IN THE SUPREME COURT OF THE STATE OF FLORIDA

FRED LEWIS WAY	:	
Appellant	:	
vs.	:	Appellate Case Number 64,931
STATE OF FLORIDA	:	
Appellee	:	
	:	

REPLY BRIEF OF APPELLANT

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ARGUMENT UPON ISSUE I

In Appellee's Brief filed herein, Appellee seeks to deal with Appellant's attack on King v. State, 390 So.2d 315 (Fla. 1980) by citing Welty v. State, 402 So.2d 1159 (Fla. 1981), and Delap v. State, 440 So.2d 1242 (Fla. 1983).

In Welty v. State, supra, after the victim was killed in his condominium, Welty set fire to the condominium. In concluding that the setting of the fire created a great risk of death to many persons, it was noted that six elderly people were, at the time of the fire, asleep in the building in which the victim's condominium was located.

In Delap v. State, supra, there was proof that Delap drove erratically, while struggling with the victim whom he killed, presenting a danger to the lives of other motorists on the road. One of the motorists was Lois Huff who was operating her automobile on the highway in front of the automobile being driven erratically by Delap. In Mrs. Huff's automobile with her were her three daughters.

The difference between Welty v. State and Delap v. State on the one hand and King v. State on the other hand is that:

a. In Welty v. State, supra, there was actual proof, as opposed to assumption, presumption and/or conjecture, that others, to-wit: six elderly sleeping people, were in fact endangered by reason of the fire started by Welty.

b. In Delap v. State, supra, there was actual proof, as opposed to assumption, presumption and/or conjecture, that others, to-wit: Mrs. Huff and her three daughters, were endangered by reason of Delap's erratic driving while struggling with his victim.

In King v. State, supra, there was no such actual proof that anyone was in reality endangered by the fire started by King after he killed his victim. In King v. State, supra, the test is one of "reasonably foreseen" that fire would endanger neighbors, firefighters and police even though the reasonably foreseeable may never have occurred. It is the test of reasonably foreseeable enunciated in King v. State, supra, complete with lack of proof that what was reasonably foreseeable even occurred which creates the problem. The application of the test, despite a lack of proof that what was so foreseeable ever occurred, results in imposition of the aggravating circumstance set forth in Chapter 921.141(5)(c)

Florida Statutes though in reality and actuality great risk to life never occurred or was ever demonstrated. Accordinly, Appellant, who contends that in his case, as in King v. State, supra, there was no proof that anyone's life was actually or realistically in danger as a result of the fire he allegedly set, claims that the concept expressed in King v. State, supra, flies in the face of the rule requiring that aggravating circumstances be proven beyond a reasonable doubt. Williams v. State, 380 So.2d 538 (Fla. 1980). In Appellant's case, as in King v. State, supra, it is assumed, presumed and/or judicially noticed that the lives of others were at great risk though the record in neither case provides any actual indication that such was in fact the case.

ARGUMENT UPON ISSUE II

Chapter 921.141(5)(d) Florida Statutes establishes as an aggravating circumstance in capital cases that:

> "The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping..." (emphasis added).

From the use of the word "while" in the statute, Appellant concludes that the act causing death must occur during the course of the commission of, or attempt to commit or flight after the commission of or an attempt to commit one of the enumerated felonies.

When the foregoing is applied to the facts of the instant case, the problem becomes clear. In the instant case, Appellant, it is alleged, dealt two blows to the head of Adrienne Way (R 799), either of which could have caused her death (R 800). After infliction of the blows, Appellant supposedly started a fire which engulfed Adrienne's body. At some point during the fire, Adrienne was alive (R 786). Adrienne's death was due to two blunt traumas to her head and burns to her body though, as between the blows and the burns, the actual and precise cause of her death is unknown (R 802-804). Since arson, for which Appellant was convicted, is one of the felonies enumerated in Chapter 921.141(5)(d) Florida Statutes, the question, which Appellee fails to address in its Brief in this case, is whether Appellant killed anyone during the fire in view of the fact that death dealing blows were inflicted prior to the commencement of the crime of arson.

While Appellant concedes that the commission or attempt to commit or flight after the commission or attempt to commit one of the enumerated felonies need not, in the strict sense, be the cause of death, Appellant nevertheless contends that there must be some nexus or relationship between such commission, attempt or flight and the resultant death. In Mills v. State, 407 So.2d 218 (Fla. 3d DCA 1981), the victim was held captive while the defendant aided and abetted in the robbery of the victim. After completion of the robbery, the victim continued to be held captive and was, while still a captive, killed by defendant's codefendant. In Mills v. State, the issue was whether the defendant was guilty of felony murder. The answer is that the defendant was guilty of felony murder, because there was no:

> "...definitive break in the chain of circumstances beginning with the felony and ending with the killing..."

and because:

> "...most certainly in this case, where Meli (the victim) remained in continuous captivity from the commencement of the felony until his death, the nexus between the robbery and his death is clear."

In Campbell v. State, 227 So.2d 813 (Fla. 1969), while escaping after the commission of a robbery, defendant was arrested by a

police officer who defendant killed. In this case, felony murder was deemed to have occurred because of the inexorable course from the time of the robbery to the death of the officer and because the death was the inevitable result and an integral part of the robbery.

From Mills v. State and Campbell v. State, the requirement of some nexus or relationship between underlying felony and death is apparent. In Appellant's case, what is the nexus or relationship between the fire and death of Adriennne Way? The answer is none because the arson, unlike the enumerated felonies in all the felony murder cases reviewed in connection with this appeal, which occurred in Appellant's case commenced subsequent to, as opposed to prior to, the acts which unequivocally and without doubt set Adrienne Way upon a certain path to and would have, without the fire, have caused her death. Prior to the infliction of the blows to Adrienne Way's head, no felony enumerated in Chapter 921.141(5)(d) Florida Statutes had commenced. It was only after the infliction of the blows that such a felony occurred and it is this sequence that eliminates the applicability of the felony murder rule in Appellant's case.

As an aside to all the foregoing, Appellant notes the existence of two cases in which death dealing acts occurred which were followed by arson. In both of these cases, as far as Appellant can fathom, arson was not treated as the basis for even an effort to impose upon the defendants the aggravating circumstance of Chapter 921.141(5)(d) Florida Statutes. The cases are King v. State, 390 So.2d 315 (Fla. 1980) cited in Appellant's initial brief filed in this cause. The other is Welty v. State, 402 So.2d 1159 (Fla. 1981) in which the victim was killed in his bed which was then set afire.

ARGUMENT UPON ISSUE III

As his argument upon Issue III in this Reply Brief, Appellant adopts his argument in his Initial Brief.

ARGUMENT UPON ISSUE IV

In response to Appellee's argument upon Issue IV, Appellant adopts his argument upon this issue as same appears in his Initial Brief filed in the cause.

In addition to the foregoing, Appellant notes that Appellee

relies upon two cases in particular to support its position on Issue IV.

The first case is Harvard v. State, 414 So.2d 1032 (Fla. 1982). In this case, it was concluded that certain actions by Harvard, to-wit:

a. Series of acts by which he harassed the victim including a Christmas card in which he advised the victim that "You will never see Christmas." and

b. Waiting for the victim and stabbing the victim prior to killing her,

constituted additional acts by Harvard rendering the death of the victim, though instantaneous, especially heinous, atrocious or cruel. Harvard v. State, supra, is inapplicable to the case at hand in which there was no such harassment over an extended period of time and no acts of lying in wait or stalking.

The second case is Breedlove v. State, 413 So.2d 1 (Fla. 1982) in which the victim, stabbed while sleeping, did not die immediately and suffered considerable pain while awaiting death. Breedlove v. State, supra, is likewise a far cry from the case at hand in which it is unknown what, if anything, Adrienne Way

experienced or felt after having had inflicted upon her the fracture wound. If, as Appellant claims, the fracture wound was the first inflicted upon Adrienne Way, and because such wound would have rendered Adrienne unconscious (R 801-803), it is clear that Adrienne Way, unlike the victim in Breedlove v. State, supra, did not experience pain subsequent to the infliction of the death dealing blow.

ARGUMENT UPON ISSUE V

As his argument upon Issue V in this Reply Brief, Appellant adopts his argument in his Initial Brief.

ARGUMENT UPON ISSUE VI

According to the Appellee, Appellant's jury heard a number of contradictory accounts of Appellant's emotional reaction to the fire which engulfed his wife and child. All the accounts were from prosecution witnesses. One set of accounts related the various manifestations of emotion displayed by Appellant to the event. The other set of accounts reflected a lack of emotional response to the event.

From the latter accounts, Appellee sought to contrast Appellant's reaction to the event to what might normally be anticipated from a husband and father who knew that his wife and daughter were burning. The relevancy of this testimony was the inference to be drawn therefrom, to-wit: a normal person in Appellant's position would have been displaying emotion but Appellant was not because he was the deliberate instigator of the engulfing flames.

It was precisely because of the unusualness of Appellant's behavior, as testified to by certain prosecution witnesses, that Appellant sought to have his conduct explained by an expert witness, to-wit: a clinical psychologist. Obviously, the unusualness of Appellant's reaction, to-wit: his calmness, lack of hysteria and subduedness, required explanation since it was this very unusualness which made testimony thereto relevant to the prosecution's case. And, it was precisely this unusualness which placed the subject of this unusual reaction beyond the ken of the average lay person. According to Appellee:

> "The average person can understand that because each person is a unique individual, reactions to a similar set of circumstances can widely vary." (P 31 of Appellee's Brief)

If indeed this be correct, then one must wonder what Appellee's purpose was in eliciting testimony of Appellant's lack of emotional expression to the fire. The obvious purpose was to convince the jury that Appellant's lack of emotional display was due to the fact that his deliberate act was the cause of his wife's and daughter's predicament and this accounted for Appellant not reacting in a manner consistent with that of a grieving husband and father fearful for the lives of his wife and daughter.

From the preceding, it is obvious that Appellant needed the testimony of a clinical psychologist, an expert witness, to provide the jury with an explanation as to why he reacted as he did. As the expert's proferred testimony amply demonstrates, Appellant's lack of expressive notion was a product of his:

> "...unusual way of dealing with emotions with stress. Most people would respond under those conditions with a tremendous amount of anxiety, with panic, with hysteria, with an observable emotional reaction. It is not because he purposely or voluntarily controls this. He is, in fact, a very toned down personality. He is capable of a lot of strong feelings internally, but observably, on the outside, he is remarkably toned down." (R 1381).

In view of the preceding, can it be logically and reasonably posited that average lay people have within their normal and

common ken sufficient knowledge to appreciate the existence of personalities such as Appellant's, as described by proferred testimony, so that they would be capable of understanding on their own without expert assistance, how a husband and father could have reacted without observable emotion to a fire in which his wife and daughter were caught? The answer to the question is in the negative and thus it was error for the trial court to have disallowed the expert's testimony.

ARGUMENT UPON ISSUE VII

At the conclusion of presentation of Appellee's case during the first phase of Appellant's trial, Appellant moved for a judgment of acquittal (R 1398) which was denied.

The propriety of the motion must be judged from the point of view of what had occurred at trial up to the making of the motion, that is, whether the Appellee's case in chief on the first phase constituted a prima facia case.

Appellant believes that even Appellee would agree that without the testimony of Tiffany Way, the Appellee would have had no chance of presenting a prima facia case. Thus, the question is

what did Tiffany's testimony do to Appellee's case in chief. The answer is that it killed Appellee's case.

According to Tiffany, Appellant suggested that she and her sister, Adrienne Way, play in Tiffany's room so Appellant could be alone with his wife. (R 837). After ten or fifteen minutes Appellant called for Adrienne from the kitchen of the Way home (R 837-838). Adrienne responded to the call and after thirty or forty seconds, Tiffany heard Adrienne call out (R 839). Next, Tiffany saw Appellant walk down a hall, go to the bathroom and then to the back patio of the home (R 840). Thereafter, Tiffany heard a scream, looked out her window and saw a line of fire in the garage (R 841). From the time Appellant called for Adrienne to when Tiffany saw the line of fire, one or two minutes elapsed according to Tiffany (R 843).

In addition to the foregoing, Tiffany reconfirmed the following statement she gave to the Hillsborough County Sheriff's Department concerning the events in question.

> "Do you think the hollering and screaming you heard between your mom and sister in the garage, they had been fighting then or not?
>
> Answer: They were fighting.

Question: Pushing each other?

Answer: Probably.

Question: Did you hear anyone scream like they were hurt or anything like that?

Answer: When I looked out the window I saw the fire and I heard my sister scream real loud.

Question: Okay. But prior to the fire, had you, had you? Did anyone indicate to you that they needed first aid or anything?

Answer: No, they were just yelling." (R 861-862)

In followup to the foregoing, Tiffany was asked if she recalled the aforequoted conversation with sheriff's deputies to which she responded in the affirmative (R 862). Tiffany was then asked:

"Question: Is that the truth.

Answer: Yes, sir.

Question: Excuse me?

Answer: Yes, sir

Question: Is that the truth?

Answer: Yes, sir...

Question: So the statement is the truth; is that correct?

Answer: Yes, sir" (R 862-863).

In addition to all the foregoing, Tiffany also testified that the

last time she heard her mother and Adrienne arguing was when Appellant walked into the bathroom (R 860).

From the preceding, if Tiffany is to be believed as she must be for Appellant's case to stand, Appellant was entering the bathroom at the time when Adrienne and her mother were fighting in the garage. According to Tiffany, from the bathroom, Appellant proceeded to the back patio of the home. And, if this be true, as it must be for the purposes hereof, Appellant was far removed from his wife and Adrienne while they were fighting. Since it is ludicrous to believe that mother and daughter were fighting, arguing and screaming after the infliction of the blunt trauma blows to their respective heads observed by the medical examiner, and since there is no evidence that Appellant returned to the garage after going to the back patio, Appellee's case failed to show that Appellant inflicted said blows or started the fire. In fact, Tiffany's testimony eliminates Appellant as the administer of the blows and the starter of the fire.

For the foregoing reasons and because Tiffany's testimony was crucial to Appellee's case, a judgment for acquittal should have been entered in Appellant's favor.

ARGUMENT UPON ISSUE VIII AND IX

As his argument upon Issues VIII and IX in this Reply Brief, Appellant adopts his arguments in his Initial Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished, by mail, this 7th day of November, 1984, to Peggy Quince, Esquire, Assistant Attorney General, 1313 North Tampa Street, Tampa, Florida 33602.

SIMSON UNTERBERGER, ESQUIRE