IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS
(cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont'd)

TABLE OF CITATIONS
(cont'd)

IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,	:	
Appellant,	:	
v.	:	CASE NO. 63,594
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

I 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 volumes will be indicated by the letter "R." References to the remaining volumes will be indicated by the letter "T."

II STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Bay County on July 6, 1982, charged Kayle Bates with first degree murder (by premeditation or during the course of a felony), kidnapping, robbery, and sexual battery (R-1-3). Bates' attorney filed a motion to suppress a statement taken from him by the police (R-159-160) and a motion for change of venue (R-164-167). The court denied the motion to suppress (T-1147), and it deferred ruling on the motion for change of venue until trial at which time it denied that motion (T-1375).

Bates was tried before the Honorable W. Fred Turner from January 17-20, 1983, and found guilty by a jury of premeditated first degree murder (R-202), kidnapping, robbery, and attempted sexual battery (R-202-203).

During the penalty phase of the trial, the state presented no additional evidence. Bates took the stand as well as his father (T-952), and both pleaded that the jury recommend mercy (T-954,956). After the court instructed the jury, they returned a recommendation of death (R-210).

The court, following the jury's recommendation, sentenced Bates to death. The court found in aggravation:

> 1. The murder was committed during the course of a kidnapping, robbery, and attempted sexual battery.
>
> 2. The murder was committed for the purpose of preventing or avoiding lawful arrest.
>
> 3. The murder was committed for pecuniary gain.

4. The murder was especially heinous, atrocious, and cruel.

5. The murder was committed in a cold, calculated, and premeditated manner without a pretense of moral or legal justification.

(R-222-223)

In mitigation, the court found that Bates had no significant history of prior criminal activity (R-224).

This appeal follows.

III STATEMENT OF THE FACTS

Shortly after 1:00 p.m. on June 14, 1982, Geraldine Gilchrist called the State Farm Insurance Agency Office in Lynn Haven, near Panama City (T-304). Janet White answered the phone in an excited voice (T-308) and suddenly started screaming (T-305). The phone was hung up (T-305), but, because of what she had heard, Gilchrist called the Lynn Haven Police Department (T-305-306).

A few minutes after 1:00 p.m., Jim Dickerson, an agent with the State Farm Insurance Company, returned from lunch to his office (T-312-313). He saw White's car and noticed that something was wrong as he walked into his office (T-314). The drapes in his office had been pulled, and his calculator unplugged, and his sliding glass door unlocked and left slightly open (T-315). As Dickerson returned to the front of the store, the police arrived (T-336).

Several other policemen arrived, and they began to search the area. About 50 steps behind the agency is a wooded area, and hidden among some bushes (T-417) they found White's body (T-417). A lot of blood covered her face, and her clothing was ripped (T-418-419). She had been stabbed twice in the chest (T-440); there were several bruises about her head (front and back), eyes, and legs (T-444). She had an abrasion about her neck (T-440). Also while there was no trauma about the vagina, there was evidence of sperm in her vagina (T-463).

As the police secured the scene, Bates walked out of the woods carrying some cattails (T-364-365). An officer stopped

him, asked for some identification, and then put him into his police car (T-367). Bates was wet, his clothing muddy, and the left side of his shirt looked like it had blood on it (T-365). He said that he wanted to go to his delivery truck which was parked near a tree behind the insurance agency (T-366). Bates worked as a truck driver for a Tallahassee paper company and his delivery route included stops in Lynn Haven and Panama City (T-378,778). On this day, he drove an 18 foot "Air National" truck (T-379).

Bates was taken to a police station, read his Miranda rights, then questioned about the murder (T-569-570). Initially, he denied any knowledge of the murder, saying that he had parked his delivery truck far behind the office to avoid being spotted by a supervisor and to eat lunch and pick some cat tails for the house he was living in (T-570,593). The blood stains he said came from his gums and were due to a gum disease he had (T-571).

Officer McKeithen, the interrogator, told Bates to empty his pockets and Bates laid a woman's ring on his desk (T-573). Janet White's husband identified the ring as belonging to his wife (T-574). Bates then admitted stopping at the agency but only to ask for directions (T-575-576). White could not help him, and as he left, he found the ring in front of the office (T-576). He went into the woods to get the cat tails (T-576), and as he came out he saw White's body (T-576). He went to it, panicked when he saw she was dead, and ran (T-577).

When confronted with some additional evidence, Bates changed his story. He said that he saw a white man struggling with White, and when he attempted to help her, the man hit him in the lip (T-609). Bates then ran into the woods (T-609).

McKeithen confronted Bates again (T-610), and Bates told his final story. He said that when he went inside the office for information, White initially acted friendly, but for some unknown reason, she began throwing things and getting mad (T-611). She squirted some mace on his arm (T-634), and he grabbed for the mace, and the two began to struggle (T-611). Somehow, she got a pair of scissors and during the struggle, she accidentally stabbed herself (T-611). Bates also admitted trying, but failing, to have sexual intercourse with White (T-638-639). Bates, however, denied taking the ring from White's hand (T-642).

At trial, Bates denied making the statements (T-803). He said that after he had talked with White, he had parked his delivery truck in some shade behind the agency, eaten his lunch, and gone to sleep. When he awoke, he checked his delivery tickets and then walked back to the agency to ask to use the telephone (T-784-786). Inside, he noted the disarray and left (T-790). He walked around back, found White's body, panicked and fled (T-792).

IV ARGUMENT

ISSUE I

THE COURT ERRED IN ADJUDGING BATES GUILTY OF ROBBERY, ATTEMPTED SEXUAL BATTERY, AND KIDNAPPING AS THE JURY ACQUITTED HIM OF FIRST DEGREE FELONY-MURDER IN WHICH THOSE CRIMES FORMED THE UNDERLYING FELONIES.

The indictment charging Bates with first degree murder alleged that he committed the murder with premeditation or during the course of a robbery, kidnapping or sexual battery, or an attempt to commit those crimes (R-1).

The court instructed the jury on both premeditated murder (R-174) and felony murder (R-174) as well as the underlying crimes of robbery, kidnapping, sexual battery and their attempts (R-175-177,181). The court, apparently following this Court's suggestion In the Matter Of The Use By The Trial Courts Of The Standard Jury Instructions In Criminal Cases And The Standard Jury Instructions In Misdemeanor Cases, Case No. 56,734 and 56,799, Fla. opinion filed April 16, 1981, gave the jury a special verdict form in which they could indicate whether Bates was guilty of "first degree murder by premeditation" and/or "first degree felony murder as charged." (R-202)

As to the first degree murder charge, the jury found Bates guilty of premeditated murder but not guilty of first degree felony murder (R-202). See, Hawkins v. State, Case No. 61,936, Fla. opinion filed July 14, 1983. The jury also found Bates guilty of kidnapping, attempted sexual battery, and robbery (R-202-203), the crimes underlying the felony-murder charge.

Because of these results, the jury's verdicts are inherently inconsistent, and according to this Court's holding in Pitts v. State, 425 So.2d 542 (Fla. 1983), this Court must reverse Bates' convictions for kidnapping, attempted sexual battery, and robbery.

As a rule, courts have permitted inconsistent verdicts rendered against a single defendant in the same trial, Dunn v. United States, 284 U.S. 390, 76 L.Ed. 356, 52 S.Ct. 189 (1932); McCloud v. State, 335 So.2d 257 (Fla. 1976), under the reasoning that each count of an indictment or information is considered as if it were a single indictment or information. Consequently, one count is not flawed by any inconsistency with another count. Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982). The only exception to this rule occurs when the jury acquits in one count and that acquittal vitiates a guilty verdict on another count. Id. f.n.3. Pitts, supra; Mahaun v. State, 377 So.2d 1158 (Fla. 1979); Redondo v. State, 403 So.2d 954 (Fla. 1981). In order for that situation to arise, however, the crime the defendant was acquitted of must be an essential element of the crime for which the jury found the defendant guilty.

The most recent case from this Court in this area is Pitts, supra. In that case, Pitts was charged with aggravated battery and possession of a firearm during the commission of the aggravated battery. The jury found Pitts not guilty of the aggravated battery charge but guilty of the possession charge. This Court, distinguishing Mahaun and Redondo, supra, said that no inconsistency existed because the jury could have found Pitts

not guilty of aggravated battery but guilty of possession of the firearm during the commission of an attempted battery. Accord McCray v. State, 425 So.2d 1 (Fla. 1983). Finding Pitts committed an aggravated battery, in short, was not an essential element of the possession charge because the jury could have found he committed only an attempted battery.

In reaching this decision, this Court distinguished Mahaun and Redondo because in each of those cases, the jury acquitted the defendants of crimes which were essential elements of the convicted crimes. In Mahaun, Mahaun was charged with third degree felony murder and aggravated child abuse, the underlying felony of the felony-murder charge. While she was convicted of the murder, the jury found her guilty of a lesser misdemeanor offense of the culpable negligence charge. Because, the misdemeanor conviction effectively acquitted Mahaun of aggravated child abuse, and because aggravated child abuse was an essential element of the third degree felony, the verdicts were inconsistent and this Court reversed her third degree felony-murder conviction.

In Redondo, the jury found Redondo not guilty of aggravated battery and attempted aggravated battery. Because at least one of those crimes was an essential element of possession of a firearm during an aggravated battery (of which the jury found Redondo guilty) the verdicts were inconsistent and this Court reversed Redondo's conviction for possession of a firearm.

Underlying the Pitts decision rests the basic problem of how much speculation into the jury's deliberations will an appellate court do. According to the majority in Pitts, virtually none. In order to uphold jury verdicts if at all possible, courts must presume that the jury acted in accordance with the jury instructions and could make reasonable inferences from them. Silvestri v. State, 332 So.2d 351, 354 (Fla. 4th DCA 1976), affirmed, 340 So.2d 928 (Fla. 1976). Consequently, in Pitts, because the jury instruction on the possession charge mentioned an attempted aggravated battery, the jury could have legitimately acquitted Pitts of aggravated battery while at the same time finding him guilty of possession of a firearm during the commission of an attempted aggravated battery.[1]

Pitts is important to this case because in instructing the jury, the court said:

---

[1] "While we suspect that what "really" happened is that...the jury simply pardoned McCray for the aggravated assault, which carried the three-year mandatory sentence required by § 775.087(2), we cannot act upon such an assumption. If Mahaun means what it says, it strongly suggests that a jury is not permitted to employ its inherent pardoning power as to less than all of multiple counts in a single case, if, by doing so, it reaches "legally inconsistent" verdicts. Courts, however, must presume that the jury acted in accordance with the law, so as, if at all possible, to uphold its conclusions...In this case, that may be done only by conclusively positing that the jury engaged in the highly unlikely-but consistent and permissible-ratiocinative process which is described in the text and which forms the basis of our decision. However artificial, perhaps fictional, this approach may seem, any other would result in wholesale judicial interference with jury verdicts on the grounds of subjectively perceived improprieties." McCray v. State, 397 So.2d 1229 (Fla. 3d DCA 1981).

> Only one verdict may be returned as to each crime charged.
>
> (R-197)

Consequently, while the jury found Bates guilty of "first degree murder by premeditation as charged" could the jury have legitimately believed that it could have also found him guilty of "first degree felony-murder, as charged?" Bates argued that they could have done so.

Although the judge told the jury they could return one finding for each count (T-927), they knew that Bates was charged with committing first degree murder by two different theories. That is, from the indictment and the jury instructions, they knew that premeditated murder and felony-murder were only different theories of how Bates could have committed the murder (R-1,173). Consequently, they knew felony-murder and premeditation were not different crimes and the jury could have found that the state proved both premeditated murder and felony-murder, and they knew they could have indicated on the jury form that it had done so. Moreover, from the jury instructions (R-173) and the verdict form (R-202), the jury clearly could have realized that felony-murder was not a lesser included offense of premeditated murder. Nowhere did the court tell the jury that felony-murder was a lesser degree offense of murder. Also, the jury was told that they could convict Bates of felony-murder even if no premeditation was shown (R-175). From this and also from the fact that they convicted him of premeditated murder, the jury could have reasonably believed that they could have also convicted Bates

of felony-murder. Finally, the court repeatedly told the jury that they must obey the law and could not exercise its jury pardoning power:

> 1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.
>
> (R-196)
>
> In closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have agreed to a constitution and to live by the law. No one of us has the right to violate rules we all share.
>
> (R-199)

Because of this repeated admonition to obey the law, and the presumption that the jury will follow the law, we must assume that they were doing so when they acquitted Bates of first degree felony-murder. Consequently, sufficient reasons exist to believe that the jury knew they could convict Bates of premeditated murder and felony-murder. Without that dual finding, however, their guilty verdicts on the robbery, kidnapping, and attempted sexual battery convictions create an impermissible inconsistency, forcing this Court to apply the test created in Pitts, supra.

Specifically, applying this test we know that some essential element is missing from the kidnapping, robbery, and attempted

sexual battery convictions by virtue of the jury's acquittal of Bates for felony-murder. That is, the only distinction between premeditated murder and felony-murder is that premeditation requires premeditation whereas felony-murder replaces the premeditation element with the requirement that during the commission of certain felonies a murder occurred. See § 782.04, Fla.Stat. (1982) (R-174). Consequently, by virtue of its not guilty verdict for felony-murder, the jury found some essential element missing from the kidnapping, robbery, and sexual battery charges which the state claimed were the basis for the felony-murder charge. The Pitts test, therefore, is met and this Court should reverse the trial court's judgment and sentence for robbery, kidnapping, and attempted sexual battery.[2]

[2]Because Bates is relying upon the special verdict form, he is not arguing that he could not be sentenced for the underlying felonies. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). If this Court rejects the argument presented by this issue Bates argues that the trial court could not sentence him for felonies underlying this murder.

ISSUE II

THE COURT ERRED IN FINDING THAT BATES COMMITTED THE MURDER DURING THE COURSE OF A ROBBERY, KIDNAPPING, AND ATTEMPTED SEXUAL BATTERY.

This issue directly depends upon how this Court rules upon the previous issue. As part of its finding of facts, the trial court said:

> 1. The murder was committed while the Defendant was engaged in the commission of a kidnapping and an attempted sexual battery. [(F.S. 921.145(5)(d)]. The murder was also committed while the Defendant was engaged in the commission of a robbery. The Defendant went to the State Farm Insurance Office on June 14, 1982 and kidnapped the victim, Janet Renee White. The crime of kidnapping was accomplished when the victim was forcibly removed from the office. The victim was then sexually assaulted and robbed of a ring worn on her left ring finger.
>
> (R-222).

By virtue of its not guilty verdict for felony-murder (R-202), the jury has acquitted Bates of robbery, attempted sexual battery, and a kidnapping. (See Issue I). Consequently, the state has not proven this aggravating factor beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court therefore, should reverse for a new sentencing hearing.

ISSUE III

THE COURT ERRED IN ADJUDGING BATES GUILTY OF ATTEMPTED SEXUAL BATTERY WHEN THE EVIDENCE SHOWS HE ABANDONED HIS ATTEMPT, IN VIOLATION OF SECTION 777.04, FLORIDA STATUTES (1982).

The jury in this case found Bates guilty of attempted sexual battery, a lesser included offense of sexual battery. Accordingly, the court adjudged him guilty of that offense. Nevertheless, the evidence at trial, while conceedingly supporting the court's judgment also shows that Bates abandoned his attempt. Consequently, because that is a defense to attempt he is not guilty of attempted sexual battery. §777.04, Fla.Stat. (1982).

As a general rule, once a person has committed a crime, he cannot thereafter "undo" the crime by some belated repentance. See Wheelis v. State, 340 So.2d 950 (Fla. 1st DCA 1976). With the inchoate crime of attempt, however, a person can undo the legal consequences of his attempt if he subsequently abandons his attempt to commit a crime:

> (5) It is a defense under this section that, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant:
>
> (a) Abandoned his attempt to commit the offense or otherwise prevented its commission;... §777.04(5), Fla.Stat. (1982).

Thus, even though a person such as Bates may have committed an attempt, he may nevertheless be held blameless if he has voluntarily renunciated or abandoned his attempt to commit a crime. Of course, once the crime is completed, abandonment is not a

defense.[3]

The policy behind this statute and Section 5.01 of the Model Penal Code[4] upon which the Florida Statute is based is easy to find. It is simply to serve as an inducement to the potential criminal to abandon his criminal design before it ends in a completed crime.

Only one Florida case explicitly discusses the defense of abandonment of an attempt. In Wheelis, supra, the court reversed the trial court's judgment and sentence for attempted breaking and entering because the lower court had excluded, as irrelevant, evidence that Wheelis had abandoned his attempt to break into a Gainesville grocery store. Abandonment, the court said, is a defense to an attempt.

---

[3]Accordingly, Bates is not arguing that because he abandoned his attempted sexual battery, he is somehow not accountable for a kidnapping or battery which may have been part of this episode.

[4] (4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Judge Boyer, dissenting, said, "A crime, once committed, cannot be uncommitted." Id. at 952. With completed crimes, that is the case, but because attempt is an inchoate crime, the legislature decided that those who abandon the attempt should not be punished. Section 777.04, Florida Statutes (1982), moreover, clearly indicates that abandonment is a defense to an attempt. That is, it cannot be argued that the offense of abandonment somehow applies only to the preparation stages of an attempt and not to those further acts which convert this preparation into an attempt.

An attempt can be "uncommitted," however, only if the abandonment is voluntary. If some external force interferes with the completion of the crime then the person has not voluntarily abandoned his attempt. Several cases outside of Florida illustrate this point. In People v. Stuples, 85 Cal. Rptr. 589 (Cal. 2d DCA 1970) a landlord thwarted an attempted burglary when he saw holes drilled in the floor above a bank vault and repossessed the office he had let to Stuples. There, Stuples had not abandoned his attempt. In People v. Davis, 388 N.E.2d 887 (Ill. 5th DCA 1979) Davis pushed the keys on a cash register but did not take any money because she fled when she saw a guard watching her. Similarly, in Stewart v. State, 455 P.2d 914 (Nev. 1969) Stewart was attempting to rob a gas station when the police drove up. Finally, in People v. White, 285 NYS 2d 633 (Crim.Ct.N.Y. City 1967) White was guilty of attempting to pass a worthless check when he gave the check and his identification to a teller. The fact that he left the bank when an officer sought to check

the ID did not undo his attempt. In these cases,circumstances beyond the control of these defendants prevented the completion of their crimes.

In this case, no similar external force intervened to prevent Bates from committing the sexual battery. From the evidence presented at trial, Bates ejaculated before penetration (T-639). Further, from his confession, Bates did not intend to sexually batter White and did not "really" try to commit the crime (T-639). Also, the state presented no evidence that Bates did not complete the sexual battery because the police arrived or someone else came onto the scene. To the contrary, for all we know, Bates could have committed the crime but for the abandonment of his attempt.

Consequently, he is not guilty of attempted sexual battery and this Court should reverse the judgment and sentence for that crime.

ISSUE IV

THE COURT ERRED IN DENYING BATES' MOTION FOR A JUDGMENT OF ACQUITTAL AS THE STATE PRESENTED NO EVIDENCE THAT WHITE WAS PLACED IN FEAR WHEN THE RING WAS TAKEN FROM HER.

The basic argument presented by this issue is that Bates did not rob White because the evidence is susceptible to the reasonable conclusion that she was dead when Bates took the ring from her. Consequently, the ring was not taken from White "by force, violence, or assault, or by putting Janet White in fear" (R-176).

The only evidence the state presented to support its robbery charge was that (1) White was dead, (2) Bates was found with the ring (T-573), and (3) Some force had been used to remove the ring from White's finger (T-445). Bates, on the other hand, denied taking the ring, claiming he found it outside of the store (T-576).

Robbery is a larceny by violence or putting in fear. Green v. State, 414 So.2d 1171 (Fla. 5th DCA 1982). But the force necessary to complete the taking in such crimes as picking a pocket does not necessarily convert this simple act into a robbery. To be a robbery, the victim must have resisted in some degree or would have likely done so if the defendant had not used or threatened the victim with some force designed to overcome the resistence of the victim. Mims v. State, 342 So.2d 116 (Fla. 3d DCA 1977). Consequently, in this case the circumstantial evidence pointing to Bates committing the robbery also points to the equally likely possibility that

Bates took the ring from White after she was dead. Specifically, the ring was not taken by force or putting in fear because White was dead.

Moreover, because the evidence was circumstantial, this Court must believe Bates' hypothesis as the facts do not show this to be an impossible reconstruction of the events. Peek v. State, 395 So.2d 492 (Fla. 1981).

Bates is not arguing that by taking the ring he is innocent of any crime. He could, for example, be guilty of theft. See McCloud v. State, 335 So.2d 257 (Fla. 1976). Nevertheless, because the evidence points to the equally possible likelihood that White was dead when Bates took the ring, he argues that he is not guilty of robbery. This Court should reverse the trial court's judgment and sentence for the robbery and remand for a new sentencing hearing on the murder conviction.

ISSUE V

THE COURT ERRED IN FINDING THAT BATES COMMITTED THE MURDER FOR THE PURPOSE OF PREVENTING OR AVOIDING LAWFUL ARREST.

The court, in sentencing Bates to death, said that he committed the murder for the purpose of avoiding or preventing a lawful arrest:

> 2. The murder was committed for the purpose of avoiding or preventing a lawful arrest. [F.S. 921.145(5)(e)]. The dominate motive for the murder of Janet Renee White was the elimination of the only witness to the defendant's crimes. To avoid being identified by the victim of his criminal acts the defendant felt it necessary to eliminate the only witness. His plan might have been successful had not law enforcement personnel responded so quickly.
>
> (R-222)

The facts of this case, however, do not justify this finding. In enacting Section 924.141, Florida Statutes (1982) the legislature intended that this factor apply primarily to killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). However, when a court finds this factor for killings involving persons other than policemen, this Court has also said that the dominant motive for the killing must be to avoid arrest, Menendez v. State, 368 So.2d 1278 (Fla. 1979), and the proof of the killer's intent must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). The mere fact that someone is dead does not support finding this aggravating factor. Id.

For example, in Menendez, supra, the victim was found lying on the floor of his jewelry store with his hands outstretched in a supplicating manner. Also, Menendez had murdered the victim with a gun which had a silencer on it. While these facts certainly suggest that Menendez committed the murder to avoid arrest, they nevertheless did not amount to the "very strong"evidence this Court said in Riley was required to support a finding of this factor. Similarly, in this case the only evidence of Bates' motive to avoid arrest is that the body was hidden 40 to 50 steps behind the State Farm Agency building where White worked (T-417). Compared with other cases, that single fact is insufficient to meet the "very strong" evidence standard this Court has required. For example, White was not a policeman and Bates did not bury her body. White v. State, 403 So.2d 331 (Fla. 1981). Neither is there any evidence that White was helpless or that she knew Bates and could have later identified him. Riley v. State, 366 So.2d 19 (Fla. 1978); Blair v. State, 406 So.2d 1103 (Fla. 1981). On the contrary, White had used mace on Bates (T-634), and by the condition of the office, she had struggled with him (T-314). Also, Bates lived in Tallahassee and came to the Panama City area only to make his deliveries (T-778). Moreover, the state presented no evidence that White threatened Bates, Elledge v. State, 408 So.2d 1021 (Fla. 1981) or that Bates was on parole and did not want to return to prison. Tafero v. State, 403 So.2d 355 (Fla. 1981) (Bates had no significant criminal history).

The murder itself was not an execution style killing, another indication that it may have been committed to avoid lawful arrest. Ferguson v. State, 417 So.2d 631 (Fla. 1982). To the contrary, the killings, as evidenced by the beating (T-440-445) and items Bates left in the area near the body (T-999), appears to have been an impulsive killing. Waterhouse v. State, 429 So.2d 301 (Fla. 1983). Finally, the body was found behind the agency and while this suggests Bates may have put it there to hide it (Bates may have taken her there to commit a sexual battery) (T-638), this fact hardly is enough to support this aggravating factor. In Adams v. State, 412 So.2d 850 (Fla. 1982), the body was hidden in a remote area and encased in a plastic bag. Likewise in Griffin v. State, 414 So.2d 1025 (Fla. 1982), Griffin killed his victim three miles from the store he had abducted him from. Accord Martin v. State, 420 So.2d 583 (Fla. 1982). Hiding the body in the remote area, far from where the victim was last seen, is strong evidence of an intent to avoid lawful arrest.

The foregoing cases suggest that much more than a "hidden" body is needed to meet the "very strong" evidence standard. But if this evidence is insufficient then how can the state ever establish that a murder was committed to avoid lawful arrest?

Typically, the state carries this very heavy burden to prove this aggravating factor was the dominant motive of the killing by the use of someone's testimony. For example, one of the victims of a murder scheme may have lived to tell why

the defendant killed another victim. Riley, supra, Francois v. State, 407 So.2d 885 (Fla. 1981) Or, a co-defendant may have said that the defendant committed the murder to eliminate a witness. Griffin v. State, 414 So.2d 1025 (Fla. 1982), Stevens v. State, 419 So.2d 1058 (Fla. 1982), Martin v. State, 420 So.2d 583 (Fla. 1982), Bolender v. State, 422 So.2d 833 (Fla. 1982), Smith v. State, 424 So.2d 726 (Fla. 1982). Or, the defendant, by confessing, may have supplied the motive. Hitchcock v. State, 413 So.2d 741 (Fla. 1982), Elledge v. State, 408 So.2d 1021 (Fla. 1981), Ferguson v. State, 417 So.2d 631 (Fla. 1982). Here, of course, we have a confession. But, unlike other cases, Bates nowhere said that he killed White to avoid or prevent an arrest. To the contrary, he said the murder was an accident (T-639). And, since no other witnesses were present, the state had nothing but circumstantial evidence to prove this factor. Of course, circumstantial evidence can prove this factor, see Adams, supra, but again it must be very strong in establishing that Bates committed the murder to avoid lawful arrest. In those cases that this Court has found this factor inapplicable it has done so because the evidence was circumstantial and inconclusive. For example, in Menendez, Menendez used a silencer on his gun to commit the murder. Moreover, the victim's body was found lying with its hands outstretched in a supplicating manner. Likewise, in Armstrong v. State, 399 So.2d 953 (Fla. 1981) and Enmund v. State, 399 So.2d 1362 (Fla. 1981) the equivocal nature of the pathologists' conclusions that the victims were laid out prone to "finish [them] off" was insufficient to find that they were killed to prevent or

avoid lawful arrest.

Conceededly, the fact that White's body was found behind the agency's building rather than inside suggests that Bates hid the body to avoid arrest.[5] But that single fact unsupported by any other evidence, direct or circumstantial, cannot support the court's finding that Bates committed the murder to prevent or avoid lawful arrest. This Court, therefore, should reverse the trial court's sentence of death and remand for resentencing.

---

[5]Although Bates can argue that he hid the body after the murder rather than he committed the murder to avoid lawful arrest for sexual battery or robbery.

ISSUE VI

THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A ROBBERY AND FOR PECUNIARY GAIN.

The trial court, in sentencing Bates to death, said:

> 1. The murder was committed while the Defendant was engaged in the commission of a kidnapping and an attempted sexual battery. [(F.S. 921.145(5)(d)]. The murder was also committed while the Defendant was engaged in the commission of a robbery. The Defendant went to the State Farm Insurance Office on June 14, 1982 and kidnapped the victim, Janet Renee White. The crime of kidnapping was accomplished when the victim was forcibly removed from the office. The victim was then sexually assaulted and robbed of a ring worn on her left ring finger.
>
> * * *
>
> 3. The murder was committed for pecuniary gain. [(F.S. 921.145(5)(f)]. The Court is 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. However, the aggravating circumstance of F.S. 921.145(5)(d), already discussed herein, is considered applicable because the murder was committed during the course of a kidnapping and an attempted sexual battery. Under the total circumstances the fact that a robbery also occurred does not prevent the Court from considering the pecuniary gain aspect of the crime.
>
> The fact that this crime was committed, at least partially, for pecuniary gain is without doubt. The defendant robbed Janet Renee White of her ring. The ring was found in the defendant's pocket upon his arrest.
>
> (R-222-223)

This Court, of course, is familiar with the rule against the doubling of aggravating factors. That rule condemns a trial court finding two or more aggravating factors which focus upon a single aspect of a crime. Provence v. State, 337 So.2d 783 (Fla. 1976). This case presents the typical situation which occurs: The court found that the murder was committed during the course of a robbery (and perhaps other crimes as well), and it was committed for pecuniary gain. Riley v. State, 366 So.2d 19 (Fla. 1978), Menendez v. State, 368 So.2d 127 (Fla. 1979).

While the court clearly found that the murder was committed during the course of a robbery as well as during a kidnapping and sexual battery, it nevertheless found that the crime was committed for pecuniary gain. This clearly was wrong according to Provence.

In Smith v. State, 424 So.2d 726 (Fla. 1982), Smith was convicted of murder, kidnapping, and sexual battery, and robbery. The trial court found that Smith committed the murder during the course of the kidnapping or sexual battery. Apparently, the court could have found it occurred also during the course of a robbery, but it chose not to do so. Instead, it found that the murder was committed for pecuniary gain, and it used the robbery conviction to support this aggravating factor without any overlap with the factor that the murder was committed during the course of a violent felony. Id. at 733.

Here, the trial court chose not to do what the trial court

in Smith did. Thus, even though it recognized its error, the error remains and this Court should reverse for a new sentencing hearing.[6]

---

[6]Alternatively, Bates argues that what the court said in finding the murder to have been committed for pecuniary gain is ambiguous and confusing in light of what it said when he found that Bates committed the murder during the course of a kidnapping, attempted sexual battery and robbery. Findings in support of a death sentence should be of unmistakable clarity so they can assist this Court. Mann v. State, 420 So.2d 578 (Fla. 1982).

ISSUE VII

THE COURT ERRED IN FINDING BATES COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The court, in finding this murder to have been committed in a cold, calculated, and premeditated manner said:

> 5. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification [(F.S. 921.145(5)(i)]. The evidence reflects that the defendant, by his own admission, stopped at the State Farm Office prior to the noon hour. He saw Janet and spoke with her at that time. He knew she was alone. Also, the office hours were clearly posted on the front door of the office. The defendant prepared for his crime by parking his truck in the woods some distance behind the State Farm Office so that it could not be seen from the office or the highway. During the noon hour, he then broke into the office and awaited Janet's return. After completion of his crimes the defendant murdered Janet, thus disposing of the only witness. He then proceeded to dispose of other items connecting him with the crimes, including the knife.
>
> There was time prior to the crimes for the defendant to reflect on the seriousness of his acts, to plan his acts, and to realize the penalty for his acts. The evidence leaves no doubt that the crime was planned and premeditated and that the murder was carried out in a cold and calculated manner.
>
> (R-223-224)

This construction of the evidence, however, was not proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973).Nor were the court's findings the only way to

interpret the facts. Peek v. State, 395 So.2d 492 (Fla. 1981). Finally, when compared with other crimes in which this Court has said the cold, calculated, and premeditated factor applied, this case does not warrant such a finding. Combs v. State, 403 So.2d 418 (Fla. 1981), Jent v. State, 408 So.2d 1204 (Fla. 1981).

Initially, the evidence simply does not support the court's theory that Bates broke into the State Farm Agency during the lunch hour to lay in wait to murder White. Interpreting the evidence in that manner means that Bates (who had no significant criminal record, and who had worked for the paper company for two years (T-776)) drove his conspicuous delivery truck from Tallahassee to Lynn Haven so that he could find someone to kill between deliveries and over the noon hour. In addition, the court implicitly assumed that Bates believed that if White was alone at noon, she would be alone after lunch. But that assumption has no basis for support in the record or common experience. After all, secretaries have bosses who frequently work at their offices. When lunch is over, they, along with their secretaries, return to work. And, in this case that is what happened (T-313). Consequently, the trial court could not have concluded beyond a reasonable doubt that Bates broke into the office to await White's return because he knew she would be alone.[7]

---

[7] Likewise, there is no evidence Bates "knew" what the office hours were, even though they were posted.

On the contrary, a more reasonable explanation is Bates saw White leave the office for lunch and decided on the spot to break into the office to take what he could. Unfortunately, White surprised him, sprayed "mace" on him and the resulting struggle ensued. Thus, Bates perhaps had time to plan a cold, calculated burglary, but murder was not part of those plans.

Other evidence supports this conclusion. Within a few feet of White's body, the police found Bates' hat, the sheath to his knife, and a blue cord the police linked to him (T-999). Surely, someone who had plotted to commit a murder would not be so careless as to leave evidence so near the body. Moreover, the body itself was relatively close to the agency office (T-417). In that respect this case is different from Combs v. State, 403 So.2d 418 (Fla. 1981) where Combs lured his intended victims into an isolated wooded area.

This case also differs from Combs in that in Combs, Combs clearly was in charge once he produced the gun and repeatedly said he was going to kill both victims and did so at a time of his choosing. In this case we have no similar execution style killing. See also Smith v. State, 424 So.2d 726 (Fla. 1982).

Moreover, despite the multiple bruises, this case is also unlike Jent v. State, 408 So.2d 1024 (Fla. 1981) where Jent and his brother savagely beat a defenseless girl into unconsciousness, then dumped her into the trunk of their car

and took her to Jent's brother's home. There, four men proceeded to rape her, after which Jent and his brother burned her.

Here, there was no similar brutal torture or prolonged beating. See Richard King v. State, Case No. 59,464 (Fla. opinion filed July 21, 1983). Instead, the attack appears to have been the work of a frenzied mind rather than that of one who calmly calculated an execution. In that sense, this case is similar to Mann v. State, 420 So.2d 578 (Fla. 1982) where this Court said that Mann's killing was not cold, calculated, and premeditated. Mann had kidnapped a 10 year old girl, slashed her throat, and finally crushed her skull with a concrete encased steel pipe that was laying nearby. The use of that murder weapon that by pure chance laid nearby indicated a frenzied mind gone awry rather than one coolly planning a killing.

Here, the evidence suggests that White surprised Bates and sprayed him with mace which caused him to go into a frenzy, resulting in her murder (see attached appendix). See Johnson v. State, 393 So.2d 1069 (Fla. 1981) (McDonald, dissenting). Certainly what happened after the murder supports this theory. That is, his "get away" car was an easily identifiable delivery van which was parked a long way from the crime scene. Moreover, it was not parked in a manner to facilitate a quick escape.

Fleeing the scene, Bates left several items easily linked to him (T-999). Minutes later, he returned to the crime scene

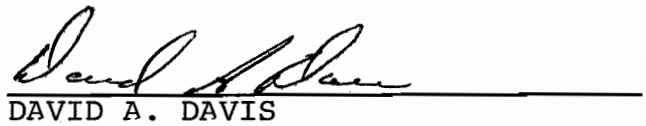
holding some cattails and wearing the bloody clothes, hardly what a person with a cold and calculated plan would do.

The record here arguably supports the jury's finding of premeditated murder. It does not, however, support the court's finding that Bates went beyond premeditation and coldly and with calculation plotted the execution of Janet White. McCray v. State, 416 So.2d 804 (Fla. 1982). This Court, therefore, should reverse Bates' sentence of death and remand for a new sentencing hearing.

V CONCLUSION

Kayle Barrington Bates asks this Honorable Court to reverse the trial court's judgment and sentence and remand to the trial court for either a new trial, or a new sentencing hearing.

Respectfully submitted,



DAVID A. DAVIS
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and, a copy has been mailed to appellant, Mr. Kayle Barrington Bates, #088568, Post Office Box 747, Starke, Florida, 32091, this 26th day of August, 1983.

David A. Davis

DAVID A. DAVIS