IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,821

(Cir. No. 83-7088 CF 10)
(DCA Case No. 84-1525)

JOHN MAREK,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 6, 1983, the Defendant was indicted by a Broward County Grand Jury after his arrest on June 17, 1983. The Indictment (R. 1358) charged the crimes of Murder (First Degree); Kidnapping; Burglary; Sexual Battery; and Aiding and Abetting a Sexual Battery. After a lengthly pretrial preparation, the case was tried to a jury, which returned a verdict on June 1, 1984. The jury found the Defendant guilty of First Degree Murder (R. 1438); guilty of Kidnapping (R. 1439); guilty of the lesser included offense of Attempted Burglary (R. 1440); guilty of the lesser included offense of Battery (R. 1441); and guilty of a second lesser included offense of Battery (R. 1442).

On June 5, 1984, 10 members of the jury recommended the Court impose the death penalty (R. 1453). Based upon this recommendation, the Court rendered a written sentence (R. 1468) imposing the death penalty on the Defendant, among other sentences. Timely post trial motions were filed and this appeal follows.

STATEMENT OF FACTS

It should be initially pointed out that the facts of this case are substantially in dispute. The State of Florida presented evidence to prove certain facts, and the Defendant testified as to a different scenario from his viewpoint. The facts as presented by the State of Florida will be presented on a witness by witness basis.

The first witness called by the State was a Jerome Kasper who worked as a lifeguard for the City of Dania (R. 447). On June 7, 1983, he reported to work to a lifeguard shack in the City of Dania. He had also been the last lifeguard to leave the previous evening (R. 461). When he arrived at the shed at approximately 7:15 a.m. (R. 465), he observed a "drag mark" in the sand which was alleged made by a trash can (R. 467). He found the trash can next to the shack. Additionally, he found the victim's blue and white "tee" shirt by the men's bathroom nearby (R. 470). When he found the victim in the shack he also found a pair of socks next to the body (R. 474), with "burn holes" in them (R. 475).

The next witness was Robert John Haarer, a deputy sheriff in the forensic unit (R. 480). He had also found the trash can that left the drag mark, and also an aluminum ladder leading to the roof of the shack (R. 487). The victim's blue and white "tee" shirt was found by him in the trash can (R. 489), where it had been deposited by Kasper (R. 470). He observed the victim, Ms. Simmons, lying on the floor of the shack, on her back, with a half inch white cotton rope over portions of her body (R. 494). The deputy also took a photograph showing the pubic area of the victim with singed hairs (R. 496). Although the Court agreed he couldn't tell there was singeing (R. 497), he allowed the deputy to testify that he felt the singeing was consistent with being burned by a lighter (R. 499). Additional photographs were taken, depicting a pair of white cotton shorts found on the floor (R. 500), and a red bandanna tied around the victim's neck (R. 501). Finally, he testified that he did not feel the victim's body had been naked prior to being in

the shack R. 534).

Next the State called George Neal Hambleton, a patrol sergeant with Daytona Beach Shores (R. 548). On June 17, 1983, he stopped Raymond Dewayne Wigley driving a pickup truck in Daytona Beach Shores (R. 549). He seized the vehicle and "sealed it" (R. 555). He also fingerprinted Raymond Dewayne Wigley (R. 556) and the Defendant (R. 557). He added that when he stopped the vehicle, the Defendant was not in it (R. 559).

Michael Rafferty was called as the person who "processed" the truck. He took photographs of the ashtray of the truck (R. 564) which contained a gold earring which was taken into evidence (R. 565). Within the storage console of the truck he found a gold watch, a gold necklace pendant and another gold earring (R. 566).

Another police officer with the City of Daytona Beach Shores by the name of Robert Francis Schafer was called (R. 607). He was present when Wigley was taken into custody (R. 608). He also came in contact with the Defendant late in the evening of June 17, 1983, (R. 607). This happened about one half hour after Wigley's arrest and approximately one and one half miles away (R. 608). When the officer took the Defendant into custody from the Daytona Beach Police Department, the Defendant asked why he was being arrested (R. 609). The Defendant denied knowing a "Wigley" (R. 611 - 612), and advised he had been hitchhiking (R. 612).

Gary Ayers, another sheriff's deputy, testified that he lifted 18 prints off the lifeguard shack on Dania Beach (R. 623).

Sandra Yonkman testified as a latent fingerprint examiner for the Broward Sheriff's Office (R. 632). Of all the prints submitted to her by Detective Haarer, she identified one as Wigley's (R. 639). She found six that matched the Defendant (R. 651).

Another police officer with the City of Dania by the name of Dennis Charles Satink testified that he came into contact with Wigley and the Defendant on Dania Beach (R. 669). He stayed in contact with them for about 40 minutes (R. 670).

During that time Wigley appeared intoxicated and laughed (R. 671 - 672). The Defendant did not appear intoxicated (R. 673). The truck that the two of them were driving was parked approximately 100 yards from the lifeguard shack (R. 676). While the officer was talking to both of them, he was suspicious of Wigley (R. 681), and Wigley was nontalkative (R. 684). On the other hand, Marek didn't cause him any concern and seemed friendly and outward (R. 681). After obtaining their names and addresses, Wigley and Marek were allowed to go.

The State next called Jean Trach (R. 693). She had been traveling with the victim prior to her death, and last saw her on June 16, 1983 (R. 695). They had been traveling south on the Florida Turnpike when their car broke down at mile marker 83 (R. 695). When they pulled to the side of the road, a truck pulled off behind them (R. 702). She saw two men in the truck, one of which she identified as the Defendant (R. 703). She was in contact with them for 40 - 45 minutes (R. 708). The Defendant tried to fix their car and then offered to give them a ride when this couldn't be done (R. 709). Ms. Simmons then made the decision that she would go get help (R. 711) and drove off with Wigley and Marek (R. 722). Ms. Trach also identified the jewelry found in the truck as belonging to the victim (R. 718).

The State's last witness was Dr. Ronald Keith Wright, the medical examiner in Broward County. It was his opinion that the victim died at approximately 3 to 3:30 in the morning of the 17th of June, 1983 (R. 753). He found a large amount of sand stuck to the skin over her back, lower back and down to her buttocks, and that sand not being present in the shack itself (R. 754). It was further his opinion that by ligature the victim died of manual strangulation (R. 759). An abrasion was found on the victim's breast consistent with a heel mark (R. 767).

With regard to the sexual intercourse aspect of the case, the doctor found spermatazoa in the victim's body (R. 776). It was his opinion that the spermatazoa was present less than 24 hours in her (R. 777). On cross-examination, he testified

that if sexual intercourse had taken place in the shack, that you would expect to find some seminal fluid either on the exterior of the vagina or on the floor right beneath her (R. 786). The spermatozoa had been found in the cervix, and there were only three in number (R. 796). In the normal ejaculation there are several million (R. 796). The doctor added that there was no evidence to indicate that sexual intercourse took place in the lifeguard shack (R. 798 - 799). Additionally, the fact that he found spermatozoa with "tails" would mean that it could be up to 3 days old (R. 800 - 801). And if such old spermatozoa was found, it would be found in the cervix (R. 801). In fact, the doctor had no opinion as to when the victim last had sexual intercourse (R. 808).

On redirect examination, the doctor testified that he felt that the victim was alive when she entered in the shack (R. 815). Also when he did pubic hair combings he didn't notice any hair that was different than other hairs (R. 818).

The Defense opened its case with Vincent James Thompson, who was a firefighter with the City of Dania (R. 874). He was present when the police confronted Wigley and the Defendant. He saw a large amount of beer in the back of the truck (R. 876), and both Wigley and the Defendant appeared to be "loaded" (R. 879). Looking back he felt Wigley was probably nervous, but the Defendant didn't appear to be (R. 888).

Officer Rickmeyer with the City of Dania testified that there were approximately 10 cases of beer in the back of the truck when he saw it (R. 891). Also, he testified that Ms. Trach didn't see Wigley on the turnpike (R. 893), but he had gotten out of the truck (R. 895).

Officer Robert Darby with the City of Dania also testified that Wigley appeared nervous on the beach (R. 903).

George T. Duncan, a forensic serologist with the Broward County Sheriff's Department crime laboratory (R. 910) testified that he did a cervical swab of the victim and was unable to find any spermatozoa (R. 916).

Finally, the Defendant took the stand to testify. He stated that he and "Ray" left Texas to come to Florida, and he was drinking two to four cases of beer a day (R. 940). While driving south on the highway he noticed the car in front was losing speed and put its flashers on, so he pulled over directly behind it (R. 942). He was driving at the time. He then went to the driver's side window and spoke to the driver. Due to the darkness he pulled the truck around to the front of the disabled vehicle and tried to fix what was wrong (R. 949). Unable to fix it, he offered to take the females to a service station (R. 945). Ms. Simmons volunteered to go, so the Defendant got in the passenger's side of the truck (R. 947) with Ms. Simmons in the middle and "Ray" driving. The Defendant fell asleep (R. 947) and when he woke up later, Ms. Simmons was gone. He asked Ray if he had dropped her off and he said yes (R. 948). The Defendant went back to sleep (R. 949) and when he next woke up he was at the beach (R. 949). He grabbed another beer and went to look for Ray (R. 950). After screaming for Ray, he found him up in the lifeguard shack (R. 950). The Defendant got up on top of a trash can, grabbed one of the railings and swung himself up to meet Ray (R. 951). Once he got in the shack, he noticed the police arrived (R. 952). It was pitch black inside (R. 956). After getting out of the shack they were confronted by the officers (R. 959). The officers, after about 30 to 40 minutes, told the Defendant to drive and leave the area (R. 962). He was subsequently arrested in Daytona.

ISSUES ON APPEAL

Point I

THE COURT ERRED IN SENTENCING JOHN MAREK TO DEATH FOR FIRST DEGREE MURDER, WHEN IT HAD PREVIOUSLY SENTENCED RAYMOND WIGLEY TO LIFE IN PRISON FOR THE SAME OFFENSE; THAT BEING A DENIAL OF JOHN MAREK'S RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

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THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISQUALIFY THE ENTIRE JURY PANEL, WHERE THE PANEL HAD BEEN EXPOSED TO A JURY ORIENTATION VIDEO WHICH PORTRAYED CRIMINAL DEFENDANTS IN A FALSE AND DISFAVORABLE LIGHT AND DENIED THE DEFENDANT'S RIGHT TO COUNSEL, A FAIR TRIAL AND MADE UNFAIR COMMENT ON HIS RIGHT TO REMAIN SILENT.

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ARGUMENT

Point I

THE COURT ERRED IN SENTENCING JOHN MAREK TO DEATH FOR FIRST DEGREE MURDER, WHEN IT HAD PREVIOUSLY SENTENCED RAYMOND WIGLEY TO LIFE IN PRISON FOR THE SAME OFFENSE; THAT BEING A DENIAL OF JOHN MAREK'S RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The co-defendants in this case were charged with the same offenses in the same indictment. By Motion, Appellant has requested that this Court supplement the Record herein, to include the "Judgment and Sentence" of Raymond Dewayne Wigley, as rendered on May 29, 1984, Case No. 83-7088 CF B, Circuit Court of Broward County, Florida. Both Defendants were tried separately, before the same Court.

Raymond Dewayne Wigley was convicted by a jury of:

(a) Count I: Murder in the First Degree;
(b) Count II: Kidnapping;
(c) Count III: Burglary; and
(d) Count IV: Sexual Battery with great force.

He was sentenced:

(a) As to Count I: Murder in the First Degree, to a term of life imprisonment with a mandatory twenty-five years without parole.

(b) A total of 107 years in prison for the remaining counts.

In its sentence, the Court specifically found that Wigley had been previously convicted of criminal acts, to wit: Burglary for which he had been previously incarcerated.

Appellant, John Richard Marek, was convicted by a jury of:

(a) Count I: Murder in the First Degree;
(b) Count II: Kidnapping;
(c) Count III: Attempted Burglary with Assault;
(d) Count IV: simple Battery; and
(e) Count V: simple Battery.

He was sentenced:

(a) As to Count I: Murder in the First Degree, to death.

(b) A total of 39 years in prison for the remaining counts.

In sentencing Appellant, the Court issued a nine (9) page opinion (R. 1468 - 1476). In the opinion, the Court reiterated its understanding of the facts. Many of the "facts" are nothing more than mere presumptions and not supported by any evidence. For instance, the Court found that "the victim was forced from the truck" (R. 1469). There was no evidence of this. The Court also presumes; "It is clear from the evidence that the victim was not a willing participant in the abduction, battery or the attempted burglary leading up to the murder" (R. 1469). We know Ms. Simmons voluntarily got in the truck. There is no evidence of when any abduction occurred. Additionally, there was no evidence that Ms. Simmons did, or did not participate in the attempted burglary. Contrary to the Court's prior opinion (R. 497), it found at the time of sentencing that "her pubic hair was burned" (R. 1469). The Court alludes to Wigley's confession for the basis that he and Appellant repeatedly raped Ms. Simmons both in the truck and in the tower (R. 1471). This is most certainly inconsistent with the facts proved at trial and casts serious doubt on the varicity of Wigley's confession. Dr. Wright couldn't even state that Ms. Simmons was raped in the tower, aside from the question as to whether she was even raped at all. There is also conflicting evidence as to whether Marek "controlled and dominated the discussion with the police" (R. 1469). The Court also specifically found that Wigley confessed, but could not use his confession. In all, it appears the Court was trying very hard to support its subsequent sentence of death for Appellant's participation in the murder.

Notwithstanding the Court's obvious feelings there is one finding that stands out above all:

> "The evidence indicates that both men acted in concert from beginning to end." (R. 1471; emphasis supplied)

With this in mind, the disparate sentencing of these two persons who "acted in concert" cannot stand.

The Court was previously convinced that identical crimes committed by people with similar criminal histories require identical sentences. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), Meeks v. State, 339 So.2d 186 (Fla. 1976). It is this uniformity and predictability of result which Section 921.141, Florida Statutes, seeks to accomplish. Meeks, at 192. This Court has also previously said; " 'Equal Justice Under Law' is carved over the doorway to the United States Supreme Court Building in Washington." It would have a hollow ring in the halls of that building if the sentences in (these) cases were not equalized. Barclay v. State, 343 So.2d. 1266, 1271 (Fla. 1977).

Similarily, in Malloy v. State, 382 So.2d. 1190 (Fla. 1979), we find a jury having recommended life and the Court imposing the death sentence. (In the case sub judice the jury recommended death.) Malloy had been attending a party with two co-defendants. The three of them went to the apartment of the victim. While there, the three perpetrators abducted two victims and took property from the apartment. According to the testimony of the co-defendants, Malloy subsequently shot both victims in the head. This Court found that it was reasonable to conclude that all participants were equally culpable. All were charged with murder, but the co-defendants were allowed to plead to a lesser charge and received prison terms in exchange for their testimony. Although the Court's ruling specifically found that the imposition of the death sentence is not always dependent upon the sentences of accomplices, it is a factor, id at 1193, that may be considered along with evidence of complicity.

Similar facts were found in Slater v. State, 316 So.2d. 539 (Fla. 1975) which lead the way on the subject. This Court said; "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts." id at 542. It is precisely this issue

that "hinges" the question of constitutional infirmity.

Nowhere in its sentence, or advisory instructions to the jury, is Wigley's sentence mentioned. If it clearly is a "factor", it should be mentioned and brought out. This is especially important in light of the fact that Wigley was convicted of greater crimes and received a heftier sentence than did Appellant. But yet, the jury and Court found its way to sentence Marek to death. It is precisely this disparity that constitutionaly should be prohibited as cruel and unusual punishment; unequal treatment; and arbitrary imposition of a death sentence.

Point II

THE COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE OF FLORIDA ELICITED TESTIMONY CONCERNING A FIREARM FOUND IN THE TRUCK, WHERE SUCH TESTIMONY AND EVIDENCE WAS IRRELEVANT AND UNCONNECTED TO THE CASE AND HIGHLY INFLAMMATORY.

On February 24, 1984, Defendant/Appellant filed a Motion to Suppress Physical Evidence, asking the Court to suppress certain items including a "pistol found in the 1983 Ford pickup truck" (R. 1385). A hearing was held on the Motion on April 10, 1984, and the Court reserved ruling (R. 1392).

George Neal Hambleton was called to testify in his capacity as a patrol sergeant with the City of Daytona Beach Shores (R. 548). He was the officer that stopped Wigley driving the pickup truck (R. 550). During his examination, he was asked;

> Q. Did you notice anything unusual inside the truck? Particularily, I want to direct your attention to the passenger side glove compartment?
>
> A. A .25 auto, small, little chrome gun. (R. 550)

Defense counsel objected as to relevance, and moved to strike the testimony. The jury was removed and the point was argued (R. 551 - 554). During that time the prosecutor admitted that he was not aware of any connection between the firearm and the Defendant. The Court then "sustained" Defendant's objection (R. 553). Defense counsel then moved for a mistrial because of the inflammatory nature of the evidence. The Court denied the motion, but offered to make a cautionary instruction to the jury. Upon the jury returning, the Court instructed them:

> "Ladies and gentlemen, before I sent you out there was an indication by the witness that he found some type of a gun or firearm in this car and after discussion with counsel, there is no evidence that I can see that would make that item relevant to this case, so at this point I would like you to do the best you can to forget it. In fact, I'll instruct you to forget that there was a firearm in that particular vehicle. It has no bearing on this case at this point and just disregard it. (R. 554)

This instruction did not go far enough. The Court was aware of the existence of the firearm through the Motion to Suppress. The prosecutor was aware that there was absolutely no nexus between the Defendant and the firearm. It was brought up merely from the standpoint of inflamming the jury.

The crimes charged in this case are those types of crimes, in the mind of a reasonable man, that require some type of force. Murder; kidnapping; burglary to commit an assault; and sexual battery are not passive crimes. The fact that a firearm was even mentioned, has to create in the mind of a juror the perception of an implement of force. Obviously, if the Defendant were an individual without arms, a jury would wonder where or how the Defendant obtained the force necessary to commit the crime. Not only do we have a Defendant in this case with arms, but we have the introduction of a greater element of force. Then a person sitting as a juror thinks; ah hah, now I know how it was done! The resulting prejudice is evident.

Relevant evidence is defined in Section 90.401, Florida Statutes (1983) as; evidence tending to prove or disprove a material fact. In this case, if there had been a nexus between the Defendant and the firearm, it may have been relevant on the issue of force, or ability to commit the crime. Even the prosecutor knew that didn't exist. There are times when even relevant evidence is inadmissible. That occurs when its probative value is substantially outweighed by the danger of unfair prejudice, Section 90.402, Florida Statutes (1983). The prejudice from the admission of some evidence is inherent. This was pointed out by Ehrhardt, in Florida Evidence, Section 403.1 (2d. Ed. 1984), when he said; "Certainly, most evidence that is admitted will be prejudicial to a party against whom it is offered."

The question now becomes, how <u>much</u> prejudice attached by the prosecutor's attempt to bring in the firearm, and whether the cautionary instruction cured the prejudice. These questions must be decided in light of the type of case we are discussing. The standard of consideration should be different between the everyday

trial, and a trial where the life of the Defendant is on the line.

In another case where the evidence was admitted, the case was subsequently reversed. Akers v. State, 352 So.2d. 97 (Fla. 4th DCA 1977). It was clear the prejudice that resulted from the introduction of such evidence which included a gun. The issue of prejudice would boil down to one of the emotional perception of the jury. Section 90.403, Florida Statutes (1983), is in agreement with its counterpart in the Federal Rule 403. Smith v. State, 404 So.2d. 167 (Fla. 1st DCA 1981). The Committee notes to Federal Rule 403 explain: "Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

Once emotion has attached to the presentation of facts in a case such as the one sub judice, prejudice must be inferred. The Court's cautionary instruction failed to cure the problem. The mere telling of a jury to "forget it," "it has no bearing on this case at this point," falls short. To protect the rights of the accused to a fair trial under both Florida and Federal Constitutions, a mistrial should have been declared.

Point III

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISQUALIFY THE ENTIRE JURY PANEL, WHERE THE PANEL HAD BEEN EXPOSED TO A JURY ORIENTATION VIDEO WHICH PORTRAYED CRIMINAL DEFENDANTS IN A FALSE AND DISFAVORABLE LIGHT AND DENIED THE DEFENDANT'S RIGHT TO COUNSEL, A FAIR TRIAL AND MADE UNFAIR COMMENT ON HIS RIGHT TO REMAIN SILENT.

In Defendant's Motion for New Trial (R. 1478 - 1479), the issue was finally decided with regard to Defendant's prior Motion to Disqualify the Entire Jury Panel. The basis of the motion was the presentation of an audio/visual presentation shown to all jurors as part of their indoctrination process. The record herein is clear as to the Court's denial of this motion, for some reason the presentation was not made part of the Record. A Motion to Supplement the Record was filed with the Court on February 8, 1985, without objection from the Attorney General's Office, therefore, this point will be argued as if this Court had already ordered the Record supplemented with the video tape of the jury presentations.

A number of questions arise from the showing of the audio/visual presentation to the jury poll. The intent of the presentation is to indoctrinate those persons called as prospective jurors. Unfortunately, the presentation goes far beyond its intended purpose.

Article I, Section 16, of the Florida Constitution sets forth the Rights of accused. One of those rights is a "public trial by an impartial jury." That same right is also set forth in Rule 3.251, Fla. Rules of Criminal Procedure. The Federal Right is protected through the due process clause of the Fourteenth Amendment to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), reh. den. 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed. 2d 1412.

There were a number of things that occurred during the audio/visual presentation that denied Defendant's right to trial by a fair and impartial jury. Those are:

1. The narator making the following statement:

   ". . . . persons who may have some knowledge of the facts pertaining

to either a civil or criminal case may be called upon by either of the attorneys to testify under oath as witnesses."

2. Photographs of the purported criminal Defendant portrayed as a "seedy" looking individual.

3. Introduction of legal points, including:

   (a) what "the law authorizes;"
   (b) discussing and defining, preemptory and challenges for cause;
   (c) defining what evidence is, and
   (d) how to determine witnesses demeanor.

The second point is probably more subjective than the other two. Showing a "seedy" looking person, with a thin little mustache, may have the tendency to portray the Defendant in a negative light to prospective jurors.

The most important factor presented for determination is the first point. To say that "persons who may have some knowledge of the facts," (ie; the Defendant), "may be called upon by either of the attorneys to testify," is a mistatement of the law. A Defendant cannot be called upon by the State Attorney to testify. Such a mistatement of the law constitutes an unfair comment on the Defendant's right to remain silent, violative of both the State and Federal Constitutions.

In David v. State, 369 So.2d. 943 (Fla. 1979), this Court stated that "any comment which is fairly susceptible of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error." Such a comment which is fairly susceptible is seen in the case of Layton v. State, 435 So.2d. 883 (Fla. 3d DCA 1983), where the prosecutor said:

> As you know, it doesn't take a genius to figure out that Mr. Layton and Mr. Parker, as opposed to the other witnesses, have been sitting here in this courtroom with the advantage and ability to listen to how each witness testified . . . "

For purposes of argument, there should be no difference between a prosecutor making such an argument, or comment, to a particular jury, and an audio/visual presentation to the entire poll. The fact is, the jury can draw the same presumption.

The cumulative prejudice to Appellant of exposing the jury to the audio/visual presentation requires reversal. The Defendant was portrayed in a negative light, and the prospective jury was instructed on the law without Appellant's counsel present. This, coupled with the jury being advised that anyone may be called to testify, again without counsel present, deprived him of an impartial jury.

Point IV

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO ALL COUNTS IN THE INDICTMENT, DUE TO LACK OF EVIDENCE.

At the close of the State's case, defense counsel moved for a Judgment of Acquittal as to all counts, based upon a lack of evidence (R. 826). That motion was renewed upon the close of all evidence (R. 1053).

The test for determining the sufficiency of proof is whether the jury might reasonably conclude that the evidence, viewed in the light most favorable to the State, is inconsistent with every reasonable hypothesis of the defendant's innocence, or, stated another way, whether a reasonably minded jury must necessarily entertain a reasonable doubt on the defendant's guilt. United States v. Diaz, 655 F.2d. 580 (5th Cir. 1981); Brown v. State, 424 So.2d. 950 (Fla. 1st DCA 1983). Each and every element of the crime should be proved.

Count I of the Indictment charged Murder in the First Degree, pursuant to Section 782.04, Florida Statutes (1983). Basically, the elements necessary include:

(a) unlawful killing
(b) of a human being
(c) with premeditation; or
(d) in the perpetration of an enumerated offense.

The three enumerated offenses that might apply sub judice are: sexual battery; burglary; and kidnapping. There is no evidence in this case of any premeditation on the part of the Appellant to kill Ms. Simmons. There are not even any facts to give rise to any such influence. In addition, there is no evidence to indicate that the killing took place during a sexual battery; burglary; or kidnapping. There is mere circumstantial evidence, based upon Appellant's presence in the vicinity of the murder, that he even knew about it, or could have known about it. There is no evidence directly relating him to the murder.

The same can be said for the kidnapping charge found in Count II. The pre-

vailing law is that kidnapping does not apply to unlawful confinements or movements incidental to other felonies, and such Statutes should not be literally applied. Mobley v. State, 409 So.2d. 1031 (Fla. 1982). In the case sub judice, the evidence indicated that Ms. Simmons voluntarily got into the truck with Appellant and Wigley. Subsequent to that, there is no evidence to indicate that any confinement was other than that incidental to her murder. If there was, there most certainly was no evidence that Appellant participated.

A similar fact situation can be seen in the case of Jenkins v. State, 433 So.2d. 603 (Fla. 1st DCA 1983) where a kidnapping conviction was reversed. The victim had been found bound and gagged, but there was no evidence to indicate how long she was tied up or how long she lived after being bound. The Court found:

> "It is therefore impossible to determine whether or not the confinement was accomplished with an intent to facilitate the commission of a robbery. The record evidence is, instead, entirely consistent with a supposition that the victim was murdered immediately, so that, her confinement before death was inconsequental in the commission of further acts." supra. pg. 604.

When did the kidnapping occur in the case sub judice; when the truck got out of sight of Ms. Trach?; when the truck arrived on Dania Beach, or in between?; when Ms. Simmons was on the beach?; when Ms. Simmons was taken into the shack? Nobody knows because whatever confinement there was was incidental to the murder, or the sexual battery if in fact one occurred.

Count III dealt with Burglary with intent to commit an assault. There was no evidence that the entering of the shack was done with the intent of assaulting Ms. Simmons. The State bootstrapped the Burglary charge along with the Sexual Battery, which the jury didn't believe because of the convictions for simple battery. Without the sexual battery, there cannot be a burglary with the intent to commit an assault because there was no other assault in the shack proved.

With regard to the Sexual Battery charged in Counts IV and V, they were charged pursuant to Section 794.011, Florida Statutes (1983). It is defined in Sec-

tion 794.011(1)(f) as;

> " 'Sexual battery' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or in the anal or vaginal penetration of another by any other object; . . . "

There is no evidence of any anal or oral penetration, or union, therefore, those will not be addressed. The only evidence tending to prove vaginal penetration, or union, would be the three spermatozoa found in the victim's cervix. Dr. Wright opened that these cells could be from 24 hours (R. 777), to three days old (R. 800). There was no evidence of any vaginal trauma, or how the cells got there. Dr. Wright was actually of the opinion that there was no sexual intercourse in the shack (R. 808 - 814). Aside from all this "lack" of evidence, there was, again, absolutely no evidence that the Appellant penetrated or united with the vagina of Ms. Simmons with his sexual organ. There aren't even any facts from which you can "presume" that.

It can be seen that there is a considerable amount of evidence lacking in the case. Although the corpus delicti may be established by circumstantial evidence, there must be sufficient evidence to establish it directly. Rowe v. State, 84 So.2d. 709 (Fla. 1955). Proof of the Defendant's connection with the crime as the operative agent, although essential for conviction, is not part of the corpus delicti. Sciortino v. State, 115 So.2d. 93 (Fla. 2d DCA 1959). Therefore, the State must not only prove the corpus delicti of the crime, but also the agency of the accused. In the case sub judice the State failed to prove the corpus delicti of kidnapping, burglary, and sexual battery.

In addition, it has failed to prove Appellant's agency in any of the counts.

This is a case of circumstantial evidence at its worst. It is built presumption upon presumption. It is well established that the basis of presumption must be a fact and that one presumption cannot be the basis of another presumption. Jefferson v. Sweat, 76 So.2d. 494 (Fla. 1954). Cut out all the secondary presump-

tions in this case, and the Court should have granted Appellant's Motion for Judgment of Acquittal as to all counts.

Point V

THE COURT ERRED IN IMPOSING THE DEATH SENTENCE DUE TO THE LACK OF SUFFICIENT EVIDENCE, OR AGGRAVATING FACTORS, TO WARRANT IMPOSITION OF SUCH SENTENCE, IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS.

Appellants death sentence must be overturned as an arbitrary and capricious inflection, in violation of his Eighth and Fourteenth Amendment Rights. There are a number of reasons for this, and each one will be viewed independently.

1. Defendant's sentence pursuant to Section 921.141(3), Florida Statute (1983) amounted to a deprivation of his due process rights. Aside from the numerous errors in the findings of fact contained in the Court's Sentence, the Aggravating Circumstances were erroneously applied.

(a) The Court in paragraph 1 finds that Appellant was previously convicted of a felony involving violence, but then states he was convicted of kidnapping, at the same time. This is an attempt to satisfy 921.141(5)(b). Clearly from the Statute, the intent of the legislature was for the Court to consider previous rather than contemporaneory convictions. Meeks v. State, 339 So.2d. 186 (Fla.1976).

(b) The Court in paragraph 2 found that the murder was committed while Appellant was engaged in the commission of Attempted Burglary with intent to commit a sexual battery. This would appear to attempt to satisfy 921.141(5)(d). There is no evidence to support this position, in consideration of Appellant's prior argument.

(c) The Court in paragraph 3 found that the murder was committed for pecuniary gain; re: 921.141(5)(f). There was no evidence that Appellant was ever in possession of the victim's jewelry, or that he even knew it was in the truck.

(d) Lastly, in paragraph 4, the Court found the murder to be especially heinous, atrocious, and cruel, in compliance with 921.141(5)(h). All murders can be classified as such by many reasonable people. As such, the description provided no guidance in the advisory phase as to precisely what was meant. Such a description is vague and ambiguous and violates

the dictates in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d. 398 (1980).

2. The Defendant was improperly sentenced to death in a case that was predicated almost entirely upon circumstantial evidence. The nature, and quality of the evidence should be considered as a mitigating factor although outside the statutory guidelines.

3. The jury, during the advisory phase pursuant to 921.141, should have been instructed that the co-defendant was convicted of greater degree offenses but yet sentenced to life in prison. This should have been done as a matter of course, without the Defendant having been threatened that it would open the door to use of the co-defendant's confession to allegedly prove Appellant's complicity (R. 1283 - 1288). As such, Appellant was deprived of due process, and equal protection of the laws in violation of the Florida and United States Constitution.

Point VI

THE COURT'S SENTENCE TO DEATH BY ELECTROCUTION AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Defendant, upon his conviction for Murder in the First Degree, was sentenced to Death by Electrocution (R. 1462). The trial court and the State of Florida, arbitrarily chose this manner of punishment merely based upon history, because it has always been the method to accomplish death. The Defendant should be put to death in the least cruel method possible. It has been pointed out to the trial court that death by electrocution does not accomplish this aim (R. 1362). Therefore, Section 922.10, Florida Statute (1983), is unconstitutional in that death by electrocution constitutes cruel and unusual punishment and in itself, amounts to torture. Furman v. Georgia, 408 U.S. 238, 392, 92 S.Ct. 2726, 33 L.Ed. 2d. 346 (1972).

CONCLUSION

Based upon the foregoing argument and citations of authority, Appellant requests this Honorable Court to reverse and remand for dismissal of the charges; or in the alternative reverse and remand for a new trial; and/or reduce the sentence to life in prison; or any other action this Court deems appropriate.

Respectfully submitted,

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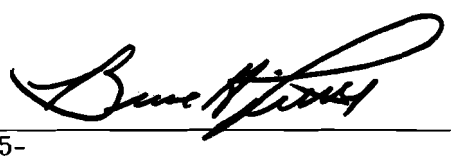
By 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of February, 1985, to: CAROLYN McCANN, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, 204, W. Palm Beach, FL 33401.

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