IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,

Appellant,

vs. CASE NO. 63,594

STATE OF FLORIDA,

Appellee.

______________________/

ANSWER BRIEF OF APPELLEE

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TOPICAL INDEX

AUTHORITIES CITED

Cases

<u>Statutes</u>

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PRELIMINARY STATEMENT

Kayle Barrington Bates is the appellant in this capital appeal. The record on appeal consists of 17 volumes, and references to the first two documents will be indicated by the letter "R." References to the remaining documents, which contains the trial transcript, will be indicated by the letters "TR."

STATEMENT OF THE CASE

While Appellee generally accepts the statement of the case as contained on pages two and three of Appellant's initial brief, said statement is incomplete. The following additions are necessary for proper disposition of the issues on appeal.

At the close of the prosecution's case Appellant's counsel moved for a judgment of acquittal as follows:

HON. BOWERS:

> The Defendant has a Motion for Judgment of Acquittal on the basis that the State has not produced a prima facie case.

THE COURT:

> That is to Count I, II, III and IV?

HON. BOWERS:

> All counts.

THE COURT:

> All right, Motion be denied.

(TR 709, 710).

At the close of all evidence, Appellant's counsel argued:

HON BOWERS:

> Your Honor, we move at this time for a Judgement (sic) of Acquittal on the basis that the evidence, they haven't met their burden of proof. We move for a Judgement (sic) of Acquittal on the basis that the evidence, on all evidence that a reasonable man could not get acquitted, that this man is innocent.

THE COURT:

> If you're going to present a Motion like that you better add to it, the State has proved no kidnapping, no rape, no robbery?

HON. BOWERS:

> Right.

THE COURT:

> All right, Motion be denied.

(TR 845, 846).

During a discussion regarding the jury instructions and jury verdict forms Appellant's counsel stated that the verdict form was "all right." (TR 774).

During his instructions to the jury, the trial court stated:

> Only one verdict may be returned as to each crime charged. This verdict must be unanimous. . .
>
> Now, a separate crime is charged in each count of the indictment and while they have been tried together each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each count. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crimes charged.
>
> The verdict form. . . simply reads State of Florida vs. Kayle Bates. We the Jury find the Defendant as to Count I, Guilty of: and there is a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q. I didn't count them but if you find the Defendant Guilty of Murder in the First Degree by premidation (sic) as charged, then you would check "a" as your finding. If that is your finding from the evidence beyond a reasonable doubt.
>
> If your finding from the evidence beyond a reasonable doubt is that Mr. Bates is guilty of First Degree Felony Murder as charged, then you would

> check "b" . . .
>
> Now, if you fail to find Mr. Bates guilty of Murder or if you have a reasonable doubt about Mr. Bates' guilt of Murder or any of those lesser included crimes, you should give him the benefit of that doubt and find him not guilty, in which case, you would check "r" down here for not guilty. Does everyone understand that?

(TR 922-924).

The trial court went through similar instructions regarding the charges of kidnapping, sexual battery, and armed robbery. (TR 924, 925). The trial court clarified, upon request of counsel, that there was to be but one finding as to each of the four counts. The jury indicated that they understood that. (TR 927).

Appellant's counsel thereafter offerred no objection to the instructions as given. (TR 927, 928).

The verdict forms utilized, in conjunction with the instructions given, indicate that one finding was to be made regarding each count. (R 262, 263).

The trial court explained premeditation to the jury, stating such was "a question of fact to be determined by you from the evidence." (TR 899). The trial court explained that proof of premeditated intent to kill was not required for felony murder. (TR 900).

Robbery was defined for the jury as being the taking of money or property from another by "force, violence, assault, or putting in fear." (TR 902).

The jury was instructed as to attempted crimes (TR 908), and also as to the defense of abandonment. (TR 909).

As noted by Appellant, the jury, following instructions and deliberations, found Appellant guilty of premeditated first degree murder, kidnapping, armed robbery, and attempted sexual battery. (R 202, 203).

During the penalty proceedings the prosecutor argued that five aggravating circumstances greatly outweighed the singular mitigating circumstance. (TR 958-962). The jury recommended a sentence of death. (R 210). The Court agreed with the prosecution and the jury in imposing a penalty of death. (TR 1155-1163; R 221-225).

STATEMENT OF THE FACTS

While Appellee generally accepts the statement of the facts as contained on pages four through six of Appellant's initial brief, said statement is incomplete. The following additions are necessary for proper disposition of the issues on appeal:

Randy White, the victim's husband, testified that his wife's rings fit her well and she had never lost them. (TR 291). He last had sexual relations with his wife two days prior to her murder. (TR 296).

Geraldine Gilchrist called the State Farm office again, after contacting police regarding the first call, and there was no answer. (TR 306).

Jim Dickerson testified that the victim was his sole employee, that it was normal for his office to be closed from twelve noon until 1:00 p.m. for lunch, and that the office hours were posted on the front door. (TR 310, 311). When he arrived at his office on June 14, 1982, at approximately 1:07 p.m., the office was in disarray. The telephone was out of position, the victim's shoes and purse were lying on the floor, two cannisters of mace were lying about, a microfische cover was on the floor, the drapes to Dickerson's sliding glass doors were open, and his calculator was unplugged. (TR 312-315). The sliding glass door was ultimately found to be ajar. (R 316). The victim's car was in the lot, but no other vehicles were there. (R 314). The office scissors were still in the office upon Dickerson's arrival, in the victim's top desk drawer. (TR 329, 330). No sharp objects were missing from the office. (TR 330). Dickerson further testified that the victim was slow to anger. (TR 335). Upon inspection, the sliding glass door showed signs of forced entry. (TR 337, 338).

Don Ciota, Lynn Haven police officer, responded to the State Farm office and saw Appellant. Appellant's clothing was wet and muddy; there appeared to be blood on his shirt. (TR 363-365). Appellant stated he lost his company baseball cap in the woods while gathering cattails. (TR 366). Appellant had abrasions on his arms. (TR 368).

Investigator Guy Tunnell testified that Appellant's delivery truck was not visible from the highway or State Farm office parked, as it was, at the dead-end of Peachtree. (TR 980). He also saw the blood on Appellant's clothing and the scratches on his arms. (TR 982, 983). Tunnell was present when a knife scabbard, blue nylon cord, and Knight Paper baseball cap were found in the woods. (TR 985-987). He noticed one set of tennis shoe prints in the area where the items were found. (TR 992).

Frank McKeighen, also an investigator, took a watch and ladies diamond ring from Appellant during questioning. (TR 1000-1002).

Investigator Paul Vecker overheard Appellant tell his wife on the phone that he had "killed a woman." Appellant's wife hung up on him. (TR 1029, 1030).

Sgt. Bobby Nowell, a lab technician verified that the sliding glass door at the State Farm office had been pried open. He identified a garbage can holder found at the scene and said it showed signs of being freshly handled. He "felt certain" the holder was used to pry the door open. (TR 1047-1049). Nowell took foot print casts at the scene. (TR 1058-1060). He also tested the scissors from the State Farm office and found no blood nor evidence that they had been wiped off recently. (TR 1067, 1068).

Raymond O'Brien testified that Appellant's delivery route was unsupervised. (TR 383). Roger Wingate had seen Appellant with a Buck knife and case at work. (TR 386, 387). Elbert Allen had as well, and he remembered the case had a blue nylon cord on it. (TR 389-394). Sgt. Henry Cannon saw Appellant with a knife and case two days prior to the murder. He identified the case because of the army-issue cord and alligator clip. Cannon was Appellant's superior in the National Guard. (TR 389-412).

Sheriff Lavelle Pitts found the victim in the woods behind the State Farm office. Her clothing was ripped and torn, blood covered her face. (TR 417, 418). The victim was on her back and her body was covered with bruises and abrasions. Part of her pantyhose was stretched into a briar bush. (TR 419, 420).

Dr. Joseph Sapala, medical examiner, testified the victim was dead at the scene of the crime. (TR 435). His autopsy revealed some fifteen contusions, seven abrasions, twenty incisions, and two deep stab wounds to the chest of the victim. (TR 444, 445). The stab wounds were 4" deep, approximately 3/4" by 1/4" in dimension. (TR 440). There were contusions on the victim's neck consistent with strangulation and rope burns. (TR 450). Indications of lack of oxygen existed as well. (TR 449). The two stab wounds would take five to ten minutes to cause death. (TR 453, 454). Either a blow to the head or strangulation could have caused death. (TR 453). The official cause of death was hemorrhagic shock secondary to stab wounds, i.e., a massive amount of blood filled the chest cavity. (TR 452).

Dr. Sapala found a 1/4" incision to the victim's left ring finger. (TR 443). There were also bruises on the same finger. (TR 445, 446).

Semen was found to be present on the vaginal smears of the victim. (TR 437, 462, 463).

The doctor stated that the stab wounds were inconsistent with scissors being used as the weapon, but consistent with a Buck knife. (R 464, 465). The blue nylon cord could have caused the neck contusions. (TR 465).

Investigator Charles Robinson testified that no blood was found inside the State Farm office or in the area between the office and where the victim was found. (TR 473-476).

Mary Lynn Hinson, a microanalysist in the field of shoe tracks, testified that Appellant's right tennis shoe could have made the print found at the scene. (TR 482-490).

James Luten, a specialist in microanalysis as well, testified that the watch pin found inside the State Farm office could have come from Appellant's watch. The pins were the same in color, diameter, size, and length. They exhibited similar construction charactersitics. (TR 498-503). Luten also found olive green polyester fibers on the victim's skirt and blouse. The fibers could have come from Appellant's trousers, i.e., army fatigues. (TR 505-509).

Suzanne Harang, a forensic serologist, testified the victim had type A blood and Appellant had type O blood. (TR 536). She found semen on a vaginal swab of the victim and on the victim's panties and Appellant's briefs. (TR 540, 542-544). Harang found type A blood on both the victim's clothing and on Appellant's shirt and pants. (TR 541-545). Type A blood, the victim's type, was also found on the blue nylon cord. (TR 548). Harang's conclusion: all blood found, either on the victim or Appellant, was type A, the victim's type. No type O blood was detected. (TR 551).

Investigator McKeithen testified once more. Appellant had a watch with a pin missing and a ladies diamond ring on his person when arrested. Appellant first said the ring was his wife's, but the victim's husband identified it contrarily. (TR 572-574). Appellant then said he found the ring. (TR 575, 576).

Appellant's two recorded statements were played for the jury. (TR 589-650). In the latter statement Appellant claimed the victim was killed accidentally during a struggle over the scissors. While not "really" trying to have sex with the victim, Appellant did remove his penis from his pants and experienced a premature ejaculation, according to the latter statement. (TR 633-650). The scissors Appellant said killed the victim were never located. (TR 654, 655).

Appellant testified at trial as stated in his initial brief. The trial testimony conflicted with Appellant's last statement to police in material respects.

ISSUE I

THE JURY VERDICTS WERE CONSISTENT AND APPELLANT PROPERLY ADJUDGED GUILTY OF PREMEDITATED FIRST DEGREE MURDER, KIDNAPPING, ARMED ROBBERY, AND ATTEMPTED SEXUAL BATTERY.

(Appellant's Issue I as restated by Appellee).

Appellant contends that the jury's verdict finding him guilty of premeditated first degree murder operated so as to acquit him of felony murder and, therefore, of the underlying felonies. Such a contention has no basis in either logic or law.

Appellant relies on this Court's opinion in Hawkins v. State, ___ So.2d ___ (Fla. 1983) [8 F.L.W. 245], to support his theory that the jury found him "not guilty" of felony murder. (AB 7). Hawkins involved a jury verdict of guilty for felony murder and this Court held that the defendant could not be sentenced for both the underlying robbery and first-degree felony murder, citing to State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). Hawkins has no applicability to the instant case.

Under section 782.04, Florida Statutes (1981), the offense of first-degree murder may be committed in several ways, including murder by premeditated design or a felony murder supported by various felonies. Lightbourne v. State, ___ So.2d ___ (Fla. 1983) [8 F.L.W. 375]. Felony murder situations do not require proof of a premeditated intent to kill, since premeditation is presumed as a matter of law. Larry v.

State, 104 So.2d 352 (Fla. 1958). It has long been settled that the State may proceed on alternative theories under an indictment charging first-degree murder. Knight v. State, 338 So.2d 201 (Fla. 1976). It is the jury's duty to evaluate the evidence and decide what crime, if any, has been proved beyond a reasonable doubt. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

From the outset Appellee submits the specific contention made herein was never asserted at the trial level and therefore is not cognizable on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Further, Appellant's reasoning necessarily involves a conclusion that first-degree murder proved by premeditated design and first-degree murder proved by felony murder are mutually exclusive. Appellee disagrees. The proof adduced at Appellant's trial supports a verdict of first-degree murder under either evidentiary theory. See: Campbell v. State, 227 So.2d 873, 879 (Fla. 1969) (wherein this Court found proof of first-degree murder by means of premeditation and felony murder existed at trial). Where there is clear evidence of premeditation, it is not necessary to prove an underlying felony, however nothing precludes it. Tafero v. State, 403 So.2d 355, 361 (Fla. 1981).

The trial court herein did not afford the jury an opportunity to explain the evidentiary basis of its verdict by means of a mutual or "and/or" verdict. Rather, the jury was told to render one verdict - and one verdict only - as to each count. (TR 922-924). The jury followed those instructions and found Appellant guilty of first-degree murder proved by premeditated design, kidnapping, armed robbery, and attempted sexual battery. (R 202, 203). Appellant did not object to the instructions as given. How can he now say that the jury really meant to acquit him of the underlying felonies when their verdict forms reveal the exact opposite? Such a contention is patently illogical.

Appellant relies on cases where inconsistent verdicts existed due to the jury acquitting on one charge which formed an essential element of a higher crime charged. Redondo v. State, 403 So.2d 954 (Fla. 1981); Mahaun v. State, 377 So.2d 1158 (Fla. 1979). Those cases are inapplicable.

Herein Appellant was acquitted of nothing more than sexual battery, the jury returning a quilty verdict as to attempted sexual battery. (R 202). If anything, since the evidence revealed all the crimes occurred during an ongoing criminal episode, the jury implied by its verdicts that Appellant was guilty of first-degree murder both because of his premeditated intent to kill the victim and because the homicide occurred during the commission of three other felonies. The jury's court-imposed silence regarding blank "b" of Count I should not be twisted to suggest what Appellant urges this Court to believe.

Appellant does not contend that proof was lacking as to the verdict rendered. Appellee submits that the manner in which the homicide was committed and the nature and manner of the wounds inflicted supplied ample evidence of premeditation. Welty v. State, 402 So.2d 1159 (Fla. 1981); Mines v. State, 390 So.2d 332 (Fla. 1980).

Appellee submits the jury verdicts were consistent and Appellant was properly adjudged guilty of the crimes the jury found to be proved beyond a reasonable doubt.

ISSUE II

THE EVIDENCE SUPPORTED THE JURY'S VERDICT AND THE TRIAL COURT PROPERLY ADJUDGED APPELLANT GUILTY OF ATTEMPTED SEXUAL BATTERY.

(Appellant's Issue III as restated by Appellee).

Appellant asserts a "defense" of abandonment for the first time on appeal. This theory was never asserted at trial, nor was it ever argued as a ground for acquittal. (TR 709, 710, 845, 846). In fact, Appellant's trial testimony is entirely inconsistent with any abandonment theory of defense. Appellant denied making any statements to police, testified that he fell asleep, and eventually found the victim's body. (TR 776-814). Specifically, he denied committing any offenses against the victim or her property. (TR 802, 813-814). Appellee submits that since the present argument was never presented to the trial court below, Appellant is precluded from raising it for the first time on appeal. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978); G.W.B. v. State, 340 So.2d 969 (Fla. 1st DCA 1977).

Intent is almost always inferred from circumstantial evidence and the jury has the duty of weighing the evidence, judging the credibility of witnesses, and ultimately determining a defendant's state of mind. State v. Alexander, 406 So. 2d 1192, 1194 (Fla. 4th DCA 1981); State v. Rogers, 386 So.2d 278, 280 (Fla. 2d DCA 1980); Cummings v. State, 378 So.2d 879 (Fla 1st DCA 1979). Whether the evidence presented at trial excluded all reasonable hypotheses of innocence was for the jury to decide and this Court will not reverse a judgment based upon a verdict returned by a jury where there is substantial, competent evidence to support the jury verdict. Rose v. State, 425 So.2d 521 (Fla. 1983); Welty v. State, 402 So.2d 1159 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1979), cert. denied, 450 U.S. 936 (1981). Appellee submits that the evidence at trial would have supported a verdict of guilty as charged, i.e., sexual battery, and that it certainly supported the jury's verdict of attempted sexual battery.

The victim was found in the woods, her clothing ripped and torn. (TR 417, 418). Her body was battered and bruised, blood covered her face. Pantyhose were found in a briar bush. (TR 419, 420). Semen was found on a vaginal swab from the victim, on the victim's panties, and on Appellant's briefs. (TR 540, 542-544). These circumstances would have supported a verdict of guilty as charged.

However, the jury may have been concerned that the victim's husband had engaged in sexual relations with his wife two days prior to the homicide and medical testimony that semen could theoretically remain inside a woman's vagina up to three days. (TR 296, 470). The jury also heard a statement of Appellant's wherein he admitted removing his penis from his pants while he abducted the victim. Appellant therein denied battering the victim because he experienced a premature ejaculation. (TR 638, 639). The premature ejaculation was why he didn't "finish" what he intended. Therefore, it appears that the jury rationally concluded, based upon substantial, competent evidence, that Appellant failed to complete the crime of sexual battery due to a physiological dysfunction on his part, not due to any voluntary abandonment of his criminal purpose.

Finally, it should be noted that the jury was instructed on the defense of abandonment. (TR 908, 909). Since no evidence was presented which supported that defense, the jury rationally rejected it. A jury may reject any hypothesis of innocence if it is unreasonable in light of the evidence supporting guilt. Floyd v. State, 361 So.2d 802 (Fla. 3d DCA 1978); McBride v. State, 191 So.2d 70 (Fla. 1st DCA 1966). Appellee submits that the instant contention, even had it been argued to the jury, would have been rejected as being unreasonable in light of the evidence presented at trial. What intervened to prevent a completed crime, if anything, was Appellant's own dysfunction. Such cannot be twisted to mean a "complete and voluntary renunciation of his criminal purpose." § 777.04(5), Florida Statutes (1982).

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL REGARDING THE ARMED ROBBERY COUNT.

(Appellant's Issue IV as restated by Appellee).

Appellant's theory that no robbery occurred because the victim was dead at the time of the taking was never presented to the trial court during motions for judgment of acquittal. Appellant's counsel presented no more than a general argument that the State had failed to prove a prima facie case of guilt as to all counts. (TR 709, 710, 845, 846). Therefore, the motions were insufficient to preserve this issue for appellate review. Fla.R.Crim.P. 3.380(b); G.W.B. v. State, 340 So.2d 969 (Fla. 1st DCA 1977). See also: Steinhorst v. State, 412 So.2d 332 (Fla. 1982), and Castor v. State, 365 So.2d 701 (Fla. 1978). This Court should not consider the present argument.

While maintaining Appellant is in procedural default as to this issue, Appellee submits that it has long been established that when a criminal defendant moves for a judgment of acquittal that "he admit[s] the facts adduced in evidence and every conclusion favorable to appellee which is fairly and reasonably inferable therefrom." Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), reh. denied, 429 U.S. 874 (1976). In reviewing the sufficiency of the evidence to support a jury verdict of guilty:

> [A]n appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). See also Lynch v. State, 293 So.2d 44 (Fla. 1974); Brown v. State, 294 So.2d 128 (Fla. 3rd DCA 1974).

Furthermore, the test to be applied to a motion for judgment of acquittal by both trial and appellate courts is not whether the totality of the evidence, in the opinion of the court, fails to exclude every reasonable hypotheses of innocence, but whether a jury might reasonably so conclude. Jackson v. Virginia, 443 U.S. 307 (1979); Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969); Victor v. State, 193 So. 762 (Fla. 1940); Amato v. State, 296 So.2d 609 (Fla. 3rd DCA 1974); Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981); Rose v. State, 425 So.2d 521 (Fla. 1982).

The evidence at trial supported the prosecutor's accusation that Appellant went to the State Farm office prior to the lunch hour and spoke with the victim, noticed that the office was closed from noon to 1:00 p.m., and parked his truck out of view. Appellant then gained access to the office through a sliding glass door, confronted the victim while she was answering a call from Geraldine Gilchrist, and abducted her. (TR 306, 316, 337, 338, 634-636, 1047-1049). The victim was found in the woods behind the office, battered and bruised. (TR 417-420). She would not have died immediately after being stabbed, which must have occurred at the place where she was found since no blood was found inside the State Farm office or between the office and the woods. (TR 452-454, 473-476). The victim's left ring finger had sufferred a 1/4" incision and was bruised. (TR 443, 445, 446). Appellant had possession of the victim's diamond ring when arrested. (TR 1000-1002). The entire incident spanned only an hour or so on June 14, 1982.

Any amount of force suffices to convert a larceny into a robbery. McCloud v. State, 335 So.2d 257 (Fla. 1976). Robbery is distinct from larceny in that it involves a contemporaneous or precedent force, or violence, or it involves an inducement of fear for one's physical safety. McCloud, supra; E.Y. v. State, 390 So.2d 776 (Fla. 3d DCA 1980). There can be no question but that the victim herein was in fear during her abduction and that the resistance she offerred was met with tortuous and repeated acts of violence. Appellant had abrasions on his arms and was out of breath when arrested. (TR 367, 368). The victim died most likely from choking on her own blood, although she may have been strangled as well, some five or ten minutes after the stab wounds were inflicted. (TR 452-454). The incisions to her body were made prior to her death. (TR 454). This presumably includes the incision to her left ring finger.

Appellee submits the jury was presented with overwhelming evidence of force and violence being utilized by Appellant to remove the victim's ring. The jury's verdict was rationally reached and supported by substantial, competent evidence of guilt. Tibbs v. State, supra.

Even if Appellant's theory that the victim was dead at the time of the taking is accepted, such does not defeat a conviction for robbery. Are robbers rendered merely thieves by virtue of murdering their victims prior to taking their property? This Court has indicated in the negative.

In Ferguson v. State, 417 So.2d 631 (Fla. 1982), a young man and woman were murdered. The young man was found shot in the head, behind the wheel of the car. The young woman was raped, her body found in a dense growth nearby. Both were robbed; the young woman's earlobe was torn where an earring had been. Id. at 633. This Court refused to accept any hypothesis of innocence as being reasonable, noting that the jewelry was taken with some degree of violence. Id. at 635. There is similar evidence in the instant case.

Further, this precise argument was offerred in Hallman v. State, 305 So.2d 180 (Fla. 1974), wherein the defendant first cut the victim's throat and then stole cash from the register. That the victim may have died prior to the actual taking did not negate the robbery.

In conclusion, but for the force and violence utilized by Appellant, he would not have procured the victim's ring. The incision to her finger reveals that simple fact.

ISSUE IV

THE SENTENCE OF DEATH WAS PROPERLY IMPOSED.

(Appellant's Issues II, V, VI & VII as restated by Appellee).

The jury rendered an advisory sentence of death by an eleven to one vote. (R 210). The trial court, noting that jury recommendations are to be given great weight and acknowledging that capital sentencing procedures require a "reasoned judgment and weighing process," (R 221), found five statutory aggravating circumstances to have been proved beyond a reasonable doubt. The court concluded a mitigating circumstance was established by Appellant's lack of a significant criminal history. The court "considered all the possible mitigating circumstances listed under Florida Statute 921.141(6) and any others that might apply," and concluded the facts did not support finding further mitigating circumstances. (R 221-225). The court concluded that "the facts suggesting a sentence of death for the commission of this murder are so clear and convincing that no reasonable person could differ." (R 224). The trial court applied the proper legal standard as developed by this Court's decisions. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U. S. 984 (1982).

Appellant challenges the trial court's finding that the murder was committed during the course of a kidnapping, attempted sexual battery, and robbery (i.e., for pecuniary gain, to be discussed subsequently). (R 222, 223). Appellant relies on his argument in Issue I, supra; so does Appellee. It is illogical to assume the jury acquitted Appellant of the additional felonies by virtue of their guilty verdict as to premeditated first-degree murder. The evidence supported, and the jury verdicts revealed, that Appellant was found guilty of kidnapping (for abducting the victim from the State Farm office), attempted sexual battery (supported by the expert testimony and circumstances under which the victim's body was found), and armed robbery (supported by the medical testimony and Appellant's possession of the victim's diamond ring). The trial court properly found that the capital murder was committed during the course of additional, specified felonies. Findings of a trial court are factual matters which should not be disturbed unless there is an absence or lack of substantial, competent evidence to support the findings. Hargrave v. State, supra. Appellee submits the evidence overwhemingly supported the trial court's conclusion that this aggravating circumstance was proved beyond a reasonable doubt. § 921.141(5)(d), Florida Statutes (1981).

Appellant contends, assuming his above argument is rejected by this Court, that the trial court improperly doubled aggravating circumstances. Appellant argues the trial court did so by finding the murder was committed during the course of a robbery and for pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976). Appellant, while acknowledging Smith v. State, 424 So.2d 726 (Fla. 1982), attempts to distinguish the instant case. The trial court's findings do not support Appellant's reasoning.

The trial court refutes this contention by stating that it was "... aware of the prohibition of considering both the robbery as an aggravating circumstance and whether the crime was committed for pecuniary gain as an aggravating circumstance," (R 222) and its conclusion that the aggravating circumstance of § 921.141(5)(d) was applicable "... because the murder was committed during the course of a kidnapping and an attempted sexual battery." (R 223). Under the "total circumstances" of the case, the trial court concluded that the robbery, a distinct crime, supported his finding that the capital murder was committed for pecuniary gain. (R 223); § 921.141(5)(f), Florida Statutes (1981).

As stated in Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118 (1981), the trial court "... did not improperly duplicate the aggravating circumstances of robbery and pecuniary gain, as appellant contends, since [Bates] committed the crime[s] of [kidnapping and attempted sexual battery] in conjunction with the murder." Id. at 696. See also: Lightbourne v. State, ___ So.2d ___ (Fla. 1973) [8 F.L.W. 375]. Smith v. State, supra, at 733; Quince v. State, 414 So.2d 185 (Fla. 1982). Knight v. State, 338 So. 2d 201 (Fla. 1976). Each factor involved distinct proof. Hill v. State, 422 So.2d 816 (Fla. 1982).

The trial court's conclusion that the murder was committed for pecuniary gain was proper. The unmistakable clarity of the trial court's finding escapes no one save Appellant.

Arguing that the capital murder was "the work of a frenzied mind," Appellant claims the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (AB 32); § 921.141(5)(i), Florida Statutes (1981). Appellee submits that Appellant's state of mind was such that he intended to kidnap, rob, rape, and murder the victim and that he made that determination substantially before the time he abducted her from the State Farm office. Hill v. State, 422 So.2d 816, 819 (Fla. 1982).

Although Appellant gave a number of conflicting statements, his trial testimony revealed that he allegedly parked his truck in the State Farm lot and approached the victim about carpet firms prior to the lunch hour. Appellant allegedly requested permission to park his truck at the end of Peachtree and take his lunch break. (TR 781, 782). The office hours were posted on the front door. (TR 310, 311). The victim met her husband for lunch. (TR 291, 292). Her abduction occurred sometime just after 1:00 p.m. (TR 304, 305). When Jim Dickerson arrived at 1:07 p.m. Appellant and the victim were already gone. (TR 312-315).

Appellant's truck was found parked at the deadend of Peachtree, undetectable from either the main highway or the

State Farm office. (TR 980). The victim was stabbed twice in the left chest area. The wounds were consistent with a Buck knife being used as the weapon. (TR 440, 464, 465). A knife scabbard for a Buck, model 110, knife was located in thick brush in the vicinity of the victim's body. (TR 985-987). The scabbard was identified as Appellant's. (TR 386, 387, 389-394, 389-412). The victim appeared to have been strangled as well. (TR 449, 450). Appellant's army-issue blue nylon cord, which he wore on his knife scabbard, was also located. (TR 389-412, 985-987). The victim sufferred a vast array of injuries; she died from choking on her own blood. (TR 452).

Probably the most revealing indication that this was no frenzied or whimsical abduction is the sliding glass door's condition. Entry was forced; probably with the garbage can holder. (TR 337, 338, 1047-1049). Nothing was missing from the office other than the victim. She was known to be slow to anger. (TR 335). No blood was found anywhere outside of the location where the victim's body was found. (TR 473-476).

Appellee submits that the totality of the circumstances, as related above, support the trial court's finding that the aggravating circumstance was proved beyond a reasonable doubt. (R 223-224).

In Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), Justice Adkins noted that the cruel strangulation of the victims "... could only be accomplished through a cold, calculated design to kill, as distinguished from a single shot from a firearm during an outburst of anger." Id. at 540. So is the case here. Only one with such a design could have battered, stabbed, and strangled the victim in such a manner.

In Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 428 U.S. 923 (1976), the defendant robbed, abducted, raped, and thereafter killed the victim. The cold, calculated circumstance was supported by the number of times the victim was shot (3) and the proximity of the weapon to the victim's chest. Id. at 1190, 1191. In the instant case the victim sufferred two 4 inch stab wounds and was strangled. The record is clear that Appellant had a cold, calculated design to effect the death of the helpless victim. Magill, at 1190.

Appellee submits the defendant's state of mind in Combs v. State, 403 So.2d 418 (Fla. 1981), was no more or less proved than in the instant case. Combs wanted money and cocaine and, when resisted, killed for it in a thorough fashion. Bates wanted to fulfill his lust and own the victim's diamond ring and, when resisted, killed for it in thorough fashion. The cases are indistinguishable.

Appellant interestingly asserts that Bates may have been surprised by the victim while burglarizing the State Farm office and only then killed her. (AB 31). While Appellee does not agree, such a construction would support the court's finding that the murder was committed to avoid lawful arrest, Appellant's next alleged sentencing error. Lightbourne v. State, ___ So.2d ___ (Fla. 1983) [8 F.L.W. 375].

The evidence adduced during Appellant's trial was very strong proof of his desire to avoid arrest or detection by murdering the victim. Riley v. State, 366 So.2d 19 (Fla. 1979). Concurrent motives for a murder may exist without defeating the instant finding. Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979).

The victim was found in the woods behind the State Farm office. (TR 417). The instruments of murder were discarded by Appellant. (TR 990-992). These items were located in very dense brush, some twenty-five yards from the office complex. Appellant went further to disguise his actions. He fabricated a cover story about gathering cattails and bleeding gums. (TR 365, 366, 570, 571, 982, 983). He gave as many different statements as he deemed necessary to explain away the mounting evidence implicating him in the crimes. (TR 568-650).

Appellee submits that Appellant's entire course of conduct the afternoon of June 14, 1982, prove that a primary motivation for the murder was to avoid arrest. The hiding of the victim's body, as conceded by Appellant, is the strongest indication of his motivation. (AB 23, 25). The trial court's conclusion that Appellant may have succeeded in his plans had it not been for the quick response of authorities is born out by the record. (R 222). Had not Gerladine Gilchrist called when she did, the police would not have been so promptly alerted. (TR 306). The first police officer arrived before Jim Dickerson determined a crime had been committed. (TR 336).

Had Appellant's plan panned out the victim would have been safely silenced in the woods while he and his cattails climbed in his hidden truck and vanished. Appellant did not make deliveries to the State Farm office and chances are (particularly if Appellant had not "lost" his hat - TR 366) no one would have ever known he was in Lynn Haven. (TR 317).

In viewing the murder, this Court must condiser the facts and circumstances surrounding the entire criminal episode. Dobbert v. State, 375 So.2d 1069 (Fla. 1979). The totality of the facts and circumstances demonstrate that this aggravating factor was proved beyond a reasonable doubt.

There is no logical reason, other than an attempt at avoiding arrest, for Appellant to have taken the victim into the woods. Routly v. State, ___ So.2d ___ (Fla. 1983) [8 F.L.W. 388, 390]. Appellant could have fulfilled all of his dark desires inside the State Farm office. All but one. He could not have disguised his crimes.

This Court recently upheld this finding where the defendant broke into a woman's home, raped, robbed, and ultimately murdered her. Lightbourne v. State, supra. The instant case similarly involves no potential witnesses other than the victim.

While it would have been helpful to the prosecution had Appellant announced his intent in this regard, Francois v. State, 407 So.2d 885 (Fla. 1982); Jacobs v. State, 396 So. 2d 1113 (Fla. 1981), his failure to do so does not defeat this finding. Routly v. State, supra. One's actions often speak louder than words. Washington v. State, supra. Appellant's have.

Generally, this circumstance is prevalent in cases of rape and murder. Alvord v. State, supra; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978). Abductions are characterized by this aggravating circumstance. Knight v. State, 338 So.2d 201 (Fla. 1976). The attempt by Appellant to hide the victim's body and the discarding of the instruments of murder speak volumes as to Appellant's intent. See: Harich v. State, ___ So.2d ___ (Fla. 1983) [8 F.L.W. 309]; Bolender v. State, 422 So.2d 833 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982). That Appellant's efforts were thwarted by a rapid police response in no way diminishes his intent.

Appellee submits that even if this Court concluded this latter finding was not proved beyond a reasonable doubt, such error was unquestionably harmless and would not have influenced the trial court to forego imposition of the death penalty. This is so for several reasons.

First, the jury recommended death and the trial court gave that recommendation great weight. (R 221).

Second, Appellant does not challenge the trial court's finding that this murder was especially heinous, atrocious, or cruel. § 921.141(5)(h), Florida Statutes (1981). Indeed, he could not. The facts reveal that this was a tortuous murder, characterized by the trial court as "extremely wicked and vile." (R 223). The brutalization of the victim set this murder apart from the norm of capital felonies.

Third, the trial court made it clear that, as part of his reasoned judgment and weighing process, "[e]ven if the

Court determined that each mitigating factor raised by the defendant had been established, that would not outweigh the overwhelming evidence of aggravating circumstances established by the testimony in this case." (TR 224). The trial court clearly reasoned death was the appropriate sentence for "this brutal and senseless attack." (R 222).

This Court, even if it concludes that an improper aggravating circumstance went into the calculus of the trial judge's sentencing decision, should conclude no reversal or remand for new sentencing is necessary. When the solitary mitigating circumstance is juxtaposed against the remaining well-founded aggravating circumstances it is "beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstance[s]." Brown v. State, 381 So.2d 690, 696 (Fla. 1980), cert. denied, 449 U. S. 1118 (1981); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978), remand for resentencing, 362 So.2d 657 (Fla. 1978), sentenced aff'd, 411 So.2d 1310 (Fla. 1981), aff'd, ____ U.S. ____ (1983).

The weighing process was not compromised; a reasoned and well-supported judgment has been made regarding Appellant's sentence. Brown v. State, supra; Hargrave v. State, supra; State v. Dixon, supra.

The sentence of death was properly imposed.

CONCLUSION

WHEREFORE, based on the foregoing, Appellee would respectfully request that the judgment and sentence of the trial court 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 forwarded to DAVID A. DAVIS, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida 32302, this 14th day of October, 1983.

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