IN THE FLORIDA SUPREME COURT

KENNETH WAYNE HARDWICK, :

Appellant, :

vs. : Case No. 63,500

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HIGHLANDS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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 its answer brief Appellee rather ingeniously argues that at trial defense counsel did not object to the prosecutor's closing argument on the same ground as that argued on appeal. Appellee, however, misinterprets the objection and the discussion which followed it.

In closing argument the prosecutor stated that 32% or 40% of the United States' population could have committed the crime. (R940) He then went on to state that the percentage of people in Sebring's population would be much less. (R940) It was at that point that defense counsel objected (R941):

> I am going to object to this line of argument as far as starting with forty percent and saying what percentage is in Sebring. I think it's a totally misconstrued and misleading type of argument.

In this objection, defense counsel clearly stated that it was misleading for the prosecutor to argue that the percentage of people in Sebring who could have committed the crimes was less than the percentage found in the general population. Defense counsel was using obvious sarcasm to show his point when, after his objection was overruled, he stated:

> You start with the world and then you say the United States and then you come down to Sebring.

When, at that point, the prosecutor agreed to "start with the world," the trial judge cut off further discussion on the objection. Even though the Appellee's answer brief indicates that Appellee does not understand the objection, the trial judge obviously did since he closed the discussion with, "You have explained your point. Go ahead."

ISSUE II.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING HARDWICK'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY CHARGE.

In its answer brief the State suggests that the standard of appellate review of the legal sufficiency of circumstantial evidence stated in Jaramillo v. State, 417 So.2d 257 (Fla.1982), has been changed by Rose v. State, 425 So.2d 521 (Fla.1982). The State is incorrect.

Jaramillo stated the standard as follows:

> A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. In McArthur v. State, 351 So.2d 972,976 n.12 (Fla.1977), we reiterated this standard to be that "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."

Id., 417 So.2d at 257. Chief Justice Alderman authored the Jaramillo opinion issued July 8, 1982. He also authored the Rose opinion issued December 9, 1982. In Rose, Justice Alderman stated, "Whether, as defendant asserts, the evidence failed to exclude all reasonable hypotheses of innocence is for the jury to determine, and we will not reverse a judgment based upon a verdict where there is substantial, competent evidence to support the jury verdict." 425 So.2d at 523. Although Justice Alderman did not mention the Jaramillo standard of review in Rose, surely he cannot have intended to

overrule himself by implication only five months after deciding Jaramillo. The decision in Rose means only that the Jaramillo standard was satisfied; no reasonable hypothesis of innocence appeared, so the verdict was supported by competent substantial evidence.

Ferguson v. State, 417 So.2d 631 (Fla.1982), cited by the State is clearly distinguishable from the instant case. At Ferguson's trial his attorney argued the possibility that a passerby might have stolen money and jewelry from the victims' bodies in between the time they were killed and the time their bodies were discovered. This Court's holding that this was not a reasonable hypothesis was based on the fact that there was no evidence introduced at trial to support such a theory.

Here, the hypothesis of innocence as to the robbery charge was supported by Hardwick's statements to Ms. Brosambly. Since the State relied on those incriminating statements at trial, it is not in a position to urge here that the statements do not constitute competent substantial evidence supporting the hypothesis of innocence.

ISSUE VI.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY REFUSING TO GIVE HARDWICK'S REQUESTED JURY INSTRUCTIONS CONCERNING THE JURY'S RECOMMENDATION ON THE PENALTY TO BE IMPOSED.

Contrary to the State's assertion, defense counsel adequately preserved the jury instruction question for appellate review. This Court has held that if a defense attorney clearly requests a jury instruction and states the basis for the request, failure to say "I object" to rejection of the instruction does not preclude appellate review. Spurlock v. State, 420 So.2d 875 (Fla.1982); Thomas v. State, 419 So.2d 634 (Fla.1982).

Here, defense counsel filed written jury instructions five and eleven. (R113,119) At the charge conference each side argued the necessity of the instructions and the trial judge ruled against giving them. (R993-994,997-998):

> MR. SHEARER [defense counsel]: ***No.5 is self-explanatory. This takes up the language of the Dixon decision, that to return a finding or recommendation for life imprisonment the Jury does not have to find any particular circumstance, a life sentence may be recommended regardless of the mitigating circumstances.
>
> THE COURT: Mr. Pickard.
>
> MR. PICKARD [prosecutor]: I have a real problem with that one, and in telling the Jury they can disregard the evidence. I don't think that they can or should be told they can disregard the evidence; therefore, I object to this particular instruction.
>
> THE COURT: I am going to deny that particular one. I don't think there is any basis for it.

* * *

> MR. SHEARER: No. 11 instructs the jury that the fact they found Mr. Hardwick guilty of premeditated murder, if they did, does not in and of itself mean he's guilty of--excuse me--that he should be found to have committed aggravating circumstance "cold, calculating, premeditated," et cetera. And another statement, there must be some additional evidence beyond premeditated murder to establish this particular aggravating circumstance, and case law is the Coleman versus State decision. In that case the defendant was objecting, saying this particular aggravating circumstance is absurd because it says premeditated murder makes it aggravating. The Court said no, it takes more than premeditation to fit this circumstance. We feel the Jury should be instructed to that regard.
>
> THE COURT: Mr. Pickard.
>
> MR. PICKARD: I agree the proposed instruction No. 11 is a correct statement of the law as it presently exists. I disagree that it is necessary that the Jury be instructed on it. It is not made a part of the standard instructions that presently exist.
>
> THE COURT: I agree with you. I am going to deny instruction No. 11.

Since the record shows that the requests were clearly made and that the trial judge clearly understood them, the issue was preserved for appellate review.

Contrary to the State's assertion, the principle of law stated in requested jury instruction number 5 was correct. See, Williams v. State, 386 So.2d 538 (Fla.1980); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Despite its use of the word "sentence" instead of the term "advisory sentence," in the context of the advisory sentencing hearing its meaning was

plain. And, the prosecutor did not object to the instruction based on its use of the word "sentence."

As to requested jury instruction number 11, the State seems to argue that the instruction incorrectly implies that the State must prove additional evidence at the sentencing hearing, rather than just relying on the evidence presented at the guilt phase, in order to prove the aggravating factor cold, calculated and premeditated without pretense of moral or legal justification. The instruction, however, does not imply that. It merely states that for the aggravating circumstance in question to be found "[t]here must be some additional evidence beyond the evidence required to prove the murder was premeditated..." (R119) This is a correct statement of the law; this Court has uniformly interpreted this aggravating factor to require proof, i.e. evidence, beyond mere premeditation. Jent v. State, 408 So.2d 1024 (Fla.1981); Combs v. State, 403 So.2d 418 (Fla.1981). In Jent the Court said:

> The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the State will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor--"cold, calculated...and without any pretense of moral or legal justification."

408 So.2d at 1032. That even the State misinterprets the level of proof needed for this aggravating factor underscores the need for an explanatory instruction to the lay jury.

ISSUE VII.

D.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

Further support for Hardwick's position that the facts of the case did not establish the aggravating factor cold, calculated and premeditated without pretense of justification is found in King v. State, __So.2d__, 8 FLW 271 (Fla. Case No. 59,464, opinion filed July 21, 1983). King got into an argument with his girlfriend who was physically smaller than he was and who was not threatening him in any way. He struck her in the face with a heavy steel bar, not causing unconsciousness. He then went into another room of the house, secured a pistol from its place of concealment, returned to the victim and shot her, once in the face and once in the back of the head. In finding the cold and calculated aggravating factor inapplicable this Court reaffirmed its position that that factor usually applies to murders which can be characterized as executions or contract murders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 17th day of October, 1983.

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