IN THE SUPREME COURT OF FLORIDA

WILTON AMOS ROSS,

Appellant,

vs

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. 63,767

APPELLANT'S REPLY BRIEF

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TOPICAL INDEX

AUTHORITIES CITED

OTHER AUTHORITIES:

POINT I.

THE TRIAL COURT ERRED IN FAILING TO GRANT MOTION FOR JUDGMENT OF ACQUITTAL IN THAT (A) THE CIRCUMSTANTIAL EVIDENCE DID NOT SUPPORT THE VERDICT, AND (B) THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION TO SUSTAIN A CONVICTION OF FIRST DEGREE MURDER.

The appellant has argued in his initial brief that (1) there was insufficient evidence to support any finding of guilt, and (2) there was insufficient evidence to support the jury verdict of premeditated murder. The appellant will rely on his original brief regarding the first point and confine the present remarks to the second point. Specifically, the appellant contends that the jury could not have reasonably concluded that the evidence fails to exclude every reasonable hypothesis of innocence in that the act of murder could have been an imminently dangerous act as opposed to a premeditated act.

The State does not attempt to refute or deny the substantial evidence that the victim's death was an act of passion and not premeditated. State witness, Dennis Harwood, testified at trial that the appellant confessed the murder to him and described the facts in detail. Mr. Harwood testified as follows:

> "...he went to the houseboat, and he told me that when he got on the houseboat, that Gladys was there; that she was arguing at him. He didn't feel like putting up with it because he had been out on the lake. He

got soaking wet and sheared a pin in the boat motor. He said that he hit her with a hammer. After he realized what he did, I guess he killed her with it the first time he hit her. He just continued to hit her...". (TR 696-697).

"Q. Now, in your letter and in your statement and in your deposition and today, are you saying that he meant to kill her?

A. No sir. He told me that after he had hit her the first time, he thought that he had killed her. He said the only thing to do was to make it look as though someone else had committed the crime." (TR 705).

"Q. Now, did he state to you at any time in what condition he was in? You indicated that they had this fight or something?

A. He said that he had been drinking, and that he was soaking wet and that he was mad." (TR 708).

Dennis Harwood's testimony as to the other facts the appellant allegedly told him was corroborated in every way. Harwood's statement as to appellant's description of his state was also corroborated by independent evidence. Other witnesses testified that the victim had failed to pick up the appellant and that he had to cross the lake in a cold, rainy storm at night. Other witnesses stated that he had a six-pack of beer with him. Another witnesses testified that there was an angry, loud altercation between the victim and an unknown person which

ended with a thump, then silence. Finally, there was medical testimony that the blow to the head with a hammer would have caused immediate unconsciousness but not necessarily immediate death.

The appellee argued that the evidence of the wounds in and of themselves are sufficient evidence to support the jury finding of no possible hypothesis of murder without premeditation. However, this Court is being asked to ignore not only a reasonable hypothesis of innocence but direct evidence that the death was not premeditated.

At the trial the defense attorney understandably chose to argue primarily that the appellant was not guilty of any wrongdoing and should be acquitted altogether. In so doing he neglected to adequately argue to the jury the legal requirements that there be no reasonable hypothesis that the victim's death occurred not by premeditation but by an act imminently dangerous to another and evincing a depraved mind regardless of human life. The legal concept of circumstantial evidence, as it relates to the element of premeditation, is a complex one. The appellant submits that the jury probably did not understand and certainly did not properly apply the law of circumstantial evidence as it related to the element of premeditation. It is unreasonable to conclude that there is no reasonable hyptothesis of innocence

when the appellee's own witness established that the appellant did not intend to kill the victim and when this testimony was verified by numerous other witnesses, including the only eye witness to the crime.

The definition of second degree murder reads like a verbatim description of this crime:

> "An act is one 'imminently dangerous to another and evincing a depraved mind regardless of human life' if it is an act or series of acts that: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and (2) is done from ill will, hatred, spite or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life." Florida Standard Jury Instructions in Criminal Cases (1981).

In order for this Court to find the jury could reasonably conclude that there is no reasonable hypothesis of innocence as regards premeditation would require this Court to totally ignore the convincing, direct evidence to the contrary.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO DISMISS FOR CAUSE A JUROR WHO WAS A RELATIVE OF THE PROSECUTOR.

In response to appellant's objection to failure to dismiss a juror for cause, the appellee concedes that the issue is properly before the Court. However, the State relies on Hartley v. State, 214 So.2d 489 (Fla. 1st DCA 1978) as authority in rejecting the appellant's argument. In Hartley, the fact situation

was entirely differenct; the juror did not announce that he was related to a witness until during the trial; the defendant had not exhausted all of his pre-emptory challenges; the relationship was to a witness; and the relationship was known to be that of a first cousin.

The appellee attempts to cast a heavy burden of proof of the exact relationship of the juror to the prosecutor in this case on to the defense. In the process of jury selection, the defense has no way to conduct an investigation to determine the exact degree of relationship of a juror to the prosecutor. When the possibility of a disqualifying relationship is raised, particularly in a case of this magnitude, the trial court should take every precaution to assure a fair and impartial jury. It is unfair to cast a burden of proof upon the appellant when he has no possible way of determining the relationship during the voir dire process. When the relationship could not be determined, the Court should have dismissed the juror for cause.

POINT III.

THE TRIAL COURT ERRED IN PERMITTING A WITNESS TO TESTIFY FOR THE STATE WHOSE NAME HAD NOT BEEN PROVIDED IN DISCOVERY.

The appellant would rely on his initial brief as to this issue.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCES OF SUBSTANTIAL IMPAIRMENT OF THE APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AND WHETHER THE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

The trial court refused to instruct the jury during the penalty phase as to any mitigating circumstances. The appellant has raised as error the failure to instruct on two mitigating circumstances: the capital felony was committed while the appellant was under the influence of extreme mental or emotional disturbance? Section 921.141(6)(b), Florida Statutes (1983); and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired? Section 921.141 (6)(f), Florida Statutes (1983).

During the charge conference, while the appellant's counsel was stating his jury instruction requests, the Court interrupted him and went on to deny both sub-sections (b) and (f) without permitting counsel any further opportunity to state his requests:

> "The Court: I don't see the influence of extreme mental or emotional disturbance in the context of that. So, I, quite frankly do not see any statutory mitigating circumstances. (R-1093).

Not only did the Court interrupt counsel in his presentation

of his jury instruction requests, but it would have been a useless act for appellant's counsel to have pursued the issue further once the Court had announced its ruling. Brown v. State, 206 So.2d 377 (Fla. 1968). At the appellant's instigation, the Court addressed the question of giving both of the instructions. It would be a very strained interpretation of the facts and a denial of due process pursuant to the Constitution of the United States and of the State of Florida to find that counsel's objection was insufficient.

The appellee cites Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Lucas v. State, 376 So.2d 1149 (Fla. 1979) in support of its argument. However, both of those cases point out that the purpose of requiring a specific objection at the trial court level is to give the trial court the opportunity to be presented with the issue and to make a specific ruling. In the instant case, the Court was presented with the issue and did make a specific ruling.

The appellee also contends that there was insufficient evidence of intoxication presented to require the mitigating circumstance instructions. The appellee does not deny that there is conflicting evidence as to the issue of sobriety. Although the appellant testified at the penalty phase that he was cold sober, he also testified that he did not commit the

murder. Both the trial court and the appellee seemed willing to accept the appellant's testimony as to his sobriety, but to reject it as to his denial of guilt. Following the same logic, they are willing to accept State witness Harwood's statement that the appellant committed the crime but to reject his testimony which establishes that the appellant was drinking at the time. No fewer than five witnesses: Dennis Harwood, Wilford Jiles, Mary Stevens, Bobby Ross and Mildred Roberts testified in regard to appellant's alcoholism and inebriation at the time of the offense. Mary Stevens testified that "...the only way that I feel he could have would have been to have been drinking. They were in a fight and then he killed her and maybe panicked and went crazy." (R-1055). Bobby Ross testified that after two or three beers, the appellant was under the influence of alcohol. (R-1059). Mildred Roberts testified that all of his previous trouble was the result of drinking. "... he was always easy to get along with, and he was liked by most all people until he got to drinking. Then he would get into it." (R-1062). Not only was there substantial evidence of intoxication, it constituted the primary thrust of the appellant's penalty phase defense.

The appellee argues that the trial court is not required to give a jury instruction on a mitigating circumstance because the jury <u>may</u> not have found that the evidence supported a finding

of the circumstance. All the cases cited by appellee on this point are cases where the jury was properly instructed but did not find that the evidence supported the mitigating circumstance. The issue on appeal was not whether it was proper to deny a jury instruction but whether it was proper to find that the evidence did not establish the mitigating circumstances as instructed.

In fact, a defendant has a right to a jury instruction if there is any evidence to support it regardless of whether or not the jury would have believed it. Carrizales v. State, 345 So.2d 1113 (Fla. 2d DCA 1977); Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965). Again, appellant would rely on the holding in Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981) which was not addressed or refuted by the appellee.

POINT V.

THE DEATH PENALTY WAS IMPROPERLY IMPOSED IN THAT THE TRIAL COURT (A) IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THAT THE HOMOCIDE WAS ESPECIALLY HEINOUS AND (B) ERRED IN FAILING TO CONSIDER APPELLANT'S LIFELONG ADDICTION TO ALCOHOL AND HIS INTOXICATION AT THE TIME OF THE OFFENSE AS A MITIGATING FACTOR ONLY BECAUSE THE APPELLANT TESTIFIED HE WAS SOBER AT THE TIME OF THE OFFENSE.

The trial court clearly imposed the death sentence in this case because it believed that the victim consciously suffered a terrible beating prior to her death:

> "The documentation of diverse location of blood pools and spatter around and about the grisly scene corroborate that the defendant did not effect instantaneous death of the victim and that she endured tortuous knowledge of her impending death with excruciating pain." (R-98).

In fact, the Court did not recognize the evidence to the contrary which was discussed in the argument under Point I. The description of the angry fight, the sudden hammer blow, and the subsequent loss of consciousness, as described in the appellant's statement to Dennis Harwood, were all verified by the listening neighbor. There is a lack of substantial competent evidence to support the trial judge's finding of an extended, tortuous killing that would set this murder apart from the norm.

Appellee contends that the trial court weighed all the evidence of intoxication before finding that there were no mitigating circumstances. Again, appellee would point to the trial court's ruling that the jury would not be instructed as to any statutory mitigating circumstances based on intoxication because, "The defendant says in his comments he was not drunk.... He had a flat-footed statement he was not drunk." (R-37).

The Court reiterates the refusal to weigh the evidence of intoxication due to the appellant's allegation of sobriety in his findings of fact:

B.

Whether the murder was committed while the Defendant was under the influence of extreme mental or emotional disturtance?

FINDING

... During the guilt or innocence phase of the trial, some evidence was submitted with regard to possible consumption of beer, however, during the sentenceing phase the Defendant testified that he was cold sober on the night of the offense. Accordingly, the jury was not instructed on this factor and the Court rejects the same.

F.

Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired?

FINDING

... As noted above, the Defendant testified during the sentencing proceedings that he was cold sober on the night in question. Accordingly, the jury was not instructed on this factor and the Court rejects the same. (R-111-112).

Significantly, the Court specifically refers to the holding regarding the refusal of jury instructions.

Because of the appellant's statement during the penalty phase the trial court, like the court in Mellins, supra, refused to consider the other evidence of intoxication including appellant's earlier, and presumably truthful, statement to Dennis Harwood that he had been drinkingat the time of the offense.

The trial court totally disregards any evidence which is contrary to the appellant's ill-advised statement at the penalty phase:

> "The evidence shows that there were no signs of impairment in the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. On the contrary, defendant testified during the guilt or innocence phase that he was neither upset nor distressed over the failure of Gladys Ross to pick him up because he thought she would have a reasonable explanation." (R-112).

Again the Court totally ignores the appellant's earlier statements to Harwood "that he was soaking wet and he was mad." (TR-708). Even the prosecutor argued in closing that:

> "... whatever fit of anger he was in--we heard testimony he has a bad temper. In this fit of anger, or whatever it was--I think the evidence shows he was just mad and wet,that she wasn't there and that she was tired and they fought and he killed her." (R-1097).

The trial court erred in failing to consider all of the evidence just because the appellant made contrary statements. This Court and the United States Supreme Court have been consistent and clear in holding that the death penalty is constitutional and the requirements of due process are satisfied only so long as each defendant is given a full and fair hearing and all the evidence is considered. Profitt v. Florida, 428 U.S. 242 (1976).

Finally, this Court has the duty to review the circumstances of each case to determine that the death sentence is

being applied even-handedly. Appellee submits that in many other jurisdictions, within the State of Florida, the State would not have even requested the death penalty in this case. It is significant that the Appellee does not deny that there is any distinction between this case and the facts in Herzog v. State, 439 So.2d 1327 (Fla. 1983). The law requires that the death sentence be set aside in this case.

POINT VI.

FLORIDA STATUTES, §921.141 (1981) IS CONTRARY TO THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF FLORIDA ON ITS FACE AND AS APPLIED IN THIS CASE.

The appellant would rely on the initial brief.

CONCLUSION

The appellant asks the Court to grant a new trial, reduce the conviction to second degree murder, reduce the sentence to life, or to remand for a new sentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished to Assistant Attorney General Richard Patterson, The Capitol, Tallahassee, FL by hand delivery, this 4th day of April, 1984.

Respectfully submitted,

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