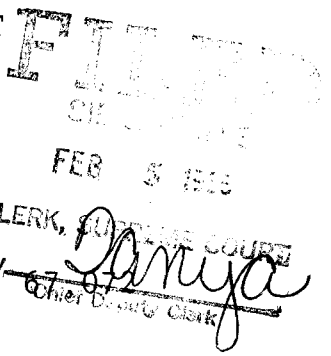
IN THE FLORIDA SUPREME COURT



BILLY RAY NIBERT, :

Appellant, :

vs. : Case No.

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF ARGUMENT

I. Defense counsel made a sufficient request of the trial court for a curative instruction to be given to the jury regarding the non-applicability of the felony murder rule. Allowing defense counsel to argue to the jury that felony murder was not applicable did not render the error harmless.

VI. Although defense counsel did not exhaust his peremptory strikes, circumstances show that Appellant was still prejudiced by the trial court's failure to grant his requested challenge for cause of a juror who indicated that she would "automatically" recommend a death sentence.

VII. Where the trial court instructed the jurors in penalty phase prior to the taking of evidence, the issue is preserved for appellate review because the error was presented to the trial judge in time for him to correct it. The prosecutor's penalty phase argument was fundamentally tainted and therefore reviewable in spite of the lack of objection.

VIII. The trial court did not make the required findings of fact when imposing a sentence of death. Entry of a

written order prepared by the prosecutor cannot replace findings of the trial judge under the Florida capital sentencing scheme.

IX. Examination of the authorities cited by the Appellee in support of the finding that the cold, calculated and premeditated aggravating circumstance was proved shows that each case showed facts distinguishable from the facts at bar. This aggravating circumstance was not sufficiently proved.

XII. The number of murders committed with a knife which do not result in a sentence of death being imposed renders a sentence of death imposed for a run-of-the-mill knife murder unacceptable under the United States Constitution, Eighth Amendment.

ARGUMENT

ISSUE I.

APPELLANT WAS DENIED A FAIR TRIAL BECAUSE DURING VOIR DIRE THE PROSECUTOR THOROUGHLY ADVISED THE JURY ON THE FELONY MURDER RULE WHICH WAS INAPPLICABLE TO THIS CASE. ALTHOUGH THE PREJUDICE WAS PROBABLY INCURABLE, THE TRIAL COURT INSURED ERROR BY NOT GIVING A CURATIVE INSTRUCTION TO THE JURY.

Appellee contends that defense counsel never requested a curative instruction from the court and hence waived any error (Brief of Appellee p.21-22). The record shows a less than emphatic request for curative instruction, but still a request.

> I just want to mention or at least have the Court mention that this matter has been resolved, that this is not a felony-murder case or at least let me argue it....(R547)

While it may be contended that defense counsel was satisfied with being allowed to argue non-applicability of the felony murder rule to the jury, this allowance did not cure the prejudice.

In the recent decision of Gardner v. State, Case No. 64,541 (Fla. December 12, 1985)[10 FLW 628], this Court held that the court's failure to give a defense requested jury instruction was not rendered harmless by allowing defense counsel to argue his defense to the jury. Counsel's argument cannot replace the trial court's instruction because "the jury must apply the law as given by the court's instructions, rather than counsel's arguments." 10 FLW at 629.

At bar, a great deal was heard from opposing counsel regarding the felony murder rule but the trial judge never clarified the situation. We cannot assume that mere lack of an instruction on felony murder settled the jurors' questions because a jury is unlikely to know that a separate felony murder instruction (and instruction on the underlying felony) is supposed to be given. Compounding the confusion was the trial court's inadvertent mention of penalty if they returned a verdict of guilt to first degree felony murder (R623). As in Gardner, supra, a new trial should be ordered.

ISSUES II., III., IV., V.

Appellant will rely upon the arguments as presented in his initial brief.

ISSUE VI.

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR STALVEY.

Defense counsel did not exhaust his peremptory challenges; but he did exercise 9 of the 10 allotted to the defense (R205,206,256,283,306,315). His request for additional peremptories was denied by the court (R324). Subsequently, as reported by the court reporter, the following bench conference occurred:

> THE COURT: What says the State?
>
> MR. BENITO: Judge, the States likes the panel, and if Mr. Meyers intends to challenge Mrs. Ford, I would ask the Court to hold him in contempt.
>
> THE COURT: I've move to Weed, so I don't know how much use for the Prince representative I would have. The Weed is about the size of a barroom door.
>
> MR. MEYERS: That's what I need.
>
> THE COURT: Do you want to play a little russian roulette and challenge one more?
>
> MR. MEYERS: No, we'll accept the jury. But how many challenges did he get for cause?
>
> THE COURT: Four. First four people.
>
> MR. MEYERS: Is that all, or did he get more for cause?
>
> THE COURT: That you know about. We slipped a few in here.
>
> MR. MEYERS: Okay. We'll accept the jury, then.

(R342)

While the prosecutor's remark about holding defense counsel in contempt was likely in jest, it was still inappro-

priate. But the court's invitation to defense counsel "to play a little russian roulette and challenge one more" cast a chilling effect upon counsel's decision whether to exercise the final peremptory challenge. Appellee's assertion that the trial court denied extra peremptories only because one was still remaining at the time of request (Brief of Appellee, p.35) is unsupportable. Clearly, the trial judge intended to hold defense counsel to the ten allotted by statute.

Defense counsel did not accept the jury because he was satisfied with its composition. Indeed, prior to opening statements he objected to the jury impanelment procedure (R371). Accepting the jury was strictly a tactical decision forced by the dilemma which the trial judge created. Had defense counsel exercised his final peremptory, the next juror seated could remain on the panel against defense counsel's wishes. The decision not to exhaust peremptories was merely a choice between two evils. The prejudice would not have arisen had the challenge for cause been properly granted.

In the case at bar, replacement of one juror could have made all the difference. In the penalty phase, the jury recommended death by only a 7-5 majority. Had the vote been 6-6, life would have been the recommended sentence.

In O'Connell v. State, Case No. 64,565 (Fla. November 27, 1985)[10 FLW 620] the trial court's failure to grant challenges for cause where prospective jurors indicated that they would automatically vote for death in the event of a first-degree murder conviction was held a "fundamental violation" of the con-

stitutional requirements that an accused be tried by "an impartial jury." U.S. Constitution, Sixth Amendment; Florida Constitution, Article I, Section 16. A new trial was ordered.

ISSUE VII.

THE TRIAL COURT ERRED IN THE PENALTY PHASE BY INSTRUCTING THE JURORS ON THE LAW PRIOR TO THE TAKING OF EVIDENCE AND ARGUMENT OF COUNSEL.

Appellee argues that defense counsel failed to object to the trial court's reversal of penalty phase procedure. The record discloses that the error was presented to the trial court, although the prosecutor, rather than defense counsel, lodged the objection.

> MR. BENITO: I would ask the Court to listen to his witnesses first to see what mitigating circumstances are established by the evidence.
>
> THE COURT: Well, I want to instruct them beforehand, not afterwards.
>
> MR. BENITO: I believe the Court would have to listen to the evidence presented in the second phase to determine what mitigating circumstances apply.

(R634)

> MR. BENITO: The State does not feel that some of those mitigating circumstances have been established at this time for the Court to instruct the jury prior to the evidence establishing those mitigating circumstances.
>
> THE COURT: Well, you can get to the Supreme Court and back within the next five minutes you may succeed in that argument.
>
> MR. BENITO: I can't do that, Judge. There is no way I can do that, Judge.

(R636)

In view of the trial court's response to the prosecutor's request that evidence be presented prior to instructing the jury in penalty phase, any objection entered by defense counsel would have been futile. Counsel need not follow a futile course in order to preserve points for appeal. After all, the purpose of the contemporaneous objection rule is only to ensure that alleged error be first presented to the trial court so that opportunity is given the trial judge to correct it. Castor v. State, 365 So.2d 701 (Fla.1978). At bar, the trial court had this opportunity and it matters not which attorney apprised the court of the error.

The prejudice to Appellant occurred in the prosecutor's penalty phase argument. After the prosecutor began arguing to the jury in regard to aggravating circumstances, the court interrupted and the following exchanges occurred:

> THE COURT: Well, I think it's a little confusing. I know that you are unintentional in what you are saying. There are nine but you are only relying on two.
>
> MR. BENITO: That is correct, sir.
>
> THE COURT: Make that clear.
>
> MR. BENITO: I will, sir.
>
> You will first determine if sufficient aggravating circumstances from those nine exist --
>
> THE COURT: Well, but that is not an accurate statement. They do not determine it from nine. They determine it from two, the two that you are relying on.
>
> MR. BENITO: I intend to tell the jury, after going through the explanation, that the State is only relying on two of those particular nine.

> THE COURT: Well, the way in which you are phrasing it now is misleading.
>
> MR. BENITO: Out of the nine it has been determined that two aggravating circumstances exist.
>
> THE COURT: May exist. That is for them to determine whether or not they exist. But it's your contention they exist. It's their decision as to whether or not they exist.
>
> Excuse me. Go ahead.
>
> MR. BENITO: Then you will determine which mitigating circumstances apply in this particular case and you will balance the aggravating circumstances that you determine, of those two, apply and you balance those two aggravating circumstances against the mitigating circumstances in this particular case to determine if those sufficient aggravating circumstances outweigh the mitigating circumstances, which if they do it will justify your recommendation to this Court to impose the death penalty.
>
> As the Court has already instructed you, there are two aggravating circumstances that apply in this particular case, and the State will contend that those two sufficient aggravating circumstances clearly, clearly outweigh any mitigating circumstances, making a recommendation of death reasonable and justified. [Emphasis supplied.]

(R655-656)

Although defense counsel did not object to the prosecutor's argument, the misleading character of the argument was such that it rose to the level of fundamental error. Where improper comments are so fundamentally tainted that "neither an objection nor retraction could entirely destroy their sinister influence" a new trial should be granted. Coleman v. State, 420 So.2d 354 (Fla.5th DCA 1982); Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984).

At bar, the error requires a new penalty phase proceeding with a new jury to be impanelled.

ISSUE VIII.

THE TRIAL JUDGE FAILED TO PREPARE AN ADEQUATE STATEMENT OF FINDINGS TO SUPPORT IMPOSITION OF A DEATH SENTENCE. ENTRY OF A STATEMENT PREPARED BY THE PROSECUTOR DOES NOT FULFILL THE RESPONSIBILITY OF THE TRIAL COURT.

The Florida capital sentencing scheme requires the sentencing judge to evaluate and weigh the evidence relevant to the aggravating and mitigating circumstances before imposing sentence. Then a written order must be prepared to effectuate the right to appellate review of the sentence. Cf. State v. Rhoden, 448 So.2d 1013 (Fla.1984); Boynton v. State, 473 So.2d 703 (Fla.4th DCA 1985).

In the case at bar, this Court is being asked to review not the findings of the trial judge, but the contentions of the prosecutor in regard to the evidence relevant to aggravating and mitigating circumstances. Preparation of the written order by the prosecutor violates the specific statutory requirements that when a sentencing court imposes a death sentence, "it shall set forth in writing its findings upon which the sentence of death is based as the facts." Section 921.141(3), Florida Statutes (1983)(Emphasis supplied).

In Cave v. State, 445 So.2d 341 (Fla.1984) the defendant moved to have his death sentence vacated on the ground that the trial judge did not enter written findings of fact. While

denying the motion, this Court "stressed" that findings in support of the sentence were dictated into the record at the time of sentencing.

We do not have even this much in the case at bar. The trial judge merely found "two aggravating and no mitigating circumstances" and imposed a death sentence. The written contentions of the prosecutor cannot be substituted for written findings of the court. Accordingly, there are no findings in support of the sentence. Section 921.141(3), Florida Statutes (1983) dictates:

> If the court does not made the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

Because neither written nor oral findings were made by the court, this cause should be remanded for imposition of a life sentence.

ISSUE IX.

THE TRIAL COURT ERRED BY FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In support of the finding of this aggravating circumstance, Appellee has directed this Court's attention to the decisions of Duest v. State, 462 So.2d 446 (Fla.1985) and Hill v. State, 422 So.2d 816 (Fla.1982). Both of these decisions are distinguishable on the facts applicable to the cold, calculated and premeditated aggravating circumstance.

In Duest, the victim was stabbed to death in his own home. However, there was compelling evidence of heightened premeditation in Duest which is lacking at bar. Duest took the victim to his own (Duest's) residence first and was seen going into the closet where he kept the dagger utilized in the murder. Then Duest proceeded with the victim to the victim's residence where the homicide occurred.

By contrast, at bar there is no evidence that the murder weapon even belonged to Appellant or how it got to the victim's residence.

In the other case cited by Appellee, Hill v. State, supra, the defendant had announced his prior intention to rape the victim and "get rid of her." This was evidence of the defendant's state of mind existing well before the time he accosted the victim.

By contrast, at bar we have only the witness Andruskiewiecz's statement that Appellant had voiced an intention "to rob" money from the victim. Nothing indicates that a murder or even physical force was contemplated. The circumstantial evidence points just as strongly to an extemporaneous homicide as to one planned in advance. Certainly this aggravating circumstance was not proved beyond a reasonable doubt. Cf. Richardson v. State, 437 So.2d 1091 (Fla.1983).

ISSUES X. AND XI.

Appellant will rely upon the arguments as presented in his initial brief.

ISSUE XII.

THE DEATH SENTENCE IMPOSED ON APPELLANT MUST BE VACATED BECAUSE, UNDER THE CIRCUMSTANCES OF THIS CASE, A SENTENCE OF DEATH WOULD VIOLATE THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

While State v. Dixon, 283 So.2d 1 (Fla.1973) indicates that death is presumed to be the proper sentence, even where only one aggravating circumstance is present unless it is outweighed by mitigating circumstances, overriding constitutional considerations require that a sentence of death not be imposed in an arbitrary or capricious manner. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

According to the 1984 Florida Statistical Abstract, there were 1203 murders committed in Florida during the year 1983.[1/] Of these, 220 were committed with a knife. A tiny percentage resulted in sentences of death for the perpetrator.

There are no principled factors which distinguish the crime committed at bar from a run-of-the-mill homicide committed with a knife. A mere finding that run-of-the-mill homicides committed with a knife are especially heinous, atrocious or cruel does not satisfy Eighth Amendment requirements that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104 at 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[1/] 1984 Florida Statistical Abstract, University Presses of Florida, Gainesville 1984, p.542. This was the latest edition counsel was able to consult.

CONCLUSION

Appellant will rely upon the conclusion as presented in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 3d day of February, 1986.

Douglas S. Connor
DOUGLAS S. CONNOR