IN THE FLORIDA SUPREME COURT

KENNETH WAYNE HARDWICK,

Apepllant,

vs. Case No. 63-500

STATE OF FLORIDA,

Appellee

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
FOR HIGHLANDS COUNTY, FLORIDA

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The record on appeal which is contained in eight volumes will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Appellee denies that the prosecutor made a misleading closing argument regarding mathematical probabilities; furthermore, there was no proper objection.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR'S ARGUMENT TO THE JURY REGARDING THE MATHEMATICAL PROBABILITIES THAT HARDWICK WAS THE PERSON WHO COMMITTED THE CRIMES.

In this appeal appellant argues that the court erred in allowing the prosecutor to argue mathematical probabilities. This was not the basis of his objection below. Below appellant objected on the grounds that in his argument the prosecutor had not included the "world" as one of his variables in arriving at his mathematical probabilities. The assistant state attorney was arguing that

> "you start out with forty percent of the population in the country having Type A blood . . ."
>
> (R-940-emphasis supplied)

and that excluding females (R-940) ". . . of that . . . forty percent live in Sebring" (R-940). At that point appellant's counsel objected arguing that the argument misconstrued the testimony and was misleading (R-940). He then elaborated at the specifics of his objection:

> MR. SHEARER: I am going to object to this line of argument as far as starting with forty percent and saying that percentage is in Sebring. I think it's a totally misconstrued and misleading type of argument.
>
> THE COURT: I note your objection but I am going to overrule it.
>
> MR. SHEARER: You start with the world and then you say the United States and then come down to Sebring.
>
> MR. PICKARD: Okay, start with the world.
>
> THE COURT: You have explained your point. Go ahead.

In order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal argument for the objection, exception, or motion below. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). An objection must also be made with sufficient specificity so that the trial court can be apprised of the potential error. Ferguson v. State, 417 So. 2d 631 (Fla. (1982). Appellant's objection is deficient on both counts. If by his objection he meant to complain about the prosecutor's argument pertaining to mathematical probabilities he was not sufficiently specific to apprise

the court of the potential error. He did not argue that such an argument as to mathematical probalities is improper, nor did he cite any cases. In view of this court's decision in Peek v. State, 395 So. 2d 492 (Fla. 1980), which, at the very least, intimates that a finding of guilt based on mathematical probabilities is not improper, and which had been decided at the time of this trial,it can hardly be said that the objection, as interposed, apprised the trial court that it was error to allow the assistant state attorney to argue mathematical probabilities premised on the expert testimony. For the same reasons the grounds raised here are not the same as those asserted below. Here appellant claims that the argument, itself is improper. Below he argued only that it was improper because the prosecutor argued that forty percent of the country's population had Type A blood whereas the expert testified it was forty percent of the world's population. When appellant made his objections, the assistant state attorney corrected his statement to ". . . start with theworld" (R-941) and appellant's counsel appeared satisfied. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

Even assuming the objection was sufficiently specific and that the grounds asserted below are the same as those raised on this appeal there was no error. Appellant relies on one case: United States v. Massey, 594 F. 2d 676 (8th Cir. 1978). Assuming arguendo, Massey is on point it is a federal case and since the alleged error is not one of constitutional dimensions it is not binding on this court. The standards imposed by federal courts on their prosecutors and by state courts are not necessarily the same. Houston v. Estelle, 569 F. 2d 372 (5th Cir. 1978). See also Witt v. State, 387 So. 2d 922 (Fla. 1980). In Peek v. State, supra, a case involving circumstantial evidence and expert testimony concerning mathematical probabilities, if there ever was one, this court said:

> "The case against appellant is concededly circumstantial. But we are satisfied that, when considered in combination, the evidence relating to the matching fingerprints, the hair comparison, and the blood and semen analysis enabled the jury to reasonably conclude that appellant's guilt was proven beyond a reasonable doubt."
>
> (Id. 495, emphasis supplied)

It would be difficult to reconcile the above statement with a holding that a prosecutor cannot argue to a jury the mathematical probabilities of the defendant's guilt based upon the testimony presented. In fact the rule in Florida is that:

> ". . . considerable latitude is allowed in arguments on the merits of this case. Logical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. Their discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to "perform their public duty" by bringing in a verdict of guilty."
>
> Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961)

The control of a prosecutor's comments is within the trial court's discretion and this court has announced it will not interfere unless an abuse of discretion is shown. Breedlove v. State, 413 So. 2d 1 (Fla. 1982).

Appellant has not and cannot show an abuse of discretion. The prosecutor based his argument on the logical inferences that could be arrived at from the expert testimony. As stated,

appellant relies on Massey, but Massey is predicated on the prosecutor's argument coupled with the trial judge's colloguy with the expert witness wherein the judge interpreted the expert's testimony as meaning that there was only one in 4,500 or one in 2,000 chances that the expert's identification was wrong. The expert had not so testified in terms of his identification. All he had testified was that he, personally, in only 2 out of 2,000 cases had found individuals whose hairs he could not distinguish and that a Canadian study showed one in 4,500. See United States ex rel Di Giacomo v. Franzen, 680 F. 2d 515 (5th Cir. 1982) which so interpreted and distinguished Massey and wherein the court said:

> "To say that the defendant's hair is merely similar to hair found in the victim's automobile is significantly different than saying that there's a one in 4,500 chance of it belonging to someone else. If the experts testimony is the latter, we know of no constitutional principle by which its admission could be held improper."

Id at 519.

If such testimony is not improper it is difficult to see why a prosecutor cannot so comment.

ISSUE II

THE TRIAL COURT ERRED IN DENYING HARDWICK'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY CHARGE SINCE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION.

Appellant argues that the state's evidence with respect to establishing a robbery is circumstantial and, as such, insufficient. He admits that the victim's car, purse and jewelry were missing and that a necklace had been yanked from her neck (appellant's brief p. 17) but argues that the evidence is susceptible of the hypothesis that he "messed up the house" to make it look like a robbery. Whether evidence fails to exclude all reasonable hypothesis of innocence is for the jury and this court has stated it will not reverse a judgment where there is substantial competent evidence to support the jury verdict. Rose v. State, 425 So. 2d 521 (Fla. 1982). Moreover, circumstantial evidence must exclude all reasonable hypothesis; not all hypothesis, Riutta v. State, 299 So. 2d 620 (Fla. 2 DCA 1974). It need not be free of alternative interpretations and the state is not required to rebut, conclusively, every possible variation or explain every possible construction in a way which is consistent only with the defendant's guilt. State v. Allen, 335 So. 2d 823 (Fla. 1976).

As appellant recognizes, a bruise on the decedent's neck indicated that a necklace had been yanked from her neck. In

Ferguson v. State, 417 So. 2d 631 (Fla. 1982) the victim's earlobe was torn where an earring had been taken. In rejecting a similar argument as made here this court said:

> "The crux of the matter is that all the state could show was that the victims had valuables on their persons before they were killed and that the jewelry was missing when the bodies were discovered. The defense argues that since the bodies were in the wooded area overnight, anyone passing by could have stolen the money and jewelry. We agree with the state that this is not a reasonable hypothesis of innocence; there was evidence that the jewelry was taken with some degree of violence; it rained very hard that night; and the bodies were found just a few hours after sunrise."

While not expressly saying so appellant argues that his version of events, as he allegedly related to Ms. Brosambly, and as she related at trial must be accepted. But, his version need not be accepted where circumstances demonstrate otherwise. Phippen v. State, 389 So. 2d 991 (Fla. 1980).

In the instant case, not only does the evidence establish that property was taken, but as appellant recognizes in his statement of facts, earlier in the night he had no money whereas later he had a "wad" of money. (Appellant's brief p.6)

ISSUE III

THE TRIAL COURT ERRED IN ADJUDICATING GUILT AND IMPOSING SENTENCE FOR BOTH FELONY MURDER AND ITS UNDERLYING FELONY SINCE DOUBLE JEOPARDY BARS MULTIPLE CONVICTIONS AND SENTENCES FOR LESSER INCLUDED OFFENSES.

Appellant argues that it constitutes double jeopardy for him to be convicted and sentenced for both the murder and the underlying felony because ". . . the underlying felony in a felony murder is necessarily included within the latter. (appellant's brief page 18). He does not, however, elaborate as to which of the underlying felonies was necessary to support the murder. Appellant was not only indicted and convicted of first degree murder, but of sexual battery, robbery and burglary any of which would,as the underlying felony, support a conviction for first degree murder. (R-3-5) Since any one of these felonies would suffice as the underlying felony none is necessary as the underlying felony. Moreover, there was ample evidence of premeditation. Appellant recognizes that matters, such as the weapon used, the manner in which the homicide was committed,and the nature of the wounds all bear on the question of premeditation. We agree. The victim was a 72 year old woman. Hardly the type of person that could assault or offer much resistance to a 33 year old man. Her death had been caused by either manual strangulation or smothering (R-622-634). Death would have taken minutes (R-623); certainly more than the time necessary to form a conscious purpose to kill. Williams v. State, So. 2d (Fla. 1983), decided June 23, 1983, Case No. 61-549. Since there was ample evidence of premeditation there is no jeopardy problem. McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), Breedlove v. State,

413 So. 2d 1 (Fla. 1972), Tafero v. State, 403 So. 2d 355 (Fla. 1981).

Bell v. State ____ So. 2d ____ (Fla. 1983), 8 CLR 199 cited by appellant does not avail him. Whatever that case holds, it does not hold that simply because an underlying felony may possibly be a lesser included offense that no conviction or sentence may be imposed.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING SECTION 921.131, FLORIDA STATUTES (1979), AND THE STANDARD PENALTY PHASE JURY INSTRUCTIONS CONSTITUTIONAL SINCE THEY USE LIMITING WORDS WHICH RESTRICT THE SENTENCERS' CONSIDERATION OF MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Although the instructions given clearly informed the jury that the mitigating circumstances were unlimited appellant complains about certain modifying words appearing in some of the statutory mitigating circumstances; viz: "extreme" "significant" "relative" and substantial.

We would point out that if the word "significant" is deleted from Fla. Stat. 921.141 (6)(a) it would be more

detrimental to a defendant because then he would not have the benefit of that section if there was any history of prior criminal activity.

Nevertheless the only modifiers that are applicable in this case are those appearing in subsection 6 (b) and 6 (f) because the state and the defense agreed that these were the only applicable mitigating circumstances that the jury need be instructed (R-989).

Appellant argues that the word "extreme" in subsection 6 (b) and the word "substantially" in subsection 6 (f) violated the precepts of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed 2d 973 (1978) and Eddings v. Oklahoma, _____U.S._____ S. Ct._____ 71 L. Ed 2d (1982) because they place a limitation on the mitigating circumstances appearing in those sections.

We beg to disagree. The word "extreme" when modifying mental or emotional disturbance is necessary to separate it from the norm of emotional or mental disturbances that any normal breathing human being is prey to. Similarly, the word "substantially" serves to identify the degree of diminished capacity from the norm that any human being on any given day may suffer.

The point is that these words are not a limitation on the mitigating circumstances, they are definitional words that serve to channel the jury with respect to these mitigating circumstances. Compare: Peek v. State, 395 So. 2d 492 (Fla. 1980). The constitution does not prohibit channelled discretion. The discretion must be suitably directed and limited so as to minimize the risk of wholly,arbitrary and and capricious action. Barcley v. Florida, 33 Cr. L. 3292 (1983). In California v. Ramos, 33 Cr. L. 3306, 3308 (1983) Justice O'Conner speaking for the majority, while referring to the joint opinion of Justices Stewart, Powell and Stevens in Gregg v. Georgia, 428 U. S. 153 (1976) commented:

> Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

As this Court recognized in Peek, supra,channeled discretion is required, not only with respect to aggravating circumstances but also with respect to the mitigating; otherwise, the jury will be left to it's unfettered discretion in making it's recommendation.

Moreover, it is important to recognize the function of statutory mitigating circumstances. As Justice Stevens points out in Barcley, supra at 33 Cr. L. 328, the second threshold question for the sentencing authority is to determine whether any of the statutory mitigating exist and if so whether they outweigh the statutory aggravating. Consequently, in making this second threshold determination the sentencing authority (in Florida, the judge, not the jury) is concerned only with statutory mitigating circumstances and, as such, is bound by their respective definitional terms. As Justice Stevens point out, this does not mean that the judge cannot impose life based, additionally, on non-statutory mitigating factors. It only means that in determining whether the defendant falls within that class of persons upon which death may be imposed the sentencing authority must first determine whether the statutory aggravating outweigh the statutory mitigating.

The function of the jury is to recommend, not to impose sentence. In making this recommendation they are instructed with respect to the statutory mitigating circumstances, as defined, in order that they be channeled in their recommendation in much the same way as the sentencing authority is, in reaching its second threshold question. Additionaly, they are instructed that in making this recommendation they may consider

any aspect of the defendant's character or record, and any other circumstance of the offense.

Consequently, while the sentencing authority may be limited in reaching its second threshold question neither the sentencing authority nor the jury in its recommendation is limited with respect to factors they may consider in mitigation.

Lastly, this court recently decided this issue adversly to appellant Johnson v. State, So. 2d (1983) 8 FLW 313.

ISSUE V.

THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTIONS ON ONLY THOSE AGGRAVATING CIRCUMSTANCES WHICH WERE SUPPORTED BY THE EVIDENCE.

Interestingly, during the charge conference counsel for appellant agreed that aggravating circumstances (a), (c), (e) and (g) of Florida Statute 921.141 (5) were inapplicable and that no instruction need be given pertaining to them. (R-993-997). Consequently, he cannot now complain. McCaskill v. State, 344 So. 2d 1276 (Fla. 1977), Ross v. State, 386 So. 2d 1191 (Fla. 1980).

ISSUE VI.

THE TRIAL COURT ERRED BY REFUSING TO GIVE HARDWICK'S REQUESTED JURY INSTRUCTIONS CONCERNING THE JURY'S RECOMMENDATION ON THE PENALTY TO BE IMPOSED WHERE SUCH INSTRUCTIONS CORRECTLY STATED THE LAW TO BE APPLIED AND WERE NOT COVERED BY THE INSTRUCTIONS GIVEN.

In the first place appellant did not interpose a timely objection to the failure to give requested instructions 5 and 11. While he did request them during the charge conference (R-993,997) he did not interpose his objection prior to the jury retiring to consider its verdict (R-1050). Florida Rule of Criminal Procedure 3.390 (d) so requires. At the charge conference counsel simply requested that these instructions be given; he did not object to their not being given (R-993-997). Even if he had, it was incumbent upon him to again object prior to the time the jury retired. Requested instructions may correctly state the law and that fact alone may support the request, but it may not be erroneous to deny them if sufficiently covered by the court's other instructions or if not supported by the evidence. White v. State, 324 So. 2d 115 (Fla. 3 DCA 1975). Hisler v. State, 42 So. 692 (Fla. 1906). That is why counsel is required to not only request, but to interpose an objection giving the grounds as to why the denial was error. Guarino v. State, 67 So. 2d 650 (Fla. 1953), Smith v. State, 396 So. 2d 206 (Fla. 1981), Castor v. State, 365 So. 2d 701 (Fla. 1978). We are cognizant of this court's holding in Spurlock v. State, 420 So. 2d 875 (Fla. 1982), but Spurlock involved the sufficiency of the objection, not whether one was in fact made.

Moreover, assuming timely and proper objections were interposed, the trial court did not err. Neither requested instruction stated a correct principle of law.

Requested instruction numbered five indicates that the jury is the sentencing authority. It is not. The jury recommends. It does not, as the instruction says ". . . return a sentence."

Requested instruction one incorrectly states that some additional evidence is needed. Additional evidence is not needed. It is one thing to say that premeditation and the cold calculated factor are not synonymous; quite another, to say that additional evidence other than that utilized to prove premeditation is needed to prove it was committed in a cold, and calculated manner. Evidence that one lies in wait with a high powered rifle to shoot another from a distance would suffice to prove that the murder was both premeditated and committed in a cold and calculated manner.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING HARDWICK TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant argues that certain misapplications of Florida's death statute, which he alleges occurred in his case, re-infect into the sentencing process the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972). We disagree. Barclay v. Florida, 33 Cr. L. 3292 (1983) and Zant v. Stephens 33 Cr. L. 3195 (1983), clearly indicate that as far as the federal constitution is concerned a sentence of death is not arbitrary and capricous where there is at least one valid statutory aggravating circumstance and other procedurals safeguards have been met. Moreover, as long as the definitions of the respective statutory factors meet constitutional muster those definitions are primarily a matter of state law.

A.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT HARDWICK HAD BEEN PREVIOUSLY CONVICTED OF A FELONY INVOLVING VIOLENCE.

Appellant recognizes that this aggravating circumstance comports with the decisions of this court in King v. State, 390 So. 2d 315 (Fla. 1980) and McCrae v. State, 395 So. 2d 1145 (1980), and, as the lower court, related in its findings (A- 1) with Lucas v. State, 376 So. 2d 1149 (Fla. 1979). Appellant, nevertheless, claims that those cases do not comport with the legislative intent or due process standards. As far as due process is concerned we refer this court to footnote 5 of Zant v. Stephens, 33 Cr. L. 3195 (1983) wherein the Court pointed out that such an interpretation as to when a conviction applies is a matter of state law. See also Alabama v. Evans, 75 L. Ed 2d 806 (1983).

B.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING CERTAIN FELONIES SINCE THE SAME FELONIES WERE THE UNDERLYING FELONIES FOR THE MURDER CONVICTION.

Here again, appellant recognizes this court has held otherwise: Menendez v. State, 419 So. 2d 312 (Fla. 1982), White v. State, 403 So. 2d 331 (Fla. 1981). How appellant can claim it is against legislative intent in view of the language in Fla. Stat. 921.146 (5)(d) escapes the undersigned.

C.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED FOR PECUNIARY GAIN.

This contention that there was insufficient evidence to establish that appellant stole some property has been sufficiently covered in issue II and will not be repeated here. Since there was evidence of theft the finding of this aggravating circumstance was not improper.

D.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

We do not quarrel with what appellant says under this sub issue with respect to the cold, calculated aggravating factor, but we do submit the evidence was more than sufficient. There is evidence appellant planned the murder in advance because he was looking for money. His victim was a 72 year old woman. He was 33. Death was by strangulation or smothering and would have taken minutes. This is not, as occurred in King

v. State, 8 F.L.W. 271 (1983), a husband and wife squabble wherein an enraged husband kills his wife. Appellant went to his victim's house for a purpose: to steal. Coldly and calculatedly he strangled her to death.

E.

THE TRIAL COURT ERRED IN NOT FINDING AS MITIGATING FACTORS THAT THE MURDER WAS COMMITTED WHILE HARDWICK WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE AND/OR THAT HARDWICK'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

It is clear that the trial judge considered these two mitigating circumstances and after having done so he rejected them. That was within his prerogative. Lucas v. State, 376 So. 2d 1149 (Fla. 1979), Martin v. State, 420 So. 2d 583 (Fla. 1982), Dougherty v. State, 419 So. 2d 1067 (Fla. 1982).

ISSUE VIII

THE TRIAL COURT ERRED IN IMPROPERLY DOUBLING STATUTORY AGGRAVATING CIRCUMSTANCES, RENDERING HARDWICK'S DEATH SENTENCE UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Why we continue to worry about "doubling up" when it is a weighing process and not a counting process, State v. Dixon, 283 So. 2d 1 (Fla. 1973) escapes the undersigned; more especially in view of the recent decisions in Barcley and Zant supra.

Nevertheless to the extent there was any doubling up it is harmless since there were no mitigating circumstances. Clark v. State, 368 So. 2d 97 (Fla. 1979), Straight v. State, 397 So. 2d 903 (Fla. 1981). See also Jacobs v. State,396 So. 2d 1113 (Fla. 1983).

Moreover, while this may not have been distinct proof with respect to the robbery and pecuniary gain there was distinct proof with respect to the sexual battery, the robbery and the burglary. Hill v. State, 422 So. 2d 816 (Fla. 1982), Waterhouse v. State, 429 So. 2d 301 (Fla. 1983).

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the judgments and sentences should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Ms. Karla J. Staker, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830-3798 on this 12th day of September, 1983.

OF COUNSEL FOR APPELLEE