983), was confronted with the question of whether Defendant's statement, "I think I should call my lawyer," constituted a request for an attorney.

However, the Court determined that the issue was not whether the statement itself constitutes such a request, but whether such a statement indicates a desire to see an attorney, given the context in which it is spoken.

In the instant case, the Defendant was advised of his constitutional rights before the Sheriff proceeded to tape record their conversation. At that time, Steven Greene, a representative from the Public Defender's Office, came over and spoke with the Defendant before any statement was made. During the interrogation, the police authorities did not honor the Defendant's right to remain silent after he indicated three times during the taking of the statement that he wanted to find out if his mother had obtained an attorney for him. After being read his rights by Detective Forte, the interrogation reads as follows:

(R. 777)

HOLT: "Do you read, J.B.? Read it and sign it."

FORTE: "I made an 'X' over there, Mr. Parker, where I would like for you to sign it."

HOLT: "J. B., that's not admitting to anything. That's advising you of your rights, and we want you to understand you do have - what rights that you do have, although your attorney is here present and he has explained it to you prior to this."

GREENE: "Mr. Parker, do you understand those rights that you're reading now?"

Parker: "Yes."

GREENE: "You understand what you're reading - what you're signing? Do you wish to go ahead and sign that?"

Parker: "I want to see if my mom got me a lawyer yet. I don't know, I ain't got in contact with her yet."

GREENE: "Well, I am acting as your attorney today."

Parker: "I just want to get this off my mind."

HOLT: "Okay, J. B., if you'll --"

Parker: "Talk."

HOLT: "You go ahead and sign that before I ask you any questions. That's not admitting to anything, it's just that you understand what you have read there and what has been read to you."

FORTE: "You see that 'X' right there, Mr. Parker, where I made the 'X'? Okay, sign your legal name, please."

GREENE: "Do you understand that by signing that, you're waiving your right to remain silent?"

Parker: "Do I have to sign to talk to you all?"

HOLT: "No, sir. You can still talk to us without it."

GREENE: "Well, you can -- they want you to sign that there, because it states here that you are waiving your rights. Do you understand your rights, here?"

Parker: "Yes, sir, the reason I was wanting one here."

GREENE: "Excuse me?"

Parker: "That is why I was wanting my lawyer. I want to see if my mom has a lawyer so I can have him with me."

GREENE: "Well, that's why I'm representing you today. Do you wish to make no statements until you get your mother to get another lawyer other than myself to represent you?"

Parker: "I was waiting on -- I want my mom to get me a Lawyer."

HOLT: "Okay, J.B., -- "

Parker: "Another one."

HOLT: "I think I understand where you're coming from. You asked me to come over and that's why I'm here. I went back and explained and explained to you that you did have a lawyer appointed for you. Nobody's going to make you make a statement. You asked me could you talk to me and explain to me just exactly what happened, that you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was. Am I correct in that?"

Parker: "Yes, sir."

HOLT: "Okay, you can still give me a statement without signing that. All that says right there is that you understand that you don't have to. Do you still wish to give us a statement at this time?"

Parker: "Yes, sir."

HOLT: "Okay, we'll continue on with it now. The two detectives that are here will be, you know it's on tape, and they will be jotting

down information as you come -- talk to us. If you would in your own words just tell me what you want to tell me."

Parker: "I want to tell you I didn't kill that girl."

(R. 780).

Clearly, the repeated request of the Defendant to see if his mother got him a lawyer was an indication "in any manner" that he wishes to invoke his right to remain silent. The police authorities did not stop the questioning at that time, nor did they allow the Defendant an opportunity to get in touch with his mother to see if a lawyer had been obtained for him. Additionally, the Defendant refused to sign the Waiver of Rights form, which was another indication of his exercise of his right to remain silent. According to the requirements of Miranda, all interrogation should have stopped after the Defendant stated, "I want my mom to get me a lawyer." (R. 779).

Although the Defendant subsequently agreed to speak with the police authorities, United States Supreme Court recently held in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 68 L.Ed.2nd 378 (1981), stated that:

> "When the accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation, even if he has been advised of his rights."

As a result of the police authorities' failure to honor the Defendant's right to remain silent, all statements made by the Defendant following the request to obtain an attorney

should be suppressed in violation of the principals set forth in Miranda.

It should be pointed out that Steven Greene was not a member of the Florida Bar at thattime and the fact that he advised the Defendant not to make a statement does not vitiate the Defendant's invocation of his right to remain silent and consult with an attorney. The Trial Court's denial fo Defendant's Motion to Suppress Admission and the admission of his statement as evidence should be reversed and the case remanded for a new trial.

POINT V

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE, OVER DEFENDANT'S OBJECTION, TO PRESENT EVIDENCE OF DEFENDANT'S PRIOR CRIMINAL HISTORY AFTER DEFENDANT EXPRESSLY WAIVED ANY RELIANCE ON MITIGATING FACTOR OF NO SIGNIFICANT PRIOR CRIMINAL ACTIVITY.

This exact issue was recently decided by the Supreme Court of Florida in Maggard v. State, 399 So.2nd 973 (Fla. 1981). The facts in that case show that prior to the sentencing hearing, Maggard announced to the Court that under no circumstances would he attempt to demonstrate to the jury that he had no significant history of prior criminal activity and moved the Court to exclude all evidence of Maggard's prior criminal record of non-violent offenses. The Trial Court denied the motion and despite Maggard's express waiver of any reliance on this mitigating factor, permitted the State, over Maggard's objection, to present extensive evidence of Maggard's prior criminal record of non-violent offenses to rebutt a mitigating factor upon which Maggard expressly stated he would not rely. This Court held that the trial judge erroneously denied the Defendant's motion and improperly admitted the evidence. In concluding that such error is of such magnitude as to require a new sentencing hearing before the jury and court, this Court stated that:

> "Mitigating factors are for the Defendant's benefit and the State should not be allowed to present damaging evidence against the Defendant to rebutt a mitigating circumstance that the Defendant expressly conceives does not exist."

The facts in the case at bar are very similar to those in Maggard's. At the beginning of the sentencing phase of trial,

the Defendant presented its Waiver of Mitigating Circumstance (a) Florida Statute 921.141 (6) and stated to the Court his intention not to rely upon the mitigating circumstance of no significant prior criminal activity (R. 1206-1208, R. 1695). However, over Defendant's objection, the State was permitted to present evidence of the Defendant's prior criminal history during its cross-examination of the witness, Dr. Paul D. Eddy.

Dr. Eddy, a clinial psychologist, was called by Defense Counsel to present a psychological profile of the Defendant to the jury. Dr. Eddy testified on direct examination that in his opinion, the Defendant is a passive or non-aggressive type of individual (R. 1269). On cross-examination, the State repeatedly tried to show that the Defendant's prior criminal history is inconsistent with Dr. Eddy's opinion. Record is replete with evidence of the Defendant's prior criminal history:

(R. 1280)

STATE: "I believe you testified, doctor, did you not, that based upon your opinion -- your opinion is that the Defendant, J. B. Parker is a passive individual, a non-aggressive type of individual, isn't that what you testified during direct examination?"

EDDY: "That's what the data says."

STATE: "Okay. Would that opinion be consistent, doctor, with breaking a window on the west side of the St. Lucie Middle School on three/twenty-eight 1977, breaking the window to the teacher's lounge--"

MAKEMSON: [Objection]

* * * *

(R. 1286)

STATE: "Doctor, were you aware prior to your examination, or even prior to testifying before this jury today, regarding the acts of the Defendant, that on three/twenty-eight/seventy-seven and three/twenty-nine/seventy-seven, at five-fifteen in the morning, the following acts: going to the St. Lucie Middle School in Fort Pierce, Florida, breaking the window on the west side of the building, breaking into the bookkeepper's office, breaking the window on the west side of the building and breaking into the teacher's lounge; prying the window on the south side of the library at that school."

* * * *

(R. 1289)

STATE: "Okay. Now, tell the jury what J. B. Parker told you regarding his prior criminal record which you formed your opinion on."

MAKEMSON: " Objection, Your Honor."

* * * *

(R. 1291)

STATE: "Dr. Eddy, what criminal acts did the Defendant tell you he performed or committed--"

MAKEMSON: [Objection]

* * * *

STATE: "What specific acts did you ask the Defendant he committed to reach an opinion as whether or not he is a passive and non-aggressive individual?"

* * * *

STATE: "Okay, answer the question, please."

EDDY: "He told me that he had been involved in breaking into a schoolhouse at age nine. That apparently is what you were referring to."

STATE: "No, Doctor, what do you have as far as a

number of time, Doctor, before that? One time, right? Isn't that what he told you?"

EDDY: "He told me one time -- that was one incident."

STATE: "One incident, right. Well, one event, right? One B-and-E, that you just said."

EDDY: "Yes, sir."

STATE: "Okay, what is B-and-E?"

EDDY: "Breaking and entering."

* * * *

STATE: "What other acts, Doctor, did you ask the Defendant about?"

EDDY: "He volunteered rather than my asking."

STATE: "Volunteered what, Doctor?"

EDDY: "That he had alos had two or three disorderly conduct charges for which he appeared in court."

* * * *

STATE: "Okay. Suppose what he told you wasn't true, Doctor? Suppose those weren't all the acts that he committed?"

* * * *

(R. 1298)

STATE: "Well, Doctor, wouldn't that have been beneficial to determine whether or not -- in fact, he in fact lied to you when he said those were the only four acts, the three disorderly conducts and the B-and-E, isn't that a lie?"

* * * *

STATE: "Okay. So if you wrote down one B-and-E and three disorderly conducts is what the Defendant told you regarding the area that you were inquiring about, that would be true, wouldn't it?"

EDDY: "Certainly."

It is clear from the record that the State was permitted to present some evidence of the Defendant's prior criminal history in front of the jury. In light of this Court's decision in Maggard, the lower court erred in permitting the State to present such evidence after the Defendant expressly waived any reliance on the mitigating factor of no significant prior criminal activity.

Accordingly, if the conviction is upheld, the sentence should be reversed and this cause remanded for a new sentencing hearing.

POINT VI

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THREE STATUTORY AGGRAVATING CIRCUMSTANCES WHERE, AS A MATTER OF LAW, THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THE EXISTENCE OF THOSE AGGRAVATING CIRCUMSTANCES.

During the penalty phase of the trial, the Trial Court instructed the jury as to five statutory aggravating circumstances under the Florida Statues 921.141(5) for them to consider in rendering an advisory sentence. The Defendant objected to three of the aggravating factors relied on by the trial judge on the basis that they were unsupported by any evidence in this case.

The first aggravating circumstance was that the crime was especially heinous, atrocious and cruel. The language of this statutory aggravating circumstance was expounded upon in State v. Dixon, 283 So.2nd 1 (Fla. 1973), cert denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2nd 295 (1974). A majority opinion in that case said:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or tittleless crime which is unnecessarily torturous to the victim.

Based on that intepretation, the Court stated in Cooper v. State, 336 So.2nd 1133 (Fla. 1976), cert denied 431 U.S. 925, 97 S.Ct. 2220, 53 L.Ed.2nd 239 (1977), that a murder by

shooting that causes instantaneous death is simply not in the "heinous, atrocious, or cruel" category.

The numerous cases in which the Florida Supreme Court has considered challenges to the application of this aggravating factor support the interpretation requiring acts of physical harm or torture to the murder victim prior to or accomanying the act resulting in death. The Court has repeatedly rejected application of this factor to killings accomplished quickly by acts of shooting or stabbing involving no additional torturous acts to the victim. E.g., Lewis v. State, 398 So.2nd 432 (Fla. 1981); Demps v. State, 395 So.2nd 501 (Fla.), cert denied 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2nd 239 (1981); Kampff v. State, 371 So.2nd 1007 (Fla. 1979); Menedez v. State, 368 So.2nd 1278 (Fla. 1979); Riley v. State, 366 So.2nd 19 (Fla. 1978). In Kampff, supra, this Court reversed this factor and stated:

> "Directing a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance."

In the instant case, the evidence also shows that the victim died instantaneously as a result of a gunshot to the back of the head.

The trial judge did not identify any evidence presented in the trial to support his finding that the crime was especially heinous, atrocious or cruel. The trial judge simply stated:

> "Frankly, I think the killing could, by the jury, if they so desire, be considered as wicked..." (R.)

There is no evidence to show that Frances Slater was tortured in any way or was subjected to a high degree of pain. As a

matter of fact, Dr. Ronald Wright, the medical examiner who did the autopsy on the victim's body, testified that she did not feel any pain from the gunshot wound whatsoever (R. 671).

The evidence in this case clearly fails to show beyond a reasonable doubt that this offense was especially heinous, atrocious, or cruel as defined by the Florida Jury Instructions and the case law.

The Defendant also objected to the Trial Court's finding that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. That aggravating circumstance ordinarily applied in those murders which are characterized as execution or contract murders. McCray v. State, 416 So.2nd 804 (Fla. 1982); Combs v. State, 403 So.2nd 418 (Fla. 1981). For example, in Jent v. State, 408 So.2nd 1024 (Fla. 1981), this aggravating circumstance was properly found where the victim was beaten and raped by four men before being doused with gasoline and set afire. Death resulted from the burns. The Court held this circumstance requires a greater level of premeditation than the amount necessary for first degree murder convictions. Another case in which this circumstance was properly found is where the Defendant methodically held the victims at gunpoint and ordered them to strip, and then beat and tortured them during the evening before killing them. Bolender v. State, 422 so. 2nd 833 (Fla. 1982).

On the other hand, in McCray, supra, this Court held that a homicide was not committed in a cold, calculated and

premeditated manner. The facts in that case are that the Defendant approached the victim and said, "This is for you, mother fucker," and shot the victim three times.

In the case at hand, the trial judge found that the crime was committed in a cold, calculated, premeditated manner on the basis that there is some evidence to the effect that they told the victim they were going to take her out and kill her. Although there is some evidence that Co-Defendant, John Earl Bush, mentioned killing her, there is no evidence to support the contention that her death was pre-planned or calculated. On the contrary, the record clearly shows that the Defendant, Parker, had no intention of harming the girl and repeatedly insisted that they release her. The lethal act resulting in the victim's death most probably was the result of a last minute decision.

Finally, the Trial Court found evidence existed to support the aggravating circumstance that the crime was committed for financial gain. The Defendant objected to the Court's finding that both the murder was committed in the course of a robbery and that it was committed for pecuniary gain, since both findings are based on the same aspect of the criminal episode. It is well-settled that such doubling-up of aggravating circumstances which both have reference to the same aspect of the crime is error. Vaught v. State, 410 So.2nd 147 (Fla. 1982); Provence v. State, 337 So.2nd 783 (Fla. 1976), cert denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2nd 1065 (1977). Although robberies or other financially motivated crimes committed

during the course of the homocide can provide this aggravating circumstance, it cannot be doubled with the aggravating circumstance of commission during a specified felony. Provence v. State, supra.

In conclusion, none of the aggravating circumstances found by the trial judge were properly applied to the facts of this case.

POINT VII

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL DURING THE STATE'S CLOSING ARGUMENT WHEN THE PROSECUTOR REFERRED TO BUSH'S STATEMENT FROM WHICH THE JURY COULD INFER THAT THE DEFENDANT HAD SHOT FRANCES SLATER.

Prior to the start of the trial, the Defendant filed a Motion in Limine requesting a ruling from the lower tribunal prohibiting the State from eliciting from any witness or otherwise presenting in any manner to the jury any evidence from which it might be inferred that any of the co-defendants have made statements in which they might have indicated that the Defendant was the one who had shot Frances Slater. The Defendant argued that these statements were the basis why the four cases were severed and any introduction of any of those statements or testimony in reference to any of those statements would deprive the Defendant of his constitutional right of confrontation guaranteed to him by the Sixth Amendment of the United State Constitution.

The State sipulated to the Defendant's motion on this point and the Court accordingly entered its Order granting Defendant's Motion (R. 26).

During its closing argument to the jury, the State placed great emphasis as to why the Defendant requested to make a statement to Sheriff Holt. The Prosecutor improperly remarked:

> "Now, what caused J. B. Parker to say that it was John Earl who stabbed and shot her? He found out that John Earl told law enforcement who actually shot Frances Julia Slater. Listen to his statement, listen to ...." (R. 1154).

The Defendant then moved for a mistrial on the grounds that the State was prohibited from bringing out what any of the co-defendants had indicated to the effect that J. B. Parker shot the girl. Although the State did not actually say it was J. B. Parker, the remarks were highly prejudicial and the Defendant pointed out that the jury can only draw one conclusion: that the reason the Defendant requested to speak with the Sheriff was because he found out that John Earl Bush told the police authorities that J. B. Parker shot Frances Julia Slater.

In denying the Defendant's Motion, the Court stated that the jury could reach three different conclusions since there were three other co-defendants (R. 1156). However, the context in which the statement was made clearly shows that only one inference can be drawn from the State's remarks.

In light of the fact that the Trial Court had entered an Order granting Defendant's Motion in Limine to prevent the introduction of any co-defendant's statement indicating that J. B. Parker is the one that did the shooting, the Trial Court clearly abused its discretion in permitting the State to make such prejudicial remarks. Although wide latitude is permitted in arguing to a jury, Thomas v. State, 326 So.2nd 413 (Fla. 1975), a new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2nd 287, 289 (Fla. 1976), cert denied 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2nd 282

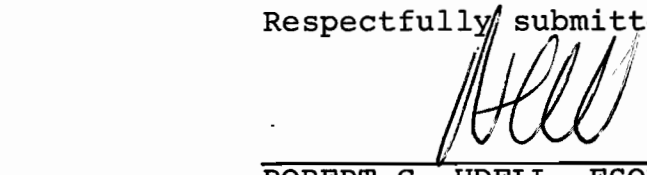
(1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id.

It is clear that the jury can only draw one conclusion from the State's highly prejudicial remarks which might have influenced them to reach a more severe verdict than it otherwise would have.

CONCLUSION

WHEREFORE, Defendant respectfully requests that this Honorable Court reverse and set aside the Judgment of Conviction and Sentence and grant the Defendant a trial de novo.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to LYDIA M. VALENTI, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 3rd day of October, 1983.

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