IN THE SUPREME COURT OF FLORIDA

SCOTT PATTERSON,)
Appellant,)
vs.) CASE NO: 67,830
STATE OF FLORIDA)
Appellee.)
)

BRIEF OF APPELLANT

Appeal from the Circuit
Court, 17th Judicial
Circuit, In and For
Broward County, Florida
Judge Harry Hinckley, Jr.
Case No. 85-7314CF

Prepared by:

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PRELIMINARY STATEMENT

Appellant, SCOTT PATTERSON, was the Defendant in the Trial Court of the Seventeenth Judicial Circuit, the Honorable Harry G. Hinckley, Jr., presiding.

Appellee, State of Florida, was the prosecution. The parties will be referred to as they appear before this Tribunal.

The pages of the trial transcript referred to will be designated as (TR._____).

The pretrial Motion to Suppress Verbal Statement is recorded in Volumes I and II.

The entire trial proceedings, including the penalty phase and sentencing, are recorded in Volumes II through X, inclusive.

The trial record on appeal is contained in Volume XI, and its pages will be designated as (R._____).

STATEMENT OF THE CASE

Appellant, SCOTT PATTERSON, was indicted by the Broward County Grand Jury for three (3) criminal offenses:

COUNT I Murder in the First Degree

COUNT II Sexual Battery

COUNT III Burglary of a Dwelling

(R.1830-1831)

A plea of not guilty was entered by counsel for Appellant. (R.1832)

Appellant filed a pretrial Motion to Suppress Verbal Statements. (R.1840-1841) The Trial Court heard the Motion to Suppress immediately prior to jury selection. (TR.6-TR.284) After considering the sworn testimony of the witnesses and legal argument of respective counsel (TR.286-TR.304), the Trial Court denied the motion. (TR.304; R.1845; R.1847)

Thereafter, the cause proceeded to jury trial on September 17, 1985 and concluded on September 25, 1985. The jury returned verdicts of guilty as charged as to each of the three (3) counts. (R.1889-1891)

Appellant was adjudicated guilty as to all counts. (R.1896;1898)

On the same day that the jury returned a guilty verdict to the charge of Murder in the First Degree, the jury

was reconvened for the purpose of considering and rendering an advisory sentence. (R.1892-1894)

On September 25, 1985, the jury returned an advisory sentence of the death penalty by a vote of 7 to 5. (R.1895)

Sentencing was deferred until October 28, 1985, and a pre-sentence investigation was ordered by the Trial Court. (R.1898)

On October 28, 1985, Appellant appeared before the Trial Court for sentencing; the Court imposed the death sentence upon the Appellant after finding that there existed three (3) aggravating circumstances as compared to only one (1) mitigating circumstance. A Sentence Order was subsequently entered. (R.1910-1915)

As to Count II, the Trial Court sentenced Appellant to a term of life in prison, said sentence to run consecutive to the sentence of death imposed on Count I. (R.1900;1902)

As to Count III, the Trial Court sentenced Appellant to a term of life in prison, said sentence to run consecutive to the sentence of life in prison imposed on Count II. (R.1901;1902)

A Motion for New Trial had been filed and was denied by the Trial Court. (TR.1796-1800)

Notice of Appeal was timely filed (R.1903) as well as Designations to the Clerk (R.1905) and Court Reporter (R.1908-1909). A Statement of Judicial Acts to be Reviewed was filed (R.1906-1907), and an Order declaring Appellant insolvent for purposes of costs on Appeal was entered by the Trial Court. (R.1904)

The entire record was thereafter lodged before this Honorable Court for review.

STATEMENT OF THE FACTS

Appellant, SCOTT PATTERSON, a high school graduate, had gone into the military service in August 1983, two months after he graduated from Miramar High School, Miramar, Florida. (TR.1532) He was assigned, as an enlisted serviceman, to the Airborne Rangers Battalion. (TR.1533)

After receiving a general discharge under honorable conditions, Appellant left the service in March 1985, returned to his parents' home, having separated from his wife and child, and began working with a security company at an Indian Reservation. (TR.1532-1533)

He had been living with his parents on the evening of June 6, 1985, when he had gone to a friend's home at approximately eight o'clock in the evening and, while at his friend's home, consumed a six pack of beer. (TR.1536)

Appellant left his friend at approximately ten o'clock the night of June 6th and went to the home of another friend, Frank Terracciano, where he stayed only briefly and then went to Lolo's pub. (TR.1536)

He remained at the pub for "a few hours until about closing time - about maybe 1:30, two o'clock." (TR.1536)

While at the pub, Appellant drank two 32 ounce pitchers of beer. (TR.1537)

Although he felt "busted - light headed", Appellant

left the pub at closing time and drove to the Terracciano residence (TR.1538) where he stayed approximately a half-hour (TR.1538) and then went home.

Appellant arrived at his residence at approximately 2:30 - 2:45 AM on June 7, 1985. He sat in his car for awhile listening to the radio and then went into his home and grabbed a kitchen knife. (TR.1539)

Appellant went across the street towards the residence of the decedent because of "an urge"; something that he "didn't have control over". (TR.1540)

He entered the residence of the decedent, not knowing why he did so. (TR.1540) He was "getting ready to leave" when the decedent woke up. (TR.1541) In fact, Appellant "didn't know" why he was in the house. (TR.1542)

There was a confrontation between Appellant and the decedent; as a result of the confrontation, the Appellant was stabbed as was the decedent. (TR.1542-1544)

Appellant had no recollection as to the number of stab wounds that were inflicted on the decedent (TR.1542); he felt like he had no control of his actions in the bedroom and could offer no explanation as to why he went to the decedent's house. (TR.1546)

It is undisputed that the Appellant was stabbed in the abdomen and also had a wound on his right hand. (TR.1486) After Appellant left the decedent's residence, he went across

the street to his home where he awakened his father. Appellant was taken by his father to the hospital where he was treated in the emergency room for the above mentioned injuries. (TR.1495)

The Appellant was eventually admitted to a hospital room where he was questioned by Detective Pierson of the Miramar Police Department.

Various verbal statements were given to Detective Pierson by Appellant.

The final statement given by the Appellant was a 55 minute tape recorded incriminating statement. Thereafter, Appellant was formally arrested for the murder of the decedent.

SUMMARY OF ARGUMENT

A total of five (5) reversible errors were committed by the Trial Court.

The tape recorded verbal statement given by Appellant, while he was a patient in the hospital, to a homicide detective was tantamount to a confession. However, the statement was not a voluntary statement nor was it made after a valid, knowing waiver of Appellant's rights to remain silent. Appellant was deluded into giving the statement, and its admission into evidence was error.

Certain color photographs were admitted into evidence notwithstanding their gruesome nature. The photographs depicted the injuries inflicted to the decedent, but they were so graphic and gruesome, that the prejudice outweighed any relevance. The photographs were admitted, over objection, while a witness other than the Medical Examiner was testifying.

The Appellant was intoxicated at the time he stabbed the decedent as well as at the time he entered her residence. Accordingly, he did not have the requisite specific intent to commit either First Degree Murder or Sexual Battery. Whether under the theory of premeditated first degree murder or felony murder, the State did not overcome the affirmative defense of voluntary intoxication.

Accordingly, the Court erred by denying the Appellant's motions for Judgment of Acquittal or to reduce the degree

of murder from first to second.

The Trial Court did not personally prepare its Sentencing Order but, rather, requested the prosecutor to prepare same; this was an impermissible delegation of a judicial function.

Lastly, the death penalty was imposed erroneously because the Trial Court considered factors not authorized by case law; in addition, the Court failed to consider mitigating factors not set forth in its Order of Sentence. As a result, the death penalty was imposed erroneously and contrary to existing law.

POINT I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S PRETRIAL MOTION TO SUPPRESS VERBAL STATEMENTS

At approximately 3:55 AM on June 7, 1985, Appellant was brought to the emergency room at Humana Hospital of South Broward by his father. It was evident that Appellant was bleeding from wounds to the stomach and right hand. (TR.1486;1491)

After being treated for his injuries, Appellant was taken to room 404 at approximately 8:30 AM. (TR.1501)

Upon his admission to the hospital, Appellant appeared to be "somewhat shocky" (TR.1488); he seemed to be "robot like" (TR.1488); he smelled from alcohol (TR.1499); he was bleeding "moderately" (TR.1492), and he was given intravenous fluids. (TR.1490)

Detective George Pierson was off duty when he received a phone call advising him that there had been a homicide in the City of Miramar. (TR.7)

The detective went directly to the hospital in order to talk with Appellant who was thought to have information on a possible suspect. (TR.7)

Detective Pierson met with Appellant in the emergency room ostensibly to gather information to relay back to the crime scene since it was believed that Appellant received an injury from a possible suspect to the homicide. (Tr.8-9)

According to Detective Pierson, Appellant was not a suspect at the time of the initial meeting in the emergency room. (TR.9)

According to Barbara Patterson, Appellant's mother and night supervising nurse, however, Detective Pierson said that Appellant was "probably a suspect" (TR.210) as early as 5:00 AM. (TR.209)

At approximately 4:15 AM, Appellant gave a statement to Detective Pierson; at the time, Appellant was laying on a stretcher and had his hand bandaged. (TR.10)

In the initial statement, Appellant told Detective Pierson that he chased a subject through the decedent's house and was ultimately in a fight with the subject during which Appellant was stabbed. Those facts were transmitted to the scene of the homicide. (TR.13)

Detective Pierson testified that at the time of the initial statement by Appellant, he did not consider Appellant to be a suspect nor was Appellant in custody. (TR.13)

A second "meeting" between Appellant and the Detective occurred near 9:45 AM in Appellant's hospital room. (TR.15)

The purpose of this meeting, in the words of Detective Pierson was to "just give him some time to regroup and think it over. Maybe grasping more additional information that he could think of . . . " (TR.19-20)

Appellant's mother was allowed to be present during

the meeting, and the first taped statement was taken from the Appellant. (TR.22)

Prior to the first taped statement, Detective Pierson told Appellant's mother that Appellant did not need a lawyer; that he was not under arrest. (TR.216)

The statement began at 9:50 AM and ended at 10:20 AM. No "Miranda" rights were read to Appellant because Detective Pierson "didn't consider him a suspect at that point". (TR.24)

Appellant was thought of more as a witness than a suspect. (TR.25)

Because there were "discrepancies" in the statement, Detective Pierson advised Appellant's mother that he would "probably be needing to speak to" her son once again. (TR.59)

Thereafter, Detective Pierson went back into the room and spoke to Appellant.

It must be noted that up to the time of the "third" meeting, Appellant had not slept more than a few moments since the time he came to the hospital. (TR.225;245) In fact, Appellant testified that he had not slept for almost two days. (TR.281)

After the first recorded statement, however, Detective Pierson told Appellant's father that his son was a suspect. (TR.220)

The second taped statement that eventually was taken resulted from the Appellant "making an admission, a verbal admission of guilt . . . " (TR.64) The first "admission" was not recorded,

and Detective Pierson continued to conclude that Appellant was not under arrest nor was he in custody. (TR.70;183) However, there were uniformed law enforcement officers positioned outside the hospital room. (TR.219)

Thereafter, Detective Pierson and Bellrose met alone with Appellant and took the second tape recorded statement, commencing at 1:00 PM; the statement was fifty-five (55) minutes in duration. [Exhibit 88] In said statement, Appellant fully admits to stabbing decedent, causing her death.

Prior to the statement being given, Appellant was a suspect. (TR.185)

Although a rights waiver form was signed by Appellant (TR.71-76), Appellant did not understand the legal ramifications of his statement. He was unsure how it could be used against him; in fact, Appellant "wasn't fully aware" of what he was doing. (TR.278)

The Appellant testified that he felt that he "had" to give a statement; he had an "idea" that it would "probably" be used against him in Court. (TR.280)

Appellant felt as though he had no options open to him at that time; he had 'hot slept for almost two (2) days". (TR.281)

Detective Pierson told Appellant to "get it off his chest" (TR.275); it would make Appellant feel better and it would "be better for" Appellant's mother. (TR.275)

Appellant testified that:

> "Detective Pierson gave me an idea that . . . because his friendship with my mother . . . was kind of like . . . a pressure kind of thing, and before I made any admissions to anything . . . he said, "You go ahead. You know, you might make it easier on yourself". . . gave me the idea . . . kind of like soothing me as far as telling me that I could probably maybe go with self-defense or something." (TR.274)

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"I wasn't fully aware of what I was doing . . ." (TR.278)

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"I was being questioned why (sic) he wasn't letting me get any sleep. And I was upset and I just wanted some time to think . . . " (TR.279)

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"And he says, 'we're just--we're just going to have to sit here until, you know, you--we come up with something. Until you tell me something." (TR.279)

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"Q. Did you think that you had any options open to you at that point?

A. I didn't feel I had any. No." (TR.281)

Under all of the attendant circumstances surrounding the final and most incriminating statement by Appellant, any purported waiver of his rights to silence and counsel was not voluntarily, knowingly or intelligently made, and the 55 minute statement to Detectives Pierson and Bellrose should have been suppressed.

The State has failed in its burden to prove, by a preponderance of the evidence, that Appellant's waiver met constitutional standards. Brewer v. State, 386 So.2d 232 (Fla. 1980); Williams v. State, 441 So.2d 653 (Fla. 3rd DCA 1983), review denied, 450 So.2d 489 (Fla. 1984), Puccio v. State, 440 So.2d 419 (Fla. 1st DCA 1983).

The Appellant was in an emotional and confused state when Detective Pierson pressed him to "get it off his chest". The State failed to present any testimony to rebut the testimony of the Appellant that he felt as though he had no options; that he had to tell Detective Pierson "something". (TR.279)

It is well settled that a confession must be suppressed if the surrounding circumstances or the declarations of those present at the making of the statement are calculated to delude the accused as to his true position or to exert improper and undue influence over him. Frazier v. State, 107 So.2d 16 (Fla. 1958); Foreman v. State, 400 So.2d 1047 (Fla. 1st DCA 1981); State v. Charon, 482 So.2d 392 (Fla. 3rd DCA 1985); State v. Slifer, 447 So.2d 433 (Fla. 1st DCA 1984).

Although the detective's actions and misleading comments, i.e., suggesting that the defense of self-defense might very well be available to Appellant, [clearly a far-fetched suggestion in light of the near 30 stab wounds] if considered individually, might not justify a finding that Appellant's statement was involuntary, see Williams v. State, 441 So.2d 653

at 656, the totality of the circumstances, including place and time of the statement, lack of sleep, etc., supports the conclusion that the statement was involuntary as a matter of law.

Detective Pierson took advantage of Appellant's weakened physical condition without ever advising him of his "true position", thus easily failing the Williams "two or more" courses of conduct test.

This Court recently reviewed the standards regarding when a confession is rendered inadmissible because of delusion or confusion.

In Thomas v. State, 456 So.2d 454, 458 (Fla. 1984), the Court opined that:

> "Techniques calculated to exert improper influence, to trick, or to delude the suspect as to his true position will also result in the exclusion of self-incriminating statements thereby obtained." [cases cited]

In the matter sub judice, the delusion or confusion was visited upon the Appellant by his interrogator, Detective Pierson; it did not originate from Appellant's own apprehension, mental state or lack of factual knowledge. Thomas, at 458. See, State v. Caballero, 396 So.2d 1210 (Fla. 3rd DCA 1981).

The Appellant, because of his physical injuries, emotional distress and confusion as to his legal position, lacked the capacity to exercise a free will or fully appreciate the significance of the taped statement.

Accordingly, the statement given at 1:00 PM should

have been suppressed. Cannady v. State, 427 So.2d 723, 727 (Fla. 1983); Reddish v. State, 167 So.2d 858 (Fla. 1964); DeConingh v. State, 433 So.2d 501 (Fla. 1983); State v. Underwood, 336 So.2d 1270, 1271 (Fla. 4th DCA 1976); Breedlove v. State, 364 So.2d 495, 497 (Fla. 4th DCA 1978).

Appellant submits, therefore, that the Trial Court erred in denying his Motion to Suppress his statement and that the convictions for First Degree Murder, Sexual Battery and Burglary must be reversed.

POINT II

THE TRIAL COURT ERRED BY ALLOWING GRUESOME PHOTOGRAPHS AND IRRELEVANT EVIDENCE TO COME BEFORE THE JURY.

The Trial Court erred by allowing the prosecutor to introduce into evidence graphic color photographs of the decedent that can best be described as gruesome.

State's Exhibits number 59 through 66, inclusive, were allowed into evidence by the Trial Court (TR.1126-1127) over vigorous and timely objection by Appellant. (TR.1118 - 1122; TR.1128)

The Court took the opportunity to personally review each of the proffered photographs. (TR.1118) Some of the photographs that had been offered into evidence were withdrawn by the prosecutor, primarily upon the basis of duplicity. (TR.1123)

The photographs that were ultimately admitted into evidence by the Trial Court over objection were characterized by the Court as "gruesome". (TR.1123) In ruling, the Court stated:

> "It's the finding of the Court that the probative value is greater than the gruesomeness. And I don't mean to take away from that but I think the probative value is there." (TR.1128) (emphasis added)

Dr. Ronald Reeves, associate medical examiner, had earlier testified for the State as to his findings relating to cause of death of the decedent. He performed an autopsy on

June 7, 1985 at approximately three o'clock in the afternoon. (TR.869)

He concluded that there were "multiple stab wounds primarily of the neck and anterior chest" (TR.872); he counted and measured each wound and placed them in a diagramatic form (TR.872); he counted approximately "28 to 30 stab wounds". (TR.886)

Appellant stipulated to the identity of the decedent as being the person named in the Indictment. (TR.886)

On cross examination, Dr. Reeves testified that his seven (7) page autopsy report contained a sketch of the location of the wounds he described. (TR.891)

Even Dr. Reeves conceded that

> "The only advantage I can see in the photographs, not the color, is the fact that they, obviously, show relative anatomic landmarks which maybe some jurors did not understand as I was trying to describe." (TR.892)

At that point, Appellant objected to the introduction of certain color photographs of the decedent. (TR.894) After hearing argument from respective counsel, the Trial Court overruled the objection and allowed into evidence exhibits number 9 through 13, inclusive. (TR.904-905)

Those initial photographs revealed the exact location of the wounds inflicted on the decedent by Appellant; the last set of photographs (Exhibits 59 through 66) were totally unnecessary to establish any relevant fact that had not previously been established.

The unavoidable result was that those highly graphic

and gruesome photographs prejudiced Appellant and inflamed the jury. Once the first set of photographs were admitted into evidence (TR.904-905), the second set were not relevant for any issue not already discussed; the admission of those photographs (Exhibit 59 through 66) constituted reversible error.

The improper prejudicial impact out weighed their probative value; as a result thereof, there was an abuse of discretion by the Trial Court. Wilson v. State, 436 So.2d 908 (Fla. 1983).

The instant case is distinguishable from Welty v. State, 402 So.2d 1159 (Fla. 1981) because in Welty, the medical examiner explained in detail why certain photographs would be relevant in explaining the injuries of the deceased to the jury (402 So.2d at 1163); in the case at bar, there were certain photographs introduced during the testimony of the medical examiner; the highly gruesome photographs (Exhibit 59 through 66), however, were admitted during the testimony of Officer Edel, not the medical examiner. See, also, Bush v. State, 461 So.2d 936 (Fla. 1984).

The objectional photographs did not meet the test of relevancy; even if they did meet the test of relevancy, they were so shocking in nature as to defeat their relevancy. See, Gore v. State, 475 So.2d 1205 (Fla. 1985); State v. Wright, 265 So.2d 361 (Fla. 1972). Even relevant photographs sometimes must be excluded if they are unduly prejudicial. See, Leach

v. State, 132 So.2d 329 (Fla. 1961).

Appellant is well aware that the basic test for admissibility of evidence is relevancy, and this includes photographs. Straight v. State, 397 So.2d 903 (Fla. 1981).

Appellant submits, however, that the very number of photographs of the deceased in evidence cannot but have had an inflamatory influence on the normal fact finding process of the jury. The number of inflammatory photographs and resulting effect thereof was totally unnecessary to a full and complete presentation of the State's case.

Unlike Duest v. State, 462 So.2d 446, 449 (Fla. 1985), there has been a showing that there was abuse of the Court's discretion.

Based upon the number of photographs admitted into evidence, the graphic nature of said photographs, the gratuitous comments by the Trial Court on the gruesomness of same and the fact that the medical examiner never stated that Exhibit 59 through 66 were necessary to assist the jury in understanding the nature of the wounds, it is submitted that the Trial Court committed reversible error by admitting said photographs into evidence. Young v. State, 234 So.2d 341 (Fla. 1970).

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REDUCE COUNT I OF THE INDICTMENT FROM MURDER IN THE FIRST DEGREE TO MURDER IN THE SECOND DEGREE AT THE CLOSE OF ALL THE EVIDENCE IN THE CASE.

At the close of all the evidence in the case, Appellant moved the Court for an Order reducing Count I to a lesser degree of murder. (TR.1623) The Trial Court denied said motion as well as two (2) other motions for Judgments of Acquittal as to Counts II and III. (TR.1625)

The Appellant was charged with two specific intent crimes in the Indictment: Count I - Premeditated Murder in the First Degree and Count III - Burglary of a Dwelling. (R.1830-1831)

Premeditated First Degree Murder has, as a material element to be proved by the State, specific intent at the time of the offense. Gurganus v. State, 451 So.2d 817 (Fla. 1984).

Burglary is also classified as a specific intent crime in the State of Florida. See, e.g., Pressley v. State, 388 So.2d 1385 (Fla. 2d DCA 1980); Heathcoat v. State, 430 So.2d 945 (Fla. 2d DCA 1983).

Sexual Battery, Count II, is a general intent crime. Mullin v. State, 425 So.2d 219 (Fla. 2d DCA 1983).

It was apparent as early as voir dire of the jury that a major part of the Appellant's theory of defense to the charge

of Premeditated First Degree Murder was the defense of voluntary intoxication. (TR.680-681)

The law is clear that the defense of voluntary intoxication applies only to specific intent crimes. Linehan v. State, 476 So.2d 1262 (Fla. 1985). It is an affirmative defense, and one which requires an accused to come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime(s) charged. Cirack v. State, 201 So.2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So. 835 (1891).

Accordingly, Appellant established through defense witnesses and unrebutted facts that he was "drunk" at the time he entered the residence of the decedent and "drunk" at the time he stabbed her; he had a blood alcohol level of .145 (Tr.944-945) and did not have the mental ability to entertain a specific intent to either enter the residence with the purpose of engaging in sexual intercourse with the decedent or to consciously and intentionally kill her. Gurganus, at 822.

The associate medical examiner was called as a defense witness (TR.930) and testified that, according to the hospital records from Humana Hospital of South Broward, Appellant had a blood sample taken which indicated that there was alcohol in his blood. (TR.937-938; 943)

The blood that contained alcohol was drawn from Appellant's body at 3:50 AM on June 7, 1985. (TR.944) Dr. Reeves

testified that Appellant would have had a blood alcohol level an hour earlier between .14 to .16 (TR.945). The doctor calculated that in order to reach that level of blood alcohol, the Appellant would have had to consume 96 ounces of beer. (TR.947)

It was established by Appellant's witnesses that he had gone to Lolo's Pub where he was seen by his sister, Sheryl, at approximately 10:40 PM on June 6, 1985. (TR. 1433) She told the jury that she had gone to the pub to purchase cigarettes when Appellant came in. (TR.1433)

She described Appellant as having "beer on his breath" (TR.1435), "a pitcher of beer in his hand" (TR.1434) and acting "unusually" happy. (TR.1435)

She concluded that he was not acting entirely normal based on her knowledge of Appellant. (TR.1435-1436) She left the pub at 11:15 PM which was prior to Appellant leaving. (TR.1436)

A friend of Appellant, Frank Terracciano, testified that he had known and been a friend of Appellant for approximately seven (7) years. (TR.1443) They were "good friends". (TR.1444)

Frank was with Appellant approximately "an hour before" the Appellant entered the decedent's residence and stabbed her. (TR.1446)

Appellant stopped at Frank's house "approximately quarter after one and stayed over . . . until approximately . . . quarter to two"; Appellant was described as being "a little drunk. And, well, he was pretty much drunk . . . " (TR.1446) In fact

Frank testified that on the day Appellant came to his house:

> "I've never seen him in that kind of condition . . . he was very slower. More slugish (sic) . . . he was pretty much wasted . . . he was drunk . . . he was, my opinion one hundred percent--He was drunk." (TR.1448)

When Frank's parents returned home, Frank told Appellant that he had to leave. (TR.1450) Appellant said he "was going to hit the sack". (TR.1451)

Another defense witness, Francine Costa, testified that she had known Appellant for two (2) years (TR.1460) She was living at the Terracciano residence and was home with Frank when Appellant stopped over.

Appellant had stopped at the Terracciano residence earlier on June 6, 1985, at approximately 9:45 PM; he told Francine that he was "going to go over to Lolo's Pub and have a few drinks" and that he would "come back over . . . " (TR.1462)

When Appellant returned, he was described by Francine as follows:

> "Then when he went to the bar and he came over our house that --- Between one and 1:15 he was drunk; . . . when I opened the door he smelled like a brewery . . . he was flushed" . . . (TR.1463) "He was slurring. He was talking slurred like a drunk person talks." (TR.1466-1467)

According to Francine, Appellant left the Terracciano residence between 1:45 AM and 2:00 AM. (TR.1469)

A registered nurse named Bonnie Baier was called to testify as a defense witness, and she related that she was working in the emergency room at Humana Hospital of South Broward when she met Appellant for the first time. (TR.1483-1486)

Ms. Baier testified that Appellant was "very pale" (TR.1486) "He seemed mechanic. His speech was mechanical. Clipped." (TR.1488) "[H]e seemed to be physiologically like he was somewhat shocky." (TR.1488) She detected an unusual aroma, i.e., "I smelled alcohol on his breath." (TR.1499) (emphasis added)

Appellant took the stand in his own behalf and described how he had consumed a six pack of beer at a friend's house prior to going to the Terracciano residence around ten o'clock. (TR.1536)

From the Terracciano's house, he went to Lolo's Pub and stayed there until about closing time; 1:30 - 2:00 AM. (TR.1536) While at the pub, Appellant drank two pitchers of beer, each pitcher consisting of 32 ounces. (TR.1537)

The effect of two pitchers of beer plus a six pack of beer caused Appellant to feel "busted; light headed". (TR.1538)

After he visited with Frank and Francine, Appellant got to his residence "maybe 2:30, quarter to three". (TR.1539)

When asked why he went across the street and entered the decedent's residence, Appellant replied that he "didn't know -- it was just like an urge; like something that I didn't

have control over; something I wasn't consciously thinking about". (TR.1540)

Appellant further testified that once he had gone inside the residence, he realized he was inside, but "I didn't know why I was in the house". (TR.1542)

When asked to explain why he stabbed decedent nearly 30 times, Appellant again reiterated: "Wasn't something that I felt -- it was like I hadn't control of it". (TR.1546)

The defense called a psychiatrist, Doctor Arnold Zager, to give his opinion on the ability of Appellant to form specific intent at the time of his conduct, i.e., breaking and entering the decedent's residence and intentionally killing her.

Dr. Zager opined that:

> "It was my impression that he had an impaired ability to formulate intent to carry out those crimes that evening due to his alcohol intoxication and alcohol dependence." (TR.1600)

The Appellee offered no facts to dispute or rebut the conclusion that, at the time of the offenses, Appellant had a .145 blood alcohol level and that he was, indeed, intoxicated or drunk, both words being legally synonoymous.

To convict an individual of premeditated murder, the State must prove, among other things, a fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Sireci v. State,

399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. Gurganus, supra, at 822.

In addition thereto, however, in order to prove First Degree Felony Murder, the State need not prove premeditation or a specific intent to kill but must prove that the Appellant entertained the mental element required to convict on the underlying felony. Gurganus, Id.; Jacobs v. State, 396 So.2d 1113 (Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

It is clear that either crime for which Appellant was convicted, whether under a premeditated or a felony murder theory, required the State to prove beyond a reasonable doubt that Appellant did have a specific intent at the time of the offense, as to Counts I and III, and Murder and Burglary. Gurganus, Id.

The State failed to prove that Appellant had any specific intent to commit any criminal offense when he entered the decedent's residence; accordingly, the Trial Court should have reduced Count I to a lesser degree of Murder and should have granted a Judgment of Acquittal as to Count III of the Indictment at the close of all the evidence in the case.

The State needed to prove that Appellant intended to

commit the felony set forth in Count III; it failed to do so. Robles v. State, 188 So.2d 789 (Fla. 1966).

The Appellant presented sufficient evidence to establish, as a matter of fact and law, that he was intoxicated at the time of his conduct that led to the death of the decedent; voluntary intoxication is a defense to Counts I and III of the Indictment. See, also, Pope v. State, 458 So.2d 327 (Fla. 1st DCA 1984).

The voluntary intoxication of Appellant, as evidenced throughout the testimony of Appellant and the defense witnesses, was so extensive as to deprive Appellant the power of reasoning, rendering Appellant incapable of entertaining the requisite specific intent. Gentry v. State, 437 So.2d 1097 (Fla. 1983).

Appellant recognizes that although the general rule is that the defense of intoxication is a question for the jury, Ekman v. State, 120 Fla. 24, 161 So. 716 (1935), this Court should rule, as it did in Britts v. State, 158 Fla. 839, 30 So.2d 363 (Fla. 1947), that intoxication in the matter sub judice had been established as a matter of law.

It has been stated that the question of intoxication "is a mixed question of law and fact". Mellins v. State, 395 So.2d 1207, 1210 (Fla. 4th DCA 1981). The facts presented by Appellant required the Trial Court to reduce the degree of murder; the Trial Court erred, as a matter of law.

Since the underlying felony upon which the felony

murder charge has been based is a specific intent offense (to-wit: Burglary), the defense of voluntary intoxication applies to the felony murder theory. Linehan, supra, at 1265.

The Court instructed the jury on both premeditated and felony murder (R.1856), because the prosecution proceeded under both theories. Although the verdict form did not specify upon which theory the jury based its findings of guilt (R.1889), the underlying felony to the felony murder theory was sexual battery and/or burglary. (R.1858)

Under Gurganus, Linehan and Tien Wang v. State, 426 So.2d 1004 (Fla. App. 3rd DCA 1983), the Trial Court should have granted the Appellant's Motion to Reduce Count I and enter a Judgment of Acquittal as to Count III. The Court's denying Appellant's motions constituted reversible error.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REQUESTED THE STATE ATTORNEY THE RESPONSIBILITY FOR PREPARING THE FINDINGS UPON WHICH THE SENTENCE OF DEATH WAS BASED.

Sentencing of Appellant took place on October 28, 1985. After hearing and considering argument from respective counsel, the Trial Court concluded that "insufficient mitigating circumstances exist to outweigh the aggravating" and, therefore, it was the decision of the Court that Appellant "be sentenced to death for the murder of the victim". (TR. 1823)

At that point in the proceedings, the Trial Court stated:

> "I am going to ask that the State Attorney prepare an Order of Sentence and keeping with the one that was made as to the jury in their mitigation or in their trial concerning the penalties." (TR.1823)

After the Court sentenced the Appellant to consecutive life sentences on Counts II and III, it again spoke to the preparation of the Sentencing Order:

> "I'm going to ask at this time the State to prepare me a Sentencing Order setting forth the mitigating extenuating and mitgating(sic) circumstances that were put forth to the jury." (TR.1828)

Subsequently, on November 4, 1985, the Trial Court entered its Sentence Order (R.1910-1915), setting forth various

findings of fact and conclusions of law.

Section 921.141(3) provides, in pertinent part, that "the Court . . . shall enter a sentence . . . but if the Court imposes a sentence of death, it shall set forth in writing its findings . . . " (emphasis added)

The above cited language clearly imposes upon the Trial Court the duty to formulate and provide written reasons for imposing the sentence of death; it is a requirement that contemplates more than the mere approval of reasons submitted by the State Attorney; a practice that has been condemned in cases wherein the Court departs from a guideline sentence and assigns the prosecutor the responsibility for preparing the reasons relied upon in departing from a presumptive sentence.

There was an improper delegation of a function committed exclusively to the judiciary. Carnegie v. State, 473 So.2d 782 (Fla. 2d DCA 1985); Johnson v. State, _____ So.2d _____ (Fla. 2d DCA 1986) [11 FLW 315].

Accordingly, as to this judicial error by the Trial Court alone, this Court should reverse the sentence and remand for resentencing.

POINT V

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT.

In its Sentence Order (R.1910-1915), the Trial Court set forth its "finding of fact pursuant to the provisions of Florida Statute 921.141(3)". (R. 1910)

The Court found three (3) aggravating circumstances applied to the conduct attributable to the Appellant:

(1) "B. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person";

(2) "D. The capital felony was committed while the Defendant was engaged in the commission of a Burglary" (R.1911);

(3) "H. The capital felony was especially heinous, atrocious or cruel." (R. 1912)

By contrast, only one (1) mitigating circumstance was found to exist by the Trial Court, to-wit:

"A. The Defendant has no significant history of prior criminal activity." (R.1913)

In its oral pronouncement of the death penalty upon the Appellant, the Trial Court, without ever specifically delineating the aggravating and mitigating circumstances it deemed appropriate, went far afield in its rationale as to why

it concluded that it should follow the 7 to 5 vote by the jury and sentence the Appellant to death.

Clearly, part of the Court's findings were legally impermissible under existing case law.

Specifically, the Court stated to the Appellant:

> " . . . it would appear and did appear to this Court that you had been in a position of feeling little or no remorse during the course of the trial. There was an indication that there was an expression of it afterwards, but I saw none otherwise." (TR.1821) (emphasis added)

This Court has recently addressed the issue of lack of remorse as either an aggravating factor or an enhancement of an aggravating factor. In Stano v. State, 460 So.2d 890 (Fla. 1984), the Court reiterated its ruling in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983) which holds that "lack of remorse should have no place in the consideration of aggravating factors . . . absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." 460 So.2d at 893.

It is impossible to ascertain what consideration was given by the Court to the "lack of remorse" on the part of Appellant. It was reversible error for the Court to have considered it.

The Trial Court found that the "age of the Defendant at the time of the crime" (R.1914) factor did not apply even though the jury had said factor to consider during its deliberations.

The Appellant was 19 years of age at the time of the commission of the crimes. After graduating high school, he went into the army; he got married while in the army but was considered AWOL when he left the base to visit his wife and newborn child; he later separated from his wife, received a general discharge from the army and began looking for work and stability in his life. These factos, not merely his age, should have been considered by the Court as mitigating circumstances. Echols v. State, 484 So.2d 568 (Fla. 1985) at 575; Huddleston v. State, 475 So.2d 204 (Fla. 1985) (Defendant was 23 years of age.)

In its written Sentence Order, the Trial Court concluded that "without question, the murder of Jean Arsenau was heinous, atrocious and cruel". (R.1912) The Court failed, however, to consider the definitions of those words as established by case law in the State; instead, it merely adopted the descriptions prepared and set forth by the prosecutor, a practice which is error, [please refer to Point IV] wherein graphic words and conclusions, i.e., "unmercifully shed blood"; "violated remains"; "a manner most vicious and foul"; "tragic, brutal and senseless crime", (R.1912) were set forth rather than legal justification to find this factor appropriate under the circumstances attendant to the killing.

It is now well established in this State that heinous means "extremely wicked or shockingly evil; atrocious means

outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others". Bundy v. State, 471 So.2d 9, 21 (Fla. 1985); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

It is submitted that the case at bar does not fit in with previous decisions in which this Court has found the manner of the killing to be the "conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially heinous, atrocious or cruel". Bundy, supra, at 22; see, e.g., Smith v. State, 424 So.2d 726 (Fla. 1982); Bolender v. State, 422 So.2d 833 (Fla. 1982).

The unrebutted testimony by Appellant revealed that he was "really frightened"; he "didn't know what to do with her"; (TR.117) he "just freaked out and stabbed her". (TR.115)

When the Appellant got stabbed in the stomach by the decedent (TR.113), he eventually was able to take the knife from her and that is when "she was kicking and biting" his fingers and . . ."I just freaked out and stabbed her". (TR.115)

It is obvious that the situation got out of hand, just as this Court noted in Bates v. State, 465 So.2d 490, 493 (Fla. 1985) (What started as a burglary resulted in a situation simply getting out of hand; death sentence vacated).

Even if this Court finds that the murder was committed in a heinous, atrocious or cruel manner, the facts at bar parallel

the facts in Amazon v. State, _____ So.2d _____ (Fla. 1986) [11 FLW 105] wherein this Court concluded that the defendant acted in an "irrational frenzy". 11 FLW at 107.

The blood alcohol level in Appellant's body combined with his receiving a knife wound to the abdomen caused Appellant to become irrational rather than rationally designing to inflict a high degree of pain upon the decedent.

There was direct, unrebutted testimony by defense witnesses that Appellant was "drunk".

The mitigating factor of no prior history of violence should override the aggravating factor that the death occurred while Appellant committed a burglary. See, Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (death penalty deemed not proportionately warranted).

The Trial Court erred by not considering as a mitigating circumstance the fact that Appellant was "drunk" and that his ability to formulate specific intent to kill was impaired. (R.1913-1914)

As in Ross, the Trial Court erred in not considering these circumstances collectively as a significant mitigating factor. 474 So.2d at 1174. (emphasis added)

In comparing the instant case with all past capital cases to determine whether or not the punishment is too great, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), it is submitted that the death penalty is inappropriate,

and this Court should reduce the penalty to life imprisonment as it did in Drake v. State, 441 So.2d 1079 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); McKennon v. State, 403 So.2d 389 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Amazon, supra; Ross, supra.

In summary, the Trial Court erred by finding, as an aggravating circumstance, that the murder was especially heinous, atrocious or cruel.

It further erred by not finding, as mitigating factors, the age of the Appellant and the capacity of the Appellant to appreciate the criminality of his conduct based upon his condition of intoxication.

Accordingly, the Trial Court committed reversible error by imposing the death penalty upon the Appellant.

CONCLUSION

Based upon the reasons stated, cited cases and applicable law, it is respectfully submitted that the Trial Court committed reversible errors prior to and during the plenary trial.

Accordingly, Appellant requests this Honorable Court to reverse the convictions and remand the case for a new trial.

If the Court concludes that the convictions should be affirmed, then Appellant requests this Honorable Court to vacate the death penalty and reduce the sentence to life in prison without eligibility for parole for twenty five (25) years.

Respectfully submitted,

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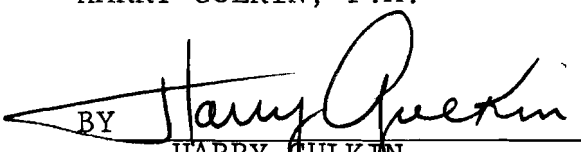
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Appellant, SCOTT PATTERSON, Case No. 67,830 has been furnished, by mail, to the Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, FL 33401, this 16th day of June, 1986.

HARRY GULKIN, P.A.

BY 
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