IN THE SUPREME COURT OF FLORIDA

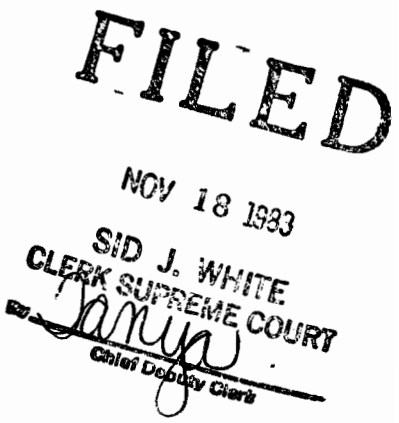
KAYLE BARRINGTON BATES,

Appellant,

v. CASE NO. 63,594

STATE OF FLORIDA,

Appellee.




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

# REPLY BRIEF OF APPELLANT

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# REPLY BRIEF OF APPELLANT

## I STATEMENT OF THE CASE AND FACTS

Appellant relies upon the statement of the case and facts he presented in his initial brief.

## II 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.

Conceededly, the weakest part of Bates' argument in this issue is his failure to raise the error presented here at the trial court level. Nevertheless, that failing is not fatal because, as this Court in Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) recognized, fundamental error can be raised on appeal despite a lack of objection at the trial level.

Without degenerating into a long discourse on fundamental error, suffice it to say that fundamental error is a denial of due process, or "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970); Ray v. State, 403 So.2d 956 (1981). In this case, Bates can think of no error more fundamentally wrong than to find him guilty of crimes the jury acquitted him of committing. That is, by virtue of their inconsistent verdicts they have acquitted him of committing a robbery, kidnapping, and attempted sexual battery. Hence, this issue is properly before this Court.

In its argument, the state claims that Bates is saying that "first degree murder proved by premeditated design and first degree murder proved by felony murder are mutually

exclusive." (Appellee's brief at 13). Bates makes no such argument. According to the instructions given to the jury and the evidence presented at trial (assuming it was sufficient) the jury could have legally convicted Bates of first degree murder by either premeditation or felony murder. By acquitting him of committing the murder under a felony-murder theory, however, the jury has clearly indicated it found insufficient evidence of the underlying felonies to justify finding him also guilty under that theory. (This is contrary to what appellee says the jury must have implicitly found by its verdicts. Appellee's brief at 14). Those verdicts, however, create the type of inconsistencies requiring application of the rule of law announced in Mahaun v. State, 377 So.2d 1158 (Fla. 1979), Redondo v. State, 403 So.2d 954 (Fla. 1981) and Pitts v. State, 425 So.2d 542 (Fla. 1983).

That is, acquittals of crimes which are essential elements of crimes that a jury find a defendant guilty of require acquittal of the "higher" offense. As applied to this case, that rule requires acquittal of the underlying felonies if the only basis for the acquittal on the felony-murder theory is an acquittal (for whatever reason) of the underlying felonies. This rule necessarily follows from the Pitts, Mahun, and Redondo rationale, and unless this Court is willing to abandon that line of cases, Bates' conviction for the underlying felonies must be reversed.

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).

On pages 17-18 of its brief, appellee says:

> 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 psychological dysfunction on his part, not due to any voluntary abandonment of his criminal intent.

Bates disagrees that a "premature ejaculation" is a "psychological disfunction." Nevertheless, even if it is, he nevertheless abandoned his attempt without any external compulsion. The fact that his desire may have waned should not be any less compelling because it was prompted by this "psychological disfuntion" than some moral sense of wrong-doing. The fact is, Bates, without external pressure did not complete his sexual battery. That fact is key, not the reason why.

ISSUE V

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

The state argues that what Bates did after the murder to hide the murder can be used to bolster the finding that he committed the murder to hinder some other crime (appellee's brief at 30). What he did to avoid arrest for the murder, however, cannot be used to support this aggravating factor that he committed the murder to avoid lawful arrest for some other crime. The state's efforts to provide facts, however, are certainly understandable in light of the trial court's failure to provide them for this Court to review. See Mann v. State, 420 So.2d 578 (Fla. 1982); Section 921.141 (3), Florida Statutes (1982). For this Court to supply the facts the trial court omitted is unfair to Bates as it forces him to argue for the first time, on rehearing, the non-applicability of whatever facts this Court may find to support this aggravating factor.

Nevertheless, contrary to the state's position (appellee's brief at 30) this Court apparently has rejected using misleading statements made to the police as evidence that the defendant committed a murder to avoid lawful arrest. Frederick Herzog v. State, Case No. 61,513 (Fla. opinion filed September 22, 1983).

Further, the state misplaces its reliance upon Lightbourne v. State, Case No. 60,871 (Fla. opinion filed

September 15, 1983). In that case, Lightbourne knew the victim; hence, the victim could identify him. Here Bates was unknown to White and lived more than 100 miles from Lynn Haven. Lightbourne is factually much different on this issue from this case and simply does not provide the support for the state's position the state would like it to.

Moreover, there was a logical reason for Bates to take White into the woods (appellee's brief at 31). If Bates wanted to commit a sexual battery, the office with its large windows and easy view would hardly have been the place to commit this crime. The woods, though not very secluded, provided more concealment than the business office.

Consequently, because the trial court provided no facts to support its findings, and the facts provided by the state are either irrelevant or inadequate, this murder was not committed to avoid lawful arrest.

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 state uses facts to support its argument on this issue which were either irrelevant ("the victim met her husband for lunch." Appellee's brief at 27), not found ("the victim appeared to have been strangled as well." Appellee's brief at 28), or were more appropriate for finding that the murder was especially heinous, atrocious or cruel.

Particularly troublesome is the state's citing of Alvord v. State, 322 So.2d 533 (Fla. 1975), cert.denied, 428 U.S. 923 (1976) and Magill v. State, 386 So.2d 1188 (Fla. 1980), cert.denied, 450 U.S. 927 (1981). By relying upon these cases, the state is asking this Court to confuse the aggravating factors "especially heinous, atrocious, and cruel" and "cold, calculated and premeditated." That is, both Alvord and Magill arose from facts which occurred before the legislature added the aggravating factor "cold, calculated and premeditated" to the list of authorized aggravating factors. Consequently, the trial courts in neither case applied this factor. Nevertheless, when this Court in Alvord characterized the methodical strangulation of three women whom Alvord had tied as "a cold, calculated design to kill" it said this in the context of finding the

murders especially heinous, atrocious or cruel.

In this Court's reported opinion in Magill, the court said that Magill had "a cold, calculated design to effect the death of his helpless victim." The opinion is unclear what factor that determination supported. In its original opinion, however, this Court had said:

> A cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder. Alvord v. State, supra, Sullivan v. State, 303 So.2d 632, 637 (Fla. 1974).

Magill v. State, Case No. 51,699 (Fla. opinion filed May 8, 1980) [5 FLW 242].

On rehearing, however, this Court deleted that language thus avoiding a possible problem of doubling of aggravating factors that may have arisen. See Provence v. State, 337 So.2d 783 (Fla. 1976). Consequently, the state, by citing Alvord and Magill has confused these two aggravating factors and invites this Court to join its confusion.

Finally, the state says this case and Combs v. State, 403 So.2d 418 (Fla. 1981) are "indistinguishable." (appellee's brief at 29). Hardly. In Combs, Combs had his victims drive him to his home so he could get a gun. He then lured them to an isolated wooded area where he intended to commit his crimes. Once there, he produced the gun and taunted both victims with threats and boasts that he would and could kill them. Much like a cat with a mouse it has caught, Combs enjoyed "playing" with his victims. He enjoyed the power of the situation, and only when the girl tried to stand up

did he cooly shoot her and her boyfriend.

In this case, Bates and his victim struggled; she was not helpless. Moreover, there was no evidence that Bates had some premeditated plan to kill White or that once confronted, he taunted her. The evidence shows that White surprised Bates as he burglarized the office, and when she "maced" him, he struck back.

Consequently, while the burglary may have been "cold, calculated and premeditated" the murder was not.

## III CONCLUSION

KAYLE BARRINGTON BATES asks this Honorable Court to reverse the trial court's judgment and sentence and remand his case to the trial court for either a new trial or a new sentencing hearing.

Respectfully submitted,

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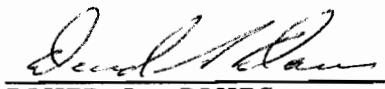
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand to Mr. Andrew Thomas, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and, a copy has been mailed to appellant, Mr. Kayle B. Bates, #088568, Post Office Box 747, Starke, Florida, 32091, this 18th day of November, 1983.



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