IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

v. CASE NO. 67,282

W.S.L., A CHILD,

Respondent/
Cross-Petitioner.

PETITIONER/CROSS-RESPONDENT'S BRIEF

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SUMMARY OF THE ARGUMENTS

I

The "State" submits there is no statutory prohibition to the imposition of separate convictions for first degree felony murder and the underlying felony. See, §775.021(4), Florida Statutes (1983); thus, it is safe to conclude that the legislature tends for an individual to be convicted for the felony which underlies the felony murder. The application of the Blockburger test supports the imposition of separate convictions and sentences without violating the principles of double jeopardy.

II

There is a difference between a juvenile having the competency to stand trial [an analysis of mental illness, disease, and/or defect] and the capacity of a 9 year old child to formulate a criminal intent to murder. That allegations were made as to communication problems between counsel and client, focuses on the infancy of the child and not his sanity. The juvenile justice system is sensitive to these problems. If a hearing is needed, the Second District is correct in mandating one on a "nunc pro tunc" basis. To require a new delinquency hearing on such a narrow issue may well do more harm to an already tragic WSL and his brother. Justice does not always require that an operation be a success yet allowing the patient to die.

III

WSL argues a point neither certified as a matter of great public interest nor does WSL demonstrate conflict of holdings.

Whether there exists a causal connection between the sexual battery and death of Baby Parks remains a question of fact for the trier of fact to determine.

IV

WSL argues a point neither certified as a matter of great public interest nor does WSL demonstrate conflict of holdings. Sexual gratification is also a question of fact; and, this determination made by the juvenile court traveled to the Second District with a presumption of correctness. WSL has failed below and here to demonstrate error.

V

WSL argues a point neither certified as a matter of great public interest nor does WSL demonstrate conflict of holdings. Baby Parks was brutalized with the intent to cause the harm reflected in literature WSL's family retained for reading. WSL is presumed to have intended the natural consequences of his acts which resulted in great bodily harm to Baby Parks.

ARGUMENT

ISSUE I.

WHEN A DEFENDANT IS GUILTY OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY? (As stated by Petitioner.)

Petitioner/Cross-Respondent will rely on the argument presented in the initial brief on the certified question.

ISSUE II.

DID THE SECOND DISTRICT COURT OF APPEAL ERR IN HOLDING THAT A HEARING COULD BE USED TO DETERMINE W.S.L.'S COMPETENCY RETROACTIVELY? (As stated by Respondent/Cross-Petitioner.)

On this issue, Respondent/Cross-Petitioner is in essence urging a conflict of decisions to entertain the claim. Such is not the case. The case at bar can be distinguished from Hill v. State, Case Nos. 65,223 and 62,227 (Fla. June 20, 1985) [10 F.L.W. 324][1/] and Gibson v. State, Case No. 65,030 (Fla. August 22, 1985)[10 F.L.W. 409]. There the issues focus on the failure to conduct a hearing to detemine competency to stand trial where such a hearing reasonably appears necessary. Such is not the case at bar. Here, the claim is better stated as infancy affecting criminal responsibility. W.S.L. is but a nine-year old child at the time he murdered Baby Parks. The common law had determined that children under the age of seven did not have the capacity to commit a crime. In establishing the age of seven as the lowest age of criminal responsibility, the common law reasoned that a child under the age of seven did not have the mental capacity to formulate the intent to commit a crime and that, therefore, for children under seven the threat of punishment would not serve as a deterent against crime. Florida continues to maintain this common law rule in the form of a conclusive presumption. See, Clay v. State, 196 So. 462

1/ Hill is still pending before this Court on rehearing. For purposes of brevity and clarity, the "State" attaches as appendix a copy of that Rehearing as Appendix.

(Fla. 1940). A child under the age of 7 years is conclusively presumed to be incapable of committing a crime, and the common law raises a presumption of incapacity of an infant between the ages of 7 and 14, but the presumption is that after 7 years of age the incapacity decreases with the progress of his years. 14 Fla. Jur. 2d, Criminal Law §25.

Thus, all that WSL is seeking (and been granted by the Second District) is an opportunity to litigate his capacity to commit a crime because of his infancy and the criminal responsibility of a 9 year old. Obviously, the younger a child, the stronger must be the evidence of mental capacity. This is entirely different from Hill and Gibson, where insanity or mental disease or defect was urged affecting criminal responsibility.

Thus, the juvenile justice systems always focuses on whether infancy affects criminal responsibility. WSL's presumption is rebuttable and evidence to the contrary may be presented. The only way for WSL to raise his infancy was by Motion for Determination of Competency to Stand Trial. (R 21-22) The determination was not so much for "competency" but rather for "capacity" to stand trial. This is where WSL is distinguished from Hill and Gibson. In all juvenile prosecutions, infancy as affecting criminal responsibility is an issue. This is why Florida has a juvenile court system; and, that system is sensitive to the needs of infants. To find Hill and Gibson controlling is like mixing apples with oranges. There has never been a need to question WSL's sanity and/or psychological normalcy; but, whether

because he is a 9 year old, did he have the capacity to murder Baby Parks? This is the only question which looms. But, can the Second District be in error if all they have mandated is return of the cause for a simple nunc pro tunc hearing to resolve the question of WSL's criminal responsibility as a 9 year old? These infancy cases are clearly distinguished from insanity or mental disease or defect as it affects criminal responsibility. Here, the Second District must be affirmed even in light of this Court's recent rulings in both Hill and Gibson.

ISSUE III.

DID THE TRIAL COURT ERR IN DENYING W.S.L.'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGE OF FIRST DEGREE FELONY MURDER WHEN THE STATE FAILED TO SHOW A CAUSAL CONNECTION BETWEEN THE UNDERLYING FELONY OF SEXUAL BATTERY AND THE RESULTING DEATH? IF ERROR WAS COMMITTED, CAN THE CHARGE BE REDUCED TO THIRD-DEGREE MURDER? (As stated by Respondent/Cross-Petitioner.)

This issue was not certified to this Court as a matter of Great Public Importance nor has WSL either urged or demonstrated conflict of cases as a basis for this Court to review the question. Petitioner/Cross-Respondent does not move to strike the point but in order to expedite the case will address the issue.

WSL continues the argument that Baby Parks did not die as a result of the sexual battery or any acts associated with sexual battery. This entire sadistic psycho-sexual scenario is best described as foreplay which resulted in Baby Parks' demise. The violence (sitting on the baby; bouncing the baby) is part of the sexual battery. What WSL continues to overlook and fails to appreciate is that all of the acts are part of the same episode. It makes not one bit of difference what the last act is. There is no question but that they are all connected in time. In any event, whether there exists a causal connection between the sexual battery and death of Baby Parks remains a question of fact for the trier of fact to determine. This is not an appropriate issue for the appellate court to re-weigh.

On this issue, the Second District held:

> As his first point on appeal, defendant contends that defendant could not be convicted of first degree felony murder because the state failed to show a causal connection between the child's death and the felony of sexual battery. We disagree. The trial court was entitled under the evidence to conclude that defendant's acts which caused the baby's death were part of one criminal episode involving sexual battery. Cf. Watts v. State, 440 So.2d 505 (Fla. 1st DCA 1983) (one criminal episode may involve events chronologically and spatially related). See also Palmer v. State, 438 So.2d 1 (Fla. 1983), for a discussion of offenses comprising a single criminal episode. In this case that was a question of fact for the trier of fact. On appeal we are not to reweigh the evidence. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd., 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). It is no defense that the specific acts of sexual battery which occurred as a part of that episode which involved other acts causing the death were not in themselves the cause of death. See section 782.04(1)(a)(2), Florida Statutes (1983).
>
> (pp 2 & 3 of slip opinion)

WSL does not demonstrate conflict.

ISSUE IV.

DID THE TRIAL COURT ERR IN DENYING W.S.L.'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE COUNT OF SEXUAL BATTERY DUE TO INSUFFICIENT EVIDENCE AND OF TWO ATTEMPTED SEXUAL BATTERY CHARGES WITH A PENCIL/HANGER IN THE VAGINA AND ANUS WHEN THE STATE FAILED TO SHOW EVIDENCE OF INTENT TO COMMIT THE BATTERIES FOR THE PURPOSE OF SEXUAL PLEASURE? (As stated by Respondent/Cross-Petitioner.)

This issue was not certified to this Court as a matter of Great Public Importance nor has WSL either urged or demonstrated conflict of cases as a basis for this Court to review the question. Petitioner/Cross-Respondent does not move to strike the point but in order to expedite the case will address the issue.

What WSL overlooked both in the Second District and at bar here is that sexual gratification is truely a question of fact; and, that the juvenile court's finding on this score traveled to the Second District with a presumption of correctness. In any event, sexual gratification is not an element of sexual battery or attempted sexual battery. The prosecution was not required to show that these sex crimes were committed for the purpose of sexual pleasure. The statute's purpose is to protect an individual's sexual privacy from violence. The attainment of sexual gratification is not an element of the crimes charged against WSL. There is no question on this record that the prosecution through the testimony of WSL'S bother proved that his brother performed the acts charged. If the desire for sexual

gratification is not a necessary element where a sexual battery is committed by a male upon a female with the male's sexual organ, then it is illogical to conclude sexual gratification is necessary with foreign objects.

On this issue, the Second District held:

> As his second point on appeal, defendant contends that the trial court erred because defendant could not properly be convicted of sexual battery and attempted sexual battery when the state made no showing of sexual gratification as an element of those charges. We disagree. We need not decide whether sexual gratification is a necessary element of sexual battery with a foreign object. See Aiken v. State, 390 So.2d 1186 (Fla. 1980). The trial court could have found under the evidence that sexual gratification was involved in this case. For us to decide otherwise would call for an improper reweighing of the evidence. See Tibbs.

(text of slip opinion at page 3)

ISSUE V.

DID THE TRIAL COURT ERR IN NOT GRANTING W.S.L.'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE AGGRAVATED BATTERY CHARGE WHEN THE STATE FAILED TO SHOW W.S.L.'S SPECIFIC INTENT TO INFLICT GREAT BODILY HARM ON THE INFANT? (As stated by Respondent/Cross-Petitioner.)

This issue was not certified to this Court as a matter of Great Public Importance nor has WSL either urged or demonstrated conflict of cases as a basis for this Court to review the question. Petitioner/Cross-Respondent does not move to strike the point but in order to expedite the case will address the issue.

WSL was not too young to know that bouncing a baby off a bed or sitting on her chest would cause great bodily harm. By circumstantial evidence, Baby Parks was brutalized with the intent to cause the harm reflected in the family's library of periodical literature. Intentional acts to main and disfigure were committed by WSL. What WSL fails to comprehend is that great bodily harm is an end product which can be inferred as a natural consequence of the acts which set the sequence in motion.

On this issue, the "State" will republish its argument presented to the Second District.

WSL argues that he was too young to know that kneeling on Baby Parks or throwing Baby Parks on the bed would cause great bodily harm to an infant with a congential heart defect caused by Mongolism as this does not show the requisite intent for an adjudication on this charge. Young Mr. WSL overlooks that

this psycho-sexual drama was played out in imitation of Black Ass and Leather Raped. (R 289-293; 310) Whatever intent this literature depicted was adopted by young Mr. WSL. The fantasy was acted out and became reality.

The supplemental record speaks louder than the physicians. The photographic depictions of the late Baby Parks leave no doubt that the multiple batteries are more serious than the simple battery in which the victim's wounds heal after a short time. Here Baby Parks was unlawfully and violently deprived of the full use of her anus and vagina. One need not be a clairvoyant to project what excruciating pain Baby Parks would suffer in evacuating her bowels after being so brutally violated; and, the collapse of the infant's chest cavity would (if survival had transpired) clearly have caused respiratory problems.

It must not be overlooked that young Mr. WSL takes his victim as he found her; and, his culpability will not be negated because a stronger victim or a victim without health problems would have survived. Swan v. State, 322 So.2d 485 (Fla. 1985). Affirmative medical treatment will not break the chain of causation between a perpetrator's acts and his criminal responsibility for the victim's death. Tunsil v. State, 338 So.2d 874 (Fla. 3d DCA 1976). Negligent medical care does not break this chain of causation. Hallman v. State, 371 So.2d 482 (Fla. 1979).

In this case, Baby Parks was knowingly and intentionally touched with the knowledge that the harm caused would be that same harm depicted in the pornographic magazines used as a

model. Here, the precepts of Sykes v. States, 351 So.2d 87 (Fla. 2d DCA 1977) and Smith v. State, 100 So. 738 (Fla. 1924) are not violated. There was a frenzied, juvenile attempt to main and disfigure. See, William Golding's Lord of the Flies.

CONCLUSION

Based on the foregoing reasons, argument, and authority, the "State" urges that the certified question be answered in the affirmative. Also, the "State" argues that the Second District was correct in remanding the cause for a "nunc pro tunc" hearing to determine the capacity of a 9 year old for criminal responsibility. The remaining three claims of WSL should not be addressed as none were certified as matters of great public importance nor was conflict of holdings demonstrated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100-144th Avenue North, Clearwater, Florida 33520 on this 28th day of August, 1985.

OF COUNSEL FOR PETITIONER/CROSS-RESPONDENT