IN THE SUPREME COURT OF FLORIDA

LLOYD DUEST, etc.,	)	
	)	
Appellant,	)	CASE NO. 63,678
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the Defendant and the Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In this brief the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal.

All emphasis in this brief is supplied by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts as presented in Appellant's Initial Brief subject to the following additions and/or corrections:

The first paragraph of Appellant's statement of the facts relates that Michael Demizio testified that, "On Tuesday (R. 665) the defendant drove up in a brown Camero . . . ." However, the record reflects that the witness testified that the day was Monday.

Neil O'Donnell, bar manager and bartender at Lefty's Bar identified Appellant as the man who left the bar with the victim (R. 580) and also stated that he believed he heard him called "Danny" but was not sure (R. 576).

Ronald Wright, Chief Medical Examiner of Broward County testified that the victim had sustained eleven stab wounds in total (R. 908).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES RICHARD LONG AND EDWARD HEFFELMAN TO TESTIFY OVER OBJECTION BY APPELLANT'S COUNSEL?

POINT II

WHETHER THE APPELLANT'S SIXTH AMENDMENT RIGHT TO HAVE "THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE" WAS ABROGATED BY COMMENTS MADE BY THE PROSECUTOR REGARDING DEFENSE COUNSEL DURING THE TRIAL?

POINT III

WHETHER THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATED MURDER TO CONVICT APPELLANT AS CHARGED IN THE INDICTMENT?

POINT IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING INTRODUCTION OF STATE'S EXHIBIT #26 (A PHOTOGRAPH OF LYLE SALIN), OVER OBJECTION?

POINT V

WHETHER THE SENTENCE OF DEATH SHOULD BE AFFIRMED WHERE THE TRIAL COURT PROPERLY FOUND THAT FOUR AGGRAVATING CIRCUMSTANCES APPLIED AND THAT THERE WERE NO MITIGATING CIRCUMSTANCES?

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ALLOWING STATE WITNESSES RICHARD LONG AND EDWARD HEFFELMAN TO TESTIFY OVER OBJECTION BY APPELLANT'S COUNSEL.

Appellant has objected to the trial court allowing the testimony of two rebuttal witnesses (Edward Heffelman and Richard Long). The record reflects that prior to trial, the prosecutor had not been aware of the existence of Edward Heffelman and that on the first or second day of trial, Detective Lauria informed the prosecutor that when the police were originally canvassing for witnesses, they showed the composite to an individual who thought the individual in the composite looked familiar. The prosecutor instructed the detective to look for him, and as soon as he was discovered, the court and defense counsel were notified (R. 1148, 560).

The record reflects that as to Mr. Long, the defense had been notified of the existence of such a witness through the State's reciprocal discovery, however, neither his correct name or address was available to the State (R. 1161). This individual was originally listed as a confidential informant by the police officer because he stated his desire to remain anonymous (R. 1162). After substantial difficulty, the State did locate Richard Long and both he and Edward Heffelman were deposed by defense counsel prior to their testimony (R. 1143).

Upon inquiry by the court, defense counsel conceded that there was no prejudice in any way other than the fact that

there was not full disclosure prior to trial (R. 1169-1170). The Richardson hearing (Richardson v. State, 246 So. 2d 771 (Fla. 1971)) on the issue of disclosure was complete and is found on pages 1143-1171 of the record.

The by now well established rule is that :

> If the State does not disclose the identity of a witness, as required by Rule 3.220(a)(1)(i), Florida Rules of Criminal Procedure, then the witness may not testify unless the court first conducts a hearing to determine whether the State's discovery violation was willful or inadvertant, whether the violation was trivial or substantial, and whether the violation has prejudiced the defendant's ability to properly prepare for trial. Richardson, supra.

Haversham v. State, 427 So. 2d 400 (Fla. 4th DCA 1983). Sub judice, there was full disclosure as to why both State rebuttal witnesses were not thoroughly identified, including their whereabouts prior to trial. The significance of their testimony was explored as well as the impact on the defendant's ability to properly prepare for trial. Defense counsel had opportunity to speak with both witnesses prior to their testimony and conceded at trial that there was no prejudice to the Appellant other than the simple fact that the witnesses had not been fully disclosed prior to trial.

On the facts, the trial judge fully complied with the mandate of Richardson. There was no abuse of discretion in the decision of the trial judge to permit the two State rebuttal witnesses to testify.

POINT II

THE APPELLANT'S SIXTH AMENDMENT RIGHT TO HAVE "THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE" WAS NOT ABROGATED BY COMMENTS MADE BY THE PROSECUTOR REGARDING DEFENSE COUNSEL DURING THE TRIAL.

A pertinent portion of the cross-examination of State witness Donna Rosechke is excerpted below:

Q Did you ever give a different answer to the question on how much time went by between when you met Danny and when you talked to the police other than three days? Do you remember ever giving a different answer?

A I may have said three or four days.

Q Do you remember ever giving a different answer than that?

A No, I don't.

Q Do you remember ever giving a deposition in my office back in July of 1982?

A Yes.

Q And do you remember being asked this question? Page 5, line 8.

"Question: Ok. And how long had he been gone or how long had it been since you had talked to him from the time you talked to him till the police talked to you?"

And your answer: "It was awhile, a few weeks, because it took, you know, I didn't know what they wanted at first."

"Question: So two weeks at least; maybe more?"

Your answer: "Maybe more."

"Question: Maybe more than that even?"

And your answer: "Yes."

Do you remember ever saying that?

A Yes.

Q Today you are saying its three days?

A Three days they brought the picture around. It was about a few weeks before I came and gave my statement. (R. 746-747)

On redirect examination of the witness, the prosecutor attempted to have clarified that despite defense counsel's attempt at obfuscation, there really was no inconsistency in the witness' statement. The redirect examination which the defense objected to and which has been asserted as a ground for mistrial is excerpted below:

Q And Mr. Baron attempted to-one of the ways he was saying did you give a different answer was when he said to you: It was weeks later, Donna. Didn't you say on this deposition in July, say that the police talked to you weeks later.

Do you remember that?

And he was saying that you contradicted yourself on the witness stand when you said it was really a few days later. And you clarified it regarding that it was a sketch a few days later.

MR. BARON: Your honor, I'm going to object to Mr. Garfield. That's up to the jury to decide whether someone contradicted themselves.

THE COURT: Objection sustained. Don't ask leading questions and we don't have problems.

Q In relation to that, Donna, would you please look at your statement and tell us the date of the tape recorded statement to the police?

A The date is April 24th.

A April 24th. Is that weeks later than February?

A Yes, it is.

Q So maybe Mr. Baron misunderstands you, doesn't he?

MR. BARON: Objection, your honor. Move to strike.

THE COURT: Sustained. Mr. Garfield, no comments. (R. 763-764).

Subsequently, the trial judge admonished the prosecutor for using leading questions, and the prosecutor apoligized for the error (R. 764). Defense counsel then moved for a mistrial without stating any reasons on the record (R. 765).

Initially, Appellee would point out that the prosecutor was not "gratuitously insulting" defense counsel as asserted in Appellant's brief but was attempting to rehabilitate the witness and show that there were in fact no discrepancies in her testimony.

In his brief, Appellant has conceded that the allegedly improper remarks were not of such severity as would require reversal without an objection. However, Appellant asserts that the improper remarks warranted a rebuke or retraction in front of the jury. Notably however, there was no request for a corrective instruction, and the only remedy which the Appellant sought was the granting of a mistrial. Further, it should be emphasized that while Appellant herein is asserting that the trial judge erred in not administering a corrective instruction, it is important to note that none was requested!

It is clear that the proper procedure to take when objectionable comments are made, is to request an instruction from

the court that the jury disregard the remarks. Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Breedlove v. State, 413 So. 2d 1, 7 (Fla. 1982). It bears reiteration that a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So. 2d 230 (Fla. 1979).

Even assuming the impropriety of the comment, clearly, the comment cannot reasonably be held to warrant reversal of a conviction. There was overwhelming evidence of Appellant's guilt in this case and certainly the single comment of the prosecutor alledged as error did not warrant the granting of a mistrial. State v. Murray, ___ So. 2d ___ (Fla., Case No. 63,364, Opinion filed January 12, 1984). It is clear, that on the facts of this case, Appellant has not carried his burden of demonstrating that the trial judge abused his discretion in denying his motion for mistrial.

POINT III

THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATED MURDER TO CONVICT APPELLANT AS CHARGED IN THE INDICTMENT.

Appellant's brief has presented a convoluted issue. He is attempting to bolster his argument that there was insufficient evidence of premeditated murder with an argument that the jury was improperly charged with felony murder. However, there was ample proof of premeditation, the jury charge was correct on the law and in fact there was a basis for the felony murder charge and in any event the jury instruction issue was waived.

It is true that the State produced only circumstantial evidence. But, the jury could reasonsably have believed that evidence, rather than the testimony of Appellant's alibi witnesses. Circumstantial evidence must not only be consistent with the defendant's guilt, but must be inconsistent with any reasonable hypothesis of innocence. Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981). The State's evidence meets this test.

As noted in Appellant's brief, Michael Demizio testified that during the bus trip from New York City to Fort Lauderdale, Appellant told him that he steals from gay people by taking them back to their apartments, "beats them up and then steals from them." (Appellant's brief at page 17). Tammie Dugan testified to a conversation which she had with the Appellant on the morning of the murder in which the Appellant told her, he was "going out to roll a fag." (R. 813). Appellant

told her about not having any money, and said that he was going to go to a gay bar and pick up a guy and go home with him and steal his money (R. 813). He also told her on the previous day, that he had Michael's knife (R. 818). In fact, he had showed some sort of seven inch knife to another witness, Donna Roeschke, who testified that she met Appellant on Sunday, Valentine's Day, and saw the weapon shoved down in the waistband of his pants (R. 735).

Numerous witnesses testified to seeing the Appellant wearing a gray jogging suit both on Sunday and Monday. Neil O'Donnell, manager of Lefty's Bar identified the Appellant as the gentleman who left the bar on Monday afternoon with the victim (R. 580). Those facts were confirmed by another bartender (R. 614). The Appellant smoked Marlboro's and a pack of Marlboro's were found on the floor of the victim's bedroom (R. 494).

Michael Demizio then testified that when the Appellant returned late Monday afternoon to the residence where they were staying, he was driving a brown Camero which had a jewelry box on the floor of the passenger side which had a black exterior and a red interior. The Appellant had a rag on the shifter and a rag on the steering wheel. Appellant was still wearing the same gray jogging suit except now there was blood on the sleeve and on the collar (R. 665-671).

Tammi Dugan testified that mid-afternoon on Monday, the Appellant returned to the Alpha Apartments where they all had been staying, accompanied by an older man. They were

driving a gold Camero, stayed for a few minutes and then left. The Appellant returned again between four and five by himself, driving the Camero. It had been stipulated that a gold Camero found parked in the shopping mall on Sunrise Boulevard belonged to the victim.

Ronald Wright, Chief Medical Examiner testified that the victim had died from multiple stab wounds and that there had been eleven wounds in total found on the victim (R. 908).

In view of even this very cursory recitation of the evidence, it should be clear that there was overwhelming proof of Appellant's guilt of premeditated murder as charged in the indictment. Premeditation, like other factual circumstances, may be established by circumstantial evidence. Adams v. State, 412 So. 2d 850 (Fla. 1982). In Alicea v. State, 392 So. 2d 960 (Fla. 4th DCA 1980) that court found that the evidence examined as a whole established that (1) the victim was known to carry large sums of money, (2) the defendant was short of money and had been trying the night before to sell the gun used to inflict the fatal wounds to pay off gambling debts. From the foregoing, the court found that there was ample evidence to support premeditation. In the instant case, the Appellant had stated he gets his money by "rolling gay guys" and that he intended to do the same on the Monday that the victim was murdered. The Appellant was was seen with the victim at a gay bar immediately prior to

the murder and was subsequently seen in the victim's car with him. A short while later, he was seen driving the victim's car alone, a rag on the shifter and steering wheel. The victim's roomate testified that the victim's jewelry case had been stolen, and in fact, the case was seen in the car driven by Appellant. When the Appellant returned to the Alpha Apartments around four or five o'clock in the afternoon, witnesses testified that they saw blood stains on the sleeve of his jogging suit. The Appellant had gotten possession of a seven inch knife or dagger and the cause of death in this case was multiple stab wounds. In fact, the victim's sustained eleven such wounds. There can be no doubt but that there was sufficient circumstantial evidence to sustain Appellant's conviction of premeditated murder.

Appellant also claims that the court erred in instructing on felony murder. Not only did the evidence support the giving of such an instruction, but trial counsel failed to object to giving the felony-murder instruction. Florida Rule of Criminal Procedure 3.390(d) provides that instructions must be objected to at trial in order to be preserved for appeal. By failing to object to the instruction at trial, Appellant has waived this point on appeal, but had he objected, he would have lost on the merits. Peavy v. State, ___ So. 2d ___ (Fla., Case No. 62,115, Opinion filed December 8, 1983).

Despite the fact that trial counsel waived any objection to a felony murder instruction, it is clear that the State

does not have to charge felony murder in the indictment but may prosecute the charge of first degree murder under a theory of felony murder when the indictment charges premeditated murder. State v. Pinder, 375 So. 2d 836 (Fla. 1979); Adams v. State, 412 So. 2d 850 (Fla. 1982). Further, in the instant case, there was evidence to support a conviction of felony murder.

POINT IV

THE TRIAL COURT DID NOT ERR IN ALLOWING INTRODUCTION OF STATE'S EXHIBIT #26 (A PHOTOGRAPH OF LYLE SALIN), OVER OBJECTION.

The record reveals that trial counsel made a bare objection to the admission of the photograph without stateting any grounds on the record (R. 887). The motion for mistrial was directed to the witnesses' characterization of Lyle Salin as a transvestite, and not to the admission of the photograph (R. 884). Although defense counsel's objection to the photograph relies on his previously stated grounds, apparently that discussion was off the record, or at least is not included in the record on appeal so that this Court is unaware as to the basis for the objection or of the argument in support of admitting the photograph into evidence.

Based on the foregoing circumstances, the Appellant has not carried his burden of demonstrating that the trial judge abused his discretion by admitting the photograph of Lyle Salin into evidence. The law is well established that admission of photographic evidence is within the trial court's discretion and that court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So. 2d 908 (Fla. 1983). Based on the paucity of of the record with regard to this issue, Appellant cannot demonstrate that the trial judge abused his discretion by admitting the photograph of Lyle Salin.

Assuming arguendo, this Court finds that the photograph should not have been admitted, the admission of such evidence was harmless and did not unduly prejudice the Appellant's right to a fair trial. Pritchett v. State, 414 So. 2d 2 (Fla. 3rd DCA 1982). Evidentiary rulings do not constitute prejudicial errors where they concern non-essential matters and do not prevent defendants from presenting matters important to their defense. Lopez v. State, 264 So. 2d 69, 70 (Fla. 3rd DCA 1972). In the instant case, admission of the photograph was a matter collateral to the crime charged and error, if any, was not prejudicial to the substantial rights of Appellant. Palmes v. State, 397 So. 2d 648, 653 (Fla. 1981).

POINT V

THE SENTENCE OF DEATH SHOULD BE AFFIRMED WHERE THE TRIAL COURT PROPERLY FOUND THAT FOUR AGGRAVATING CIRCUMSTANCES APPLIED AND THAT THERE WERE NO MITIGATING CIRCUMSTANCES.

Appellant does not contest that the finding of two of the aggravating circumstances applied to his case under 921.141(5) Florida Statutes. Those circumstances are that: (1) the Appellant had been previously convicted of armed robbery and assault with intent to commit murder; (2) that the evidence presented shows that the capital felony was committed while the Appellant was engaged in the commission of a robbery and that the capital felony was committed for pecuniary gain (R. 1833-1836).

Appellant does not contest the finding that the capital felony for which Appellant was sentenced was especially heinous, atrocious or cruel. The trial judge found that the evidence which supported this finding was that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom; and the medical examiner's testimony that the victim lived some few minutes before dying (R. 1834).

As supporting his assertion that the murder at bar was not particularly heinous, atrocious or cruel, Appellant has presented this Court with a "parade of horribles" and attempts to show that by comparison this murder was not as offensive as others which have been labeled "heinous, atrocious or cruel." Appellant's argument is not persuasive where the evidence presented shows

the victim received eleven stab wounds and did not die instantaneously.

Despite Appellant's attempts to distinguish the case of Morgan v. State, 415 So. 2d 6 (Fla. 1982), that case is directly on point and supports the applicability of the aggravating factor contested herein. In Morgan, the evidence showed that the death was caused by one or more of ten stab wounds; and the Court approved the finding that the homicide was especially heinous, atrocious or cruel. In the instant case, that same aggravating circumstance is likewise appropriate.

Appellant also challenges the finding of the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In finding that this aggravating circumstance applies, the trial court found:

> Evidence adduced at trial indicated that defendant informed witness Demezio some two days prior to the murder that he brings homosexuals back to their apartments, beats them up, and takes their money or jewelry. Defendant on the day of the murder went to his temporary residence with the victim, went into the closet where Demezio kept a dagger and left the residence with John Pope, Jr., the victim. The dagger was later discovered missing, and John Pope, Jr. was later discovered at his home, dead. His car and jewelry box were missing (R. 1834).

The elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration when imposing a sentence in a capital case as well as in other criminal cases. Combs v. State, 403 So. 2d 418 (Fla. 1981).

In the instant case, the Appellant was charged with premeditated murder and the evidence clearly supports the finding that the homicide was committed in a cold, calculating, and premeditated manner without any pretense of moral or legal justification.

Based on the two aggravating circumstances which Appellant alleges were improperly found, he argues that he is entitled to a new sentencing hearing, despite the fact that he does not even contest the finding of two more aggravating circumstances and the fact of the non-existence of any mitigating factor. Appellant also urges this Court to overturn his death sentence because of an alleged disproportionality in applying that sentence.

However, the record reflects that the trial judge utilized a reasoned weighing process of the circumstances and determined that the death sentence was appropriate. In the instant case, even if this Court found that one or two of the aggravating circumstances found by the trial judge, were inapplicable to the instant case, it would still be appropriate to maintain the death penalty. Fleming v. State, 374 So. 2d 954 (Fla. 1979); Hargrove v. State, 366 So. 2d 1 (Fla. 1979).

When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor which might override the aggravating factors, death is presumed to be the appropriate penalty. White v. State, 403 So. 2d 331 (Fla. 1981), cert. denied, 103 S. Ct. 3571 (1983); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). This proposition of law was recently affirmed again in

White v. State, ___ So. 2d ___, (Case No. 62,144, Opinion filed January 19, 1984), where despite the finding on review that one of the aggravating circumstances did not apply, this Court nonetheless affirmed the death sentence.

Appellant was properly convicted of first degree murder. The jury recommended death. The trial court correctly found four aggravating circumstances and nothing in mitigation. A comparison of this case with similar cases shows death to be the appropriate penalty.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Appellee would respectfully request that this Honorable Court AFFIRM the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished to R.E. CONNOR, ESQUIRE, Attorney For Appellant, 410 N.W. 74th Avenue, Plantation, Florida 33317 by U.S. Mail delivery this 5TH day of March, 1984.

Marlyn J. Altman
OF COUNSEL