IN THE SUPREME COURT OF THE STATE OF FLORIDA

ERIC BRIAN HOLSWORTH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 67,973
Cir. case no. 84-10916CF

APPELLANT'S BRIEF

A Death Penalty appeal from the Circuit Court of the Seventeenth Judicial Circuit, Broward County, the Honorable Robert W. Tyson, presiding

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TABLE OF CONTENT

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Appellant, Eric Brian Holsworth, a young man in his late twenties, was indicted and convicted of the following offenses: (1) the first degree murder of Alice Dzikowski, (2) the attempted murder in the first degree of Gloria Salerno, and (3) armed burglary. The jury recommended life imprisonment as to the offense of first degree murder. The court overruled the jury recommendation. He was sentenced to death for the first degree murder conviction, to life imprisonment for the attempted murder, and life imprisonment for armed burglary.

A motion for new trial was denied. The undersigned attorney was appointed special public defender for purposes of this appeal. A timely notice of appeal was filed, and the Appellant herein appeals his convictions, judgments, and sentences for all the offenses.

STATEMENT OF THE FACTS

Re: Change of venue:

The Appellant the day the trial commenced moved the trial court for a change of venue. (Vol. 3, p. 427). The grounds were that a newspaper article about the case had appeared in the morning newspaper. Specifically, an article with the Appellant's picture appeared on the front page of the local section of The Miami Herald, the largest newspaper in the State of Florida with a large circulation in Fort Lauderdale. The article detailed the State's case. Most importantly, it related the Appellant's statements (ie. confession) which had been the subject of a

pretrial motion to suppress the day before.

It related Officer Ables testimony that on June 24, 1984, he stopped a car because of its defective exhaust and excessive noise. The driver did not have his drivers license. Ables asked the Appellant, who was a passenger in the back seat, for his driver's license. The officer ran the Appellant's name through the NCIC computer and learned that he was wanted on a felony warrant. He asked him, "I guess you know what you're wanted for." The Appellant replied, "I guess murder."

In the police car on the way to the county jail, the radio dispatcher informed the officer that the Appellant was wanted for two counts murder. The Appellant replied he did not think that was correct, because according to the newspaper one person was dead and one person was in critical but stable condition.

The article made reference to the statements the trial court had suppressed which were as follows. Ables said to the Appellant it must have been a hell of a shootout, and the Appellant responded that he did not shoot them, he stabbed them.

The Appellant offered the testimony of a public defender investigator that two copies of The Miami Herald were in the jury assembly room, and that prospective jurors were seen reading the newspaper. The State stipulated to this factual predicate. (Vol. 3, p. 427-432). The trial court denied the motion for change of venue.

Later, Carol Weber, the associate publisher of The Miami Herald, was selected as a juror.

Re: Motion to Suppress Statements:

On June 24, 1984, fifteen days after the incident Jerry Ables, a police officer in Eureka, California, stopped a car because of its defective exhaust and excessive noise. The driver did not have his drivers license. Ables asked the Appellant, who was a passenger in the back seat, for his driver's license. The officer ran the Appellant's name through the NCIC computer and learned that he was wanted on a felony warrant. (Vol. 9, p. 1583) The Appellant was placed under arrest. While the officer was putting the handcuffs on the Appellant he asked him, "I guess you know what you're wanted for, because I don't". (Vol. 2, p. 344). The Appellant replied, "I guess murder." (Vol. 2, p. 344).

In the police car on the way to the county jail, the radio dispatcher informed the officer that the Appellant was wanted for two counts of "187PC". The Appellant asked the officer what it meant, and the officer responded he was wanted for two counts of murder. The Appellant replied he did not think that was correct, because according to the newspaper one person was dead and one person was in critical but stable condition. (Vol. 2, p. 346).

Prior to the aforementioned statements, the Appellant had never been advised of his Miranda rights. The first time Officer Ables advised the Appellant of his Miranda rights was when Detective Ewing asked him to ascertain whether the Appellant would give Ewing a telephone statement. (Vol. 2, p. 350). The Appellant declined to give a statement.

Upon learning that the Appellant had been arrested in California, Detective Ewing telephoned the arresting officer. He asked Officer Ables to ask the Appellant if he would be willing

to give a statement over the telephone. Officer Ables told Detective Ewing that the Appellant did not want to make a statement. (vol. 2, p. 329).

Three months later Detective Ewing and Detective Griffiths went to Eureka, California to transport the Appellant to Fort Lauderdale. (Vol. 2, p. 317). They went to the county jail to interview the Appellant. Immediately upon being brought to them, he informed them that he had consulted a lawyer and did not want to discuss the case. (Vol. 2, p. 320, 330).

Three days after their arrival in California, the Appellant was taken to the airport for the flight back to Fort Lauderdale. (Vol. 2, p. 321-322). Prior to boarding the airplane, the Appellant was not advised of his Miranda rights. During the ten hour flight back while flying over Texas, Detective Ewing told the Appellant that he knew his father lived in Texas and that his grandparents lived in Indiana. The Appellant asked how he knew that. Thereafter they talked. At no time during this conversation was the Appellant advised of his Miranda rights. Appellant told the detective he had thought about going to Texas, but he figured the police would look there for him, so he went farther west. (Vol. 2, p. 317-337).

The trial court suppressed the Appellant's statement in response to Officer Ables' statement concerning that it must have been a hell of a shootout. Concerning the other statements made to Officer Ables the trial court ruled they were voluntary, unsolicted statements. (Vol. 2, p. 393-399).

Concerning the Appellant's statements to Detective Ewing,

the trial court found that Officer Ables' advisement of Miranda rights three months earlier coupled with the fact that the Appellant three years earlier had been advised of his Miranda rights in connection with another case, was sufficient. (Vol. 2, p. 397-399).

Re: Motion to suppress in-court identification:

The Appellant moved to suppress Gloria Salerno's in-court identification. Gloria was the victim of the attempted murder, and was present in the trailer when the deceased was fatally stabbed. The night of the incident, Gloria was awakened by screams. She ran to the livingroom. Before she got to the living room she was grabbed from behind. Her assailant covered her mouth with one hand and held a knife in the other. Gloria struggled with her assailant.

At approximately 3:00 a.m. the morning of the burglary, Detective Ewing went to the hospital to interview to Gloria. The detective constructed a composite drawing based on Gloria's description. (Vol. 2, p. 234-316).

Later, Detective Ewing visited Gloria for the purpose of having her view a photographic lineup consisting of six (6) photographs, including the photograph of the Appellant. She told him that she believed her attacker was either photograph number three, four, or five. (Vol. 2, p. 246-248). The Appellant's photograph was number five, but she never specifically identified him. (Vol. 2, p. 248).

She later viewed a live lineup. The Appellant was placed in the lineup at position number five. (Vol. 2, p. 266). None of the

persons depicted in the photograph lineup were participants in the live lineup, except the Appellant. (Vol. 2, p. 266-268). The Appellant was the only person in both the photographic and live lineup.

Re: State's case-in-chief:

On the night of June 9th, 1984, at approximately 12:00 a.m. the mobile home of Gloria Salerno was burglarized. Gloria was asleep in her bedroom and her daughter, Alice Dzikowski was asleep on the couch in the living room. Gloria was awakened by screams. She ran to the livingroom. Before she got to the living room she was grabbed from behind. Her assailant covered her mouth with one hand and held a knife in the other.

Gloria struggled with her assailant. She grabbed the blade of her assailant's knife and it broke. (Vol. 9, 1579). She was thrown to the ground, and her assailant went to a drawer for another knife. Gloria thought he was cut during the struggle. (Vol. 9, p. 1578)

The assailant escaped by running down the hall of the trailer. He bumped into the trailer walls as he ran. He left the trailer through a window in the northeast bedroom.

Barbara Morris lived in the trailer next to the Gloria's. She was awakened by screams and called the "911" emergency number. Barbara went over to Gloria's trailer. It was dark when she went to the Gloria's trailer. (Vol. 6, p. 1029) On the way to Gloria's trailer she saw a blue car on the road between the trailers. The car paused a moment then drove off. (Vol. 6, p. 1032). Gloria was on the telephone calling the "911" emergency number. The

assailant was gone before Barbara arrived. She calmed Gloria until paramedics arrived.

Alice and Gloria were taken to the hospital. Alice died as a result of stab wounds. Gloria was treated for injuries, and released four days later. (Vol. 9, p. 1545)

At approximately 3:00 a.m. the morning of the burglary, Detective Ewing went to the hospital to interview to Gloria. (Vol. 9, p. 1471). The detective constructed a composite drawing based on Gloria's description. (Vol. 9, p. 1472)

After leaving the hospital, Detective Ewing responded to a loidering and prowling call at the mobile home of Penny Lindsay. Lindsay and Gloria lived in the same trailer park. Lindsay could not give a description of the person she had seen outside her home other than it was a male in blue jeans. (Vol. p. 1774) The police showed Lindsay the composite. She told the police it reminded her of Howard Miller, the Appellant's cousin. (Vol. 10, p. 1770) Lindsay's sister who was also present, stated the composite looked like the Appellant. (Vol. 10, p. 1777)

The Appellant left Fort Lauderdale the next day. He traveled to his sister's home in Deland, Florida. The Appellant told his brother-in-law that he had done something "stupid". Referring to his mental state, he said he needed medical attention. (Vol. 8, p. 1406) The Appellant spent the night with them and left the next day.

On June 24, 1984, fifteen days after the incident Jerry Ables, a police officer in Eureka, California, stopped a car because of its defective exhaust and excessive noise. The driver did not have his driver's license. Ables asked the Appellant,

who was a passenger in the back seat, for his driver's license. The officer ran the Appellant's name through the NCIC computer and learned that he was wanted on a felony warrant. (Vol. 9, p. 1583) The Appellant was placed under arrest. While the officer was putting handcuffs on the Appellant he asked him, "I guess you know what you're wanted for." The Appellant replied, "I guess murder." (Vol. 8, p. 1384).

In the police car on the way to the county jail, the radio dispatcher informed the officer that the Appellant was wanted for two counts of "18713T". The Appellant asked the officer what it meant, and the officer responded he was wanted for two counts of murder. The Appellant replied he did not think that was correct, because according to the newspaper one person was dead and one person was in critical but stable condition. (Vol. 8, p. 1385)

Detective Ewing and Dectective Griffiths went to Eureka, California to transport the Appellant to Fort Lauderdale. (Vol. 8, p. 1485). On the return trip while flying over Texas, Detective Ewing told the Appellant that he knew his father lived in Texas. The Appellant told the detective he had thought about going there, but he figured the police would look there for him, so he went farther west. (Vol. p. 1486).

Concerning physical and/or scientific evidence to link the Appellant to the crime, the State adduced the following evidence. Detective Richtarcik, a fingerprint expert, testified that latent prints of comparable value found at the crime scene. The first was a palm print lifted from the window in the northeast bedroom. (Vol. 6, p. 1049). The palm print was compared to the

Appellant and it did not match. (Vol. 6, p.1050). Two fingerprints were found on the same window. These were identified as being the Appellant's prints. (Vol. 6, p. 1060)

There were two footprints found outside the window. One was a tennis shoe impression and the other of a barefoot impression. (Vol. 6, p.1069, Vol. 7, p.1183). These prints were never matched to anyone. (Vol. 6, p. 1070).

One fingerprint impression was found on each of two knives. The fingerprint on the knife with the bent blade was identified as the Appellant's. The print on the other knife was unidentified. (Vol. 6, p. 1070).

George Duncan, a forensic serologist, testified that the deceased had "AB" blood type; that her mother, Gloria, has "A" blood type; and that the Appellant has "B" blood type. (Vol. 7, p.1243). Type "A" blood was found on the knife without the bent blade (Vol. 7, p. 1245). However, two weeks before trial, and about one year after the incident, the knife was retested. This second examination revealled "B" type blood. Duncan opined that this "B" type could have come from a person with "AB" blood (i.e. the deceased), or a person with "B" type blood (i.e. the Appellant). (Vol. 7, p. 1246). The knife with the bent blade had only "A" type blood (i.e. Gloria).

Dr. Reeves, the former associate medical examiner, performed the autopsy on the deceased.

Concerning eyewitness identification of the Appellant as the perpetrator of the crime, the State adduced the following evidence. Gloria Salerno testified that she had not read or watched any media coverage regarding the incident. She was

impeached with her deposition wherein she stated that she had learned, from reading the newspaper, that the Appellant, who lived in the same mobile home park, was the prime suspect. (Vol. 9, p.1559). She also testified that she wears glasses and that she was not wearing her glasses the night of the incident. (Vol. 9, p.1579). Midway through cross examination Gloria had an emotional outburst. The jury was taken from the courtroom. She was taken out of the courtroom. After this she returned and identified the Appellant. (Vol. 9, p. 1595)

Adeline Cutler was the State's final witness. She testified that three years earlier, the Appellant had burglarized her home. (Vol. 10, p. 1609)

Re: Defense case at trial:

Trial counsel presented a two-prong defense. First, that there was another person involved who was actually the killer of the deceased. Second, that the Appellant's "voluntary intoxication" prevented him from forming the requisite "specific" intent.

Concerning the defense that someone else was the actual killer, the Appellant offered the following proof. Howard Seiden, a forensic serologist who works with the State's expert, Duncan, testified that a body hair of an unidentified person was found wrapped around the deceased middle finger on her right hand. (Vol. 10, p.1670, 1695). Officer Hapsas testified that there was a blue Nova, with its lights turned off, being driven in the area following the incident. (Vol. 10, p. 1744).

Concerning the defense of "voluntary intoxication" the

Appellant offered the following proof. Various witnesses gave testimony concerning the Appellant's prior use of drugs and alcohol. Thereafter, the Appellant sought to introduce the testimony of Dr. Antonio R. Varsida, a doctor in psychology with a post-doctorate certificate in psychotherapy and psychoanalysis and with specialized training in psychopharmacology and substance abuse. He evaluated the Appellant regarding his history of substance abuse as it affected his conduct the night of the incident.

The doctor learned that the Appellant began drinking when he was 14 years old. He later progressed to using marijuana, quaaludes, LSD, cocaine. and PCP. (Vol. 2, p. 2244). The doctor reviewed the police reports and the statement of the only eyewitness to the incident, Gloria Salerno. He administered standarized personality tests. (Vol. 11, p. 1850-1865).

Based on the Appellant's statements and Gloria Salerno's description of her attacker's behavior, he opined that the night of the incident, the Appellant had been drinking alcoholic beverages, smoking marijuana, and had taken PCP. Based on the tests the doctor diagonosed the Appellant as having a borderline personality with paranoid and schizoid features. (Vol. 11, p. 1850-1865).

Concerning the Appellant's conduct the night of the incident, based upon the ingestion of PCP and alcohol interacting with his personality, he opined that the Appellant's psychological functioning would have been impaired. (Vol. 11, p. 1855).

The trial court excluded Dr. Varsida's testimony on the grounds that the State had not been given adequate notice, and that the evidence was incompetent and not relevant. (Vol. 11, p. 1858). Notwithstanding its exclusion of the doctor's testimony, the trial court found there was sufficient evidence of intoxication to merit an instruction on the defense of "voluntary intoxication". (Vol. 15, p. 2588).

During its deliberations, the jury had a question concerning whether the Appellant could be convicted of first degree murder without proof of a specific intent. (Vol. 12, p. 2075-2081).

Re: Evidence adduced at the penalty phase:

During pretrial hearings on motions concerning the imposition of the death penalty which were heard shortly before selecting the jury, the trial prosecutor, the chief assistant state attorney who is the number two man in the office heirarchy, stated to the trial court, "...I would like to point out that the State through this Assistant State Attorney is not seeking the death sentence against this Defendant at all." (Vol. 1, p. 138). Notwithstanding this statement the penalty phase was held, and the following evidence was received by the jury.

Six years before this incident, Virginia DeCampe was the victim of a burglary and the Appellant was charged. She could not identify the Appellant. (Vol. 13, p. 2146). The prosecutor that had prosecuted the DeCampe case, testified that the Appellant pled guilty to burglary and misdemeanor battery. (Vol. 13, p. 2159).

Barry Goldstein, another prosecutor, testified that the

Appellant three years before had been convicted of Adeline Carter burglary. (Vol. 13, p. 2169).

Steven James, the Appellant's brother-in-law, testified that the Appellant smoked marijuana and drank heavily (Vol. 13, p. 2186). He stated that the Appellant's behavior would change when he drank. (Vol. 13, p. 2187). However, he had never seen the Appellant do anything violent. (Vol. 13, p. 2187). Pamela Stouder testified that the Appellant had been drinking from the age of 14. (Vol. 13, p. 2201).

A number of witnesses testified regarding the Appellant's background. Paula James, his sister, Paula Stouder and Michael Vogelman, childhood friends, all testified that the Appellant was beaten and verbally abused by his alcoholic father. (Vol. 13, p.2197, 2202, 2204). None of them had ever seen the Appellant act violently. (Vol. 13, p. 2187, 2202) The Appellant was protective of his mother when his stepfather became abusive toward her. (Vol. 13, p. 2197)

The Appellant's mother testified that she and the Appellant's father divorced when he was 10 years old. (Vol. 13, p. 2255). She then married Mr. Dixon another alcoholic who beat her and the Appellant.

Dr. Antonio R. Varsida, a doctor in psychology with a post-doctorate certificate in psychotherapy and psychoanalysis and with specialized training in psychopharmacology and substance abuse, evaluated the Appellant regarding his history of substance abuse. He learned that the Appellant began drinking when he was 14 years old. He later progressed to using marijuana, quaaludes, LSD, cocaine. and PCP. (Vol. 2, p. 2244). The doctor reviewed the

police reports and the statement of the only eyewitness to the incident, Gloria Salerno. He administered standarized personality tests. (Vol. 13, p. 2243).

Based on the Appellant's statements and Gloria Salerno's description of her attacker's behavior, he opined that the night of the incident the Appellant had ingested alcoholic beverages, marijuana, and PCP. Based on the tests the doctor diagonosed the Appellant as having a borderline personality with paranoid and schizoid features. (Vol. 13, p. 2246). Concerning the Appellant's conduct the night of the incident, he opined that the Appellant's capacity would be diminished. (Vol. 13, p. 2248).

Re: Jury's recommendation of a life sentence; Trial court's sentence of death

Notwithstanding the pretrial statement of the trial prosecutor, the chief assistant state attorney who is the number two man in the office heirarchy, that "...I would like to point out that the State through this Assistant State Attorney is not seeking the death sentence against this Defendant at all", and the jury's 9 to 3 vote in favor of life imprisonment, the trial court imposed the death penalty. (Vol. 1, p. 138).

The jury, of eight women and four men, consisted of the following persons: William Hamilton - the foreman, a telephone company plant manager; Carol Weber - associate publisher of The Miami Herald; Deborah Mensoza - a department store supervisor; Zora Van Scoyoc - a housewife; Richard Auerbach - a computer programmer; Betty Lestrange - wife of a prominent orthopedic surgeon, an airline stewardess and former emergency

room nurse; Susan Grinnell - a bank officer; Frances Linville - a secretary in a real estate office; Ellen Luizzi - a housewife; Clarence Bolger - a post officer employee; Michael Short - a telephone company cable repairman; and Melissa Mears - a college student. (Vol. 16, p. 2713)

After deliberating for over three (3) hours, the jury by a 9 to 3 vote recommended that a life sentence be imposed. (Vol. 16, p. 2705). The jury in deciding its recommendation of life considered all the evidence set forth above.

The trial court in overriding the jury's recommendation found three (3) aggravating circumstances: (1) that the Appellant was previously convicted of a felony involving the use or threat of violence, (2) that the homocide was committed while the Appellant was engaged in the commission of the enumerated offense of armed burglary, and (3) that the homocide was especially heinous, atrocious and cruel. The trial court found no statutory, or non-statutory mitigating circumstances.

Concerning the aggravating circumstances that the Appellant was previously convicted of a felony involving violence, the trial court referred to the earlier convictions outlined above. The trial court also made reference to the two felonies (i.e. attempted murder and armed burglary) of which the Appellant was convicted contemporaneously with the homocide. The latter two crimes were not prior to the incident.

Concerning the aggravating circumstance that the homocide was committed during the perpetration of an enumerated felony, the trial court referred to the armed burglary committed contemporaneous with the homocide, which also was the same

enumerated felony that classified the homocide as a first degree murder.

Concerning the aggravating circumstance that the crime was heinous, atrocious, and cruel, the trial court summarized the facts of the homocide. The deceased was surprised in her home, struggled with her assailant, and stabbed repeatedly. She was to some degree conscious when emergency help arrived 10-15 minutes after the attack. (Vol. 16, p. 2732)

Concerning the statutory mitigating circumstances that the homocide was committed while the Appellant was under the influence of extreme mental or emotional disturbance, the trial court found no evidence to support this circumstance. (Vol. 16, p. 2734).

Concerning the statutory mitigating circumstances that the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court found no evidence to support this circumstance. The trial court chose to ignore Dr. Varsida's expert testimony wherein he opined, that based upon the ingestion of PCP and alcohol interacting with his personality, the Appellant's mental capacity the night of the incident was diminished. (Vol. 13, p. 2248). Not only did the trial court completely disregard this expert testimony, the trial court substituted its own finding of fact that the the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, was not impaired in any way. (Vol. 16, p. 2735-2736)

Concerning any non-statutory mitigating circumstances, the trial court found that there was no evidence of drug and alcohol abuse at the time of the offense; that there was no evidence the Appellant could be rehabilitated; and that the Appellant's family history was of no importance. (Vol. 16, p. 2736-2737).

SUMMARY OF ARGUMENT

The day the jury was selected, an article appeared on the front page of the morning newspaper which contained the Appellant's inculpatory statements, including the statements that had been suppressed. Later, the associate publisher of the newspaper was seated as a juror. Under the reasoning of Oliver v. State, id, the Appellant's motion for change of venue should have been granted.

Within the holding of this Court's decision in Burch v. State, id, the expert testimony concerning whether drug and alcohol abuse rendered the Appellant incapable of forming a specific intent should have been admitted.

The only eyewitness was unable to identify the Appellant from six photographs in a display. She narrowed her selection to three of the six, including the Appellant. Then, the police conducted a live lineup, and the Appellant was the only person among her three choices in the lineup. This impermissibly suggestive pretrial identification rendered her in-court identification inherently unreliable.

The trial court's override of the jury's life recommendation

was error because there were sufficient mitigating circumstances upon which the jury based its decision. Finding that the killing was heinous, atrocious, and cruel, and finding no mitigating circumstances was error.

The arresting officer without advising the Appellant of his Miranda warnings asked a question of the Appellant reasonably likely to elicit an inculpatory statement. The lead detective, after being repeatedly told by the Appellant that he did not want to discuss the case, while transporting the Appellant from California to Florida engaged him in a conversation reasonably likely to invoke an inculpatory statement.

Notwithstanding the fact the prosecution had an eyewitness, fingerprints, and inculpatory statements, the prosecution engaged in needless overkill by introducing evidence of a dissimilar burglary committed by the Appellant three years before.

The Appellant asserted the defense of voluntary intoxication. After deliberating seven (7) hours, the jury had a question concerning the intent requirement of first degree felony murder. When the jury was re-instructed, it was not advised of the elements of the enumerated felony, burglary. Specifically, the jury was not advised that it too, like premeditated murder, was a specific intent crime.

POINT 1

THE TRIAL COURT SHOULD HAVE GRANTED THE APPELLANT'S MOTION FOR CHANGE OF VENUE.

THE APPELLANT WAS DENIED A FAIR TRIAL CONSIDERING THAT THE ASSOCIATE PUBLISHER OF THE NEWSPAPER CONTAINING THE PREJUDICIAL ARTICLE WAS A MEMBER OF THE JURY.

On the day the trial began an article with the Appellant's picture appeared on the front page of the local section of The Miami Herald, the largest newspaper in Florida with a large circulation in Fort Lauderdale. The article stated (1) that upon the Appellant's arrest in California that he told the police that he was wanted for murder; and (2) that when the California police told him he was wanted for two muders, he corrected them and told them one murder because the other person had survived. Most importantly, the article stated that the Appellant had admitted stabbing the victims, but that the jury was not going to hear that because the statements had been suppressed.

The associate publisher of that newspaper was a member of the jury panel. Aside from the associate publisher who is presumed to read her own newspaper, the Appellant presented evidence, stipulated to by the prosecution, that copies of the newspaper were being read by prospective jurors in the jury assembly room prior to

jury selection.

Notwithstanding these facts, the trial court denied the motion for change of venue, the jury was selected, and the associate publisher of the newspaper was a member of the jury.

In Oliver v. State, 250 So.2d 888, 890 (Fla. 1971) this Court held, "... as a general rule, when a 'confession'is featured in news media coverage of a prosecution, as here, a change of venue motion should be granted whenever requested; we also hold that in the case sub judice the voir dire process cannot cure the effect of a 'confession' which has been news media coverage." The defendant's confession was published in the sole daily newspaper in the general Tallahassee area, the Tallahassee Democrat which is owned by the same group that owns The Miami Herald. The confession was printed the day after the defendant's magistrate hearing well before his trial.

In the case sub judice, The Miami Herald is not the only newspaper in metropolitan Fort Lauderdale. However, it is the largest newspaper in the State of Florida and has the lion's share of newspaper readers in metropolitan Fort Lauderdale. While the statements complained of in Oliver were printed well before trial, the statements complained of herein were printed the day of trial. Plus, the article noted that portions of the statements had been suppressed and would not be heard by the trial jury.

In Oliver there was no proof that members of the jury venire has read the article. However, in the case sub judice the trial court had proof that copies of the newspaper were in the jury assembly room. Oliver did not have the editor of the Tallahassee Democrat on his jury. However, the trial court herein allowed the

associate publisher of the newspaper to be seated as a jury member.

This Court has construed the Oliver rule in later decisions. First, in Hoy v. State, 353 So.2d 826 (Fla. 1977), this Court concluded that the situation was not as aggravated and that the Oliver rule did not apply. In distinguishing the cases, this Court noted: (1) that the article did not appear in the sole daily newspaper and in fact appeared in a lesser read publication, (2) that the article contained both the defendant's confession and his retraction of his confession, and (3) that there was no proof any of the prospective jurors read the article.

In Straight v. State, 397 So.2d 903 (Fla. 1981), co-defendants Palmes and Straight were jointly charged with first degree murder. The cases were severed and Palmes was tried first. Palmes' confession, his retraction of his confession, and his repudiation of his confession at trial received news media coverage. This Court in applying the Oliver rule noted: (1) that the co-defendant's confession was the subject of media coverage, and (2) that it was not clear that Palmes confession even implicated Straight. Clearly, Straight's situation did not fall within the strict holding of Oliver supra.

The Appellant's case is easily distinguished from Hoy supra. While Hoy's confession appeared in a lesser read publication, the Appellant's confession appeared in the largest newspaper in Florida with a large circulation in Fort Lauderdale. While Hoy's article contained both his confession and retraction both of

which the jury heard, the Appellant's article contained both the admissible statements the jury heard, and the suppressed statements they did not hear. While Hoy had no proof the venire had read his article, the Appellant had proof that the newspaper was in the jury assembly room. Most importantly, the associate publisher of the newspaper was a member of the jury.

Likewise, the Appellant's case is easily distinguished from Straight supra. While Straight's co-defendant's statements were the subject of the media coverage, in the case sub judice it was the Appellant's own statements which were the subject of the media coverage. The situation was aggravated by the fact that the article clearly informed the reader that the jury would not be allowed to consider certain very damaging admissions.

In summary, The Miami Herald, while not the only newspaper in metropolitan Fort Lauderdale,is the largest newspaper in the State of Florida and has the lion's share of newspaper readers in metropolitan Fort Lauderdale. The article appeared the first day of trial. The article included that portion of the Appellant's confession that the jury would consider. But, most importantly the article clearly informed the reader that certain very damaging admissions (ie. "I did not shoot them, I stabbed them.") would not be heard and considered by the jury. Copies of the newspaper were seen in the jury assembly room. If this were not enough prejudice, the trial was fatally flawed by the seating of the associate publisher of the newspaper as a member of the jury.

The Fourth District Court of Appeals has recognized that news media coverage of an inadmissibe statement in a highly publicized case may constitute sufficient cause for pretrial

closure. Miami Herald Publishing Co. v. Lewis, 383 So.2d 236 (Fla. 4 DCA 1980).

When the Oliver rule is applied to the foregoing circumstances, the trial court should have granted the Appellant's motion for a change of venue. Or, in the alternative, the trial court sua sponte should have continued the trial in an attempt to dissipate the taint.

Having been tried under the above-described circumstances, the Appellant was denied a fair trial as guaranteed by the Florida and United States Constitutions. Accordingly, the cause should be reversed and remanded for a new trial.

POINT 2

THE TRIAL COURT ERRED IN EXCLUDING THE EXPERT'S TESTIMONY CONCERNING THE CRITICAL QUESTION WHETHER THE THE INGESTION OF INTOXICANTS RENDERED THE APPELLANT INCAPABLE OF FORMING A SPECIFIC INTENT.

The trial court excluded the following expert testimony concerning the Appellant's ability or capacity to form a "specific intent" the night of the incident. Dr. Antonio R. Varsida, a doctor in psychology with a post-doctorate certificate in psychotherapy and psychoanalysis and with specialized training in psychopharmacology and substance abuse, evaluated the Appellant regarding his history of substance abuse as it affected his conduct the night of the incident. The doctor learned that the Appellant began drinking when he was 14 years old. He later progressed to using marijuana, quaaludes, LSD, cocaine. and PCP. (Vol. 12, p. 2244). The doctor reviewed the police reports and

the sworn statement of the only eyewitness to the incident, Gloria Salerno. He adminsitered universally recognized standarized personality tests. (Vol. 11, p. 1850-1865).

Based on the Appellant's statements and Gloria Salerno's description of her attacker's behavior, he opined that the night of the incident, the Appellant had been drinking alcoholic beverages, smoking marijuana, and had taken PCP. Based on the tests the doctor diagonosed the Appellant as having a borderline personality with paranoid and schizoid features. (Vol. 11, p. 1850-1865). Concerning the Appellant's conduct the night of the incident, he opined that the ingestion of alcohol and PCP interacting with his personality would cause the Appellant's psychological functioning to be impaired. (Vol. 11, p. 1855).

The trial court ruled (1) that the State had not been given adequate notice that the doctor would testify, and (2) that the evidence was incompetent and not relevant. (Vol. 11, p. 1858).

First, concerning the question of whether the State was surprised by the doctor's appearance as a witness. The prosecutor told the trial court that he had been supplied the witness' name on July 12th, which was nineteen (19) days before he testified. (Vol. 11, p. 1855-56). The trial was recessed ten (10) days from July 19th through July 30th. (Vol. 9 and 10). The prosecutor had nineteen (19) days notice that the witness might testify, and a ten (10) day recess in which to interview him. Had the prosecutor used due diligence he could have discovered the substance of the doctor's favorable testimony. The trial court's exclusion for lack of notice clearly did not fall within the parameters of Richardson v. State, 246 So.2d 771 (Fla. 1971).

In Burch v. State, 478 So.2d 1050 (Fla. 1985), this Court held that when a defendant asserts the defense of voluntary intoxication by use of drugs and other intoxicants that expert testimony concerning the critical question of whether a defendant was capable of forming a specific intent to commit first degree murder is admissible. As a predicate for the admissibility of the expert's testimony, there must be some proof of ingestion of the intoxicants other than the defendant's hearsay statements to the expert. Evidence sufficient to establish the predicate may be elicited during cross-examination of a prosecution witness. Gardner v. State, 480 So.2d 91 (Fla. 1985).

Various witnesses, who had known the Appellant for years, testified that he had a long history of use of intoxicants. The State's key witness and the only eyewitness, Gloria Salerno, provided proof that the Appellant had ingested intoxicants the night of the incident. She testified (1) that the Appellant's statements to her did not make any sense, (2) that he was very intense, (3) that his eyes were glaring, (4) that she smelled beer on his breath, (5) that he could have been on drugs, (6) that he was unsteady on his feet, and (7) that when he ran down the hallway his balance was so unsteady that he bounced from wall to wall. (Vol. 9, p. 1580-82).

Further, the trial court gave an instruction on the defense of "voluntary intoxication". (Vol. 15, p. 2588). Before a theory of defense instruction can be given, the trial court must find that there is some scintilla of proof to support the defense. Accordingly, it must be assumed that the trial court found that

there was some evidence to support the defense of "voluntary intoxication". The instruction on the defense of "voluntary intoxication" was rendered meaningless without the expert testimony.

The exclusion of the testimony was not harmless error, because the jury debated whether the Appellant had the requisite ability to form a "specific intent". During its deliberations, the jury asked the trial court whether the Appellant could be convicted of first degree murder without proof of a "specific intent". (Vol. 12, 2075-2081).

There being proof of intoxication the night of the incident, the trial court erred when it excluded the evidence on the grounds of competency and relevancy. Accordingly, the Appellant's convictions should be reversed and remanded for a new trial.

POINT 3

THE IN-COURT IDENTIFICATION OF THE ONLY EYEWITNESS WAS INHERENTLY UNRELIABALE BECAUSE OF THE IMPERMISSIVELY SUGGESTIVE PRETRIAL IDENTIFICATION.

The Appellant moved to suppress the in-court identification of the State's only eyewitness, Gloria Salerno, the victim of the attempted murder, who was present in the trailer when the deceased was fatally stabbed. She viewed a photographic lineup consisting of six (6) photographs, including the photograph of the Appellant. She told the detective that she believed her attacker was either photograph number three, four, or five. (Vol. 2, p. 246-248). The Appellant's photograph was number five, but she never specifically identified him. (Vol. 2, p. 248).

She later viewed a live lineup. The Appellant was placed in the lineup at position number five. (Vol. 2, p. 266). None of the persons depicted in the photograph lineup were participants in the live lineup, except the Appellant. (Vol. 2, p. 266-268). The Appellant was the only person in both the photographic and live lineup.

Suggestive confrontations are disapproved because they increase the likelihood of misindentification. Unnecessarily suggestive ones are condemned for the further reason that there is an increased chance of misidentification. In determining whether a witness' in-court identification is inherently unreliable, the courts have applied a two-fold test. First, did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification? Second, if so, considering the totality of the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 110, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

It is not per se suggestive if the defendant is the only person to be depicted in both the photographic display and the live lineup. However, it is a factor to be considered. The danger of misidentification or suggestiveness will be increased if the police show the witness pictures of several persons among which the photograph of a single person recurs, or is in some way emphasized. Simmons v. United States, 390 U.S. 377, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

The Appellant concedes that a witness who views a

photographic display and identifies a specific person, and then later corroborates the identification with an identification from a live lineup that the identification has not been tainted merely because that person is the only thing common to both viewings.

However, the facts in the case sub judice are materially different. The eyewitness from a photgraphic display of six (6) photographs narrowed her choice down to three photographs. The eyewitness only eliminated 50% of the photographs viewed. It is significant that she did not specifically identify the Appellant. Had she specifically identified him, her later lineup identification would merely have been corroboration.

Having narrowed her choices to three, she viewed live only one of her three choices. The police in constructing the lineup eliminated two of her previous choices and narrowed her previous identifiable choices to "one". Having narrowed her choice to "one", the Appellant was emphasized by being placed in the same position he had been in the photographic display.

She knew she had narrowed her choices to three. Then she was asked to view a lineup. Obviously, the purpose of the lineup was to see if an identification could be made. She viewed the lineup and saw that her previous choices have been narrowed to "one". Would not the witness intuitively assume that her choices had been narrowed for a reason.

The pretrial procedure having been impermissively suggestive, it must be determined whether the witness had a sufficient independent basis for her in-court identification. The factors to be considered are (1) the opportunity to view at the

time of the offense, (2) degree of attention, (3) accuracy of prior description, (4) level of certainty, and (5) the elapsed time. Manson v. Braithwaite, supra.

Considering the above factors, the witness was awaken in the night and accosted by her assailant in the dimly lit, if not dark, hallway and kitchen of her mobile home. Rather, than being able to concentrate on his face, she was engaged in a life and death struggle. Her attention was directed at her cut hand and trying to disarm her assailant. She and the police constructed a composite that looked similiar not only to the Appellant but others. Within three days of this description, she was shown his photograph and was unable to identify him. Later she viewed a live lineup in which the Appellant was the only person she had been previously shown.

Considering first the lack of a pretrial identification, then the suggestive pretrial identification, and lastly, the totality of the factors, her in-court identification a year later was inherently unreliable evidence. Accordingly, the trial court erred in allowing the jury to consider the evidence. This error manadates a reversal of his convictions and a remand for a new trial.

POINT 4

THE TRIAL COURT'S OVERRIDE OF THE JURY'S RECOMMENDATION OF A LIFE SENTENCE AND ITS IMPOSITION OF THE DEATH PENALTY WAS ERROR.

After deliberating for over three (3) hours, the jury by a 9 to 3 vote, or a 3 to 1 ratio, recommended that a life

sentence be imposed. (Vol. 16, p. 2705). The trial court in overriding the jury's recommendation found three (3) aggravating circumstances: (1) that the Appellant was previously convicted of a felony involving the use or threat of violence, (2) that the homocide was committed while the Appellant was engaged in the commission of the enumerated offense of armed burglary, and (3) that the homocide was especially heinous, atrocious and cruel. The trial court found no statutory, or non-statutory mitigating circumstances.

"In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person person could differ." Tedder v. State id at 910. For the trial court to overrule the jury's recommendation, the record must be devoid of any valid statutory or non-statutory mitigating circumstances. Brown v. State, 473 So.2d 1260 (Fla. 1985).

In determining whether the death sentence is appropriate, the Court must examine the case in its entirety. During pretrial hearings on the propriety of the death penalty, the trial prosecutor, the chief assistant state attorney who is the number two man in the office heirarchy, stated to the trial court, "...I would like to point out that the State through this Assistant State Attorney is not seeking the death sentence against this Defendant at all". (Vol. 1, p. 138).

The reasonable people the trial court overruled were from all walks of life and different socio-economic groups. The jury, of eight women and four men, consisted of the following persons: William Hamilton - the foreman, a telephone company plant

manager; Carol Weber - associate publisher of The Miami Herald; Deborah Mensoza - a department store supervisor; Zora Van Scoyoc - a housewife; Richard Auerbach - a computer programmer; Betty Lestrange - wife of a prominent orthopedic surgeon, an airline stewardess and former emergency room nurse; Susan Grinnell - a bank officer; Frances Linville - a secretary in a real estate office; Ellen Luizzi - a housewife; Clarence Bolger - a post officer employee; Michael Short - a telephone company cable repairman; and Melissa Mears - a college student. (Vol. 16, p. 2713). This cross section of the community, the conscience of the community, found sufficient justification to recommend life imprisonment by an overwhelming vote.

Concerning the existence of statutory aggravating circumstances, the Appellant concedes that two aggravating circumstances existed. First, the Appellant had a prior conviction for a felony involving violence. And, the crime was committed during the perpetration of the enumerated felony of burglary which is also a necessary element of the offense of first degree murder. Thus, the enumerated felony is both an essential element of the capital offense and an aggravating circumstance.

The Appellant challenges the trial court's finding of a third aggravating circumstance and no mitigating circumstances. Concerning the aggravating circumstance that the crime was heinous, atrocious, and cruel, the trial court summarized the facts of the homocide. The deceased was surprised in her home, struggled with her assailant, and stabbed repeatedly. She was to

some degree conscious when the emergency help arrived 10-15 minutes after the attack. (Vol. 16, p. 2732).

Concerning the statutory mitigating circumstances that the homocide was committed while the Appellant was under the influence of extreme mental or emotional disturbance, the trial court found no evidence to support this circumstance. (Vol. 16, p. 2734). Concerning the statutory mitigating circumstances that the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court found no evidence to support this circumstance. Concerning any non-statutory mitigating circumstances, the trial court found that there was no evidence of drug and alcohol abuse at the time of the offense; that there was no evidence the Appellant could be rehabilitated; and that the Appellant's family history was of no importance. (Vol. 16, p. 2736-2737).

The Appellant challenges that the crime was not heinous, atrocious, or cruel as defined by this Court. The law is clear that to be considered heinous, atrocious, or cruel, the homocide must be accompanied by such additional acts as to set the homocide apart from the norm of homocide. The homocide must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. 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. State v. Dixon, 283 So.2d 1 (Fla. 1973); Tedder v. State, 322 So.2d 908 (Fla. 1975); Lewis v. State, 398 So.2d 432 (Fla. 1981).

Stabbing has been recognized as heinous, atrocious, and cruel where the victim died a slow and torturous death, or even when the victim died instaneously, if before death the victim was subjected to agony over the prospect that death was soon to occur. Preston v. State, 444 So.2d 939, 945 (Fla. 1984); Medina v. State, 466 So.2d 1046 (Fla. 1985); Peavy v. State, 442 So.2d 200 (Fla. 1983).

In the case sub judice, while death was not instantaneous, unconsciousness and death occurred within minutes because the fatal stab wound went all the way through the heart. (Vol. 8, p. 1434). The deceased was awakened by the attack. There was a brief, intense struggle, and she was mortally wounded. Compare, in Preston v. State supra, the victim was robbed at her place of employment, abducted, and driven to an isolated location. There she was made to undress, and then marched at knifepoint to the location where she was killed. She experienced a ride of terror with much time to reflect on her fate. Compare, in Medina v. State, the victim was stabbed numerous times, then gagged and left to die. Based upon the aforementioned case law, the trial court erred in finding the death was heinous, atrocious, and cruel.

The jury's recommendation of life imprisonment was based upon statutory and non-statutory mitigating circumstances contained in the record. The trial court's finding that there were no statutory or non-statutory mitigating circumstances was clearly erroneous, and ignored the uncontradicted expert and lay testimony offered by the Appellant. The trial court ignored or

dismissed as not credible, Dr. Varsida's uncontradicted expert testimony wherein he opined that based upon the ingestion of PCP and alcohol interacting with his personality, the Appellant's mental capacity the night of the incident was diminished. (Vol. 13, p. 2248). Not only did the trial court completely disregard this expert testimony, the trial court substituted its own finding of fact that the the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, was not impaired in any way. (Vol. 16, p. 2735-2736)

Concerning non-statutory mitigating circumstances, the trial court found that the Appellant could not be rehabilitated. The trial court made this finding predicated upon the mere fact of the Appellant's prior convictions. The trial court did not have benefit of the Appellant's prison records to see what progress he had made during previous incarcerations. Skipper v. South Carolina, 39 CrL 3041, United States Supreme Court decision April 29, 1986. The trial court found that there was no evidence of drug and alcohol abuse at the time of the offense ignoring the State's key witness' testimony that she smelled the odor of alcoholic beverage on the Appellant's breath, and ignoring the expert testimony that the Appellant was under the influence of alcohol and drugs. The trial found that the Appellant's family history was of no importance, notwithstanding the testimony concerning substance abuse at an early age and a history of child abuse.

There was sufficient evidence of mitigating circumstances on the record such that the jury's recommendation was not clearly

erroneous. Steven James, the Appellant's brother-in-law, testified that the Appellant smoked marijuana, and drank heavily. He stated that the Appellant's behavior would change when he drank. However, he had never seen the Appellant do anything violent. Pamela Stouder testified that the Appellant had been drinking from the age of 14 years old. A number of witnesses testified regarding the Appellant's background. Paula James, his sister, Paula Stouder and Michael Vogelman, childhood friends, all testified that the Appellant was beaten and verbally abused by his alcoholic father. None of them had ever seen the Appellant act violently. The Appellant was protective of his mother when his stepfather became abusive toward her. The Appellant's mother testified that his stepfather also an alcoholic beat her and the Appellant.

Dr. Antonio R. Varsida, a doctor in psychology with a post-doctorate certificate in psychotherapy and psychoanalysis and with specialized training in psychopharmacology and substance abuse, evaluated the Appellant regarding his history of substance abuse. He learned that the Appellant began drinking when he was 14 years old. He later progressed to using marijuana, quaaludes, LSD, cocaine. and PCP. The doctor reviewed the police reports and the statement of the only eyewitness to the incident, Gloria Salerno. He administered standarized personality tests. Based on the Appellant's statements and Gloria Salerno's description of her attacker's behavior, he opined that the night of the incident, the Appellant had been drinking alcoholic beverages, smoking marijuana, and had taken PCP. Based on the

tests, the doctor diagonosed the Appellant as having a borderline personality with paranoid and schizoid features. Concerning the Appellant's conduct the night of the incident, based upon the ingestion of PCP and alcohol interacting with his personality, he opined that the Appellant's capacity would be diminished.

Accordingly, there being two aggravating circumstances offset by sufficient statutory and non-statutory mitigating circumstances, the trial court's overruling of the jury's recommendation was error. If the Appellant's convictions are upheld, a sentence of life imprisonment should be imposed.

POINT 5

THE APPELLANT'S STATEMENTS TO THE ARRESTING OFFICER AND THE LEAD DETECTIVE SHOULD HAVE BEEN SUPPRESSED.

The Appellant moved to suppress two sets of statements, one to the arresting officer and the other to the lead detective who transported him to Florida. The Appellant was arrested during a routine traffic stop in California. The driver of the vehicle did not have identification. When the Appellant produced his identification, an NCIC computer check revealed that he was wanted on a felony warrant from Florida. While the officer was handcuffing the Appellant, he asked the Appellant, "I guess you know what you are wanted for, because I don't?" In response to this question, the Appellant responded, "I guess murder." At the time of this statement, the Appellant had not yet been given his Miranda warnings. The trial court ruled the statement was a voluntary, unsolicted statement. (Vol. 2, p. 393-399).

An objective rather than a subjective standard defines when interrogation occurs:

> The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elict an incriminating response from the suspect.
> Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980)

The prescribed inquiry is whether the officer should have known that his words or actions were reasonably likely to elicit an incriminating response. Lornitis v. State, 394 So.2d 455 (Fla. 1 DCA 1981). An officer, before administering Miranda warnings, telling an arrestee that he does not know what he is arresting him for, and then asking if he knows, is an inquiry reasonably likely to elicit an incriminating response. Accordingly, the trial court erred in finding the Appellant's statement to be free and voluntary.

As to the second statement, the Florida authorities were notified of the Appellant's arrest. They inquired whether the Appellant would agree to a telephone interview. He refused to discuss the case with them. (Vol. 2, p. 329, 350). Thereafter, the State of Florida instituted extradition proceedings against him. At the conclusion of those proceedings, two police officers, including the lead investigator, were sent to California to transport the Appellant back to Florida. Upon their arrival in California they went to the jail to interview the Appellant. He informed them that upon the advice of counsel he did not want to talk about his case.

Three days later, they transported the Appellant to the airport for the trip to Florida. During the ten hour flight back while flying over Texas, the lead investigator told the Appellant that he knew the Appellant's father lived in Texas and that his grandparents lived in Indiana. Thereafter, the Appellant told the detective that he had thought about going to Texas, but figured the police would look there for him, so he went further west.

(Vol. 2, p. 317-337). At no time during this conversation was the Appellant given his Miranda warnings. The Appellant three months earlier had asserted his right to remain silent when the lead investigator requested a telephone interview. The Appellant three days earlier had asserted his right to remain silent when the lead investigator came to the jail to interview him. The trial court found the statements to be free and voluntary noting that the Appellant knew his rights because three years earlier he had been advised of his rights in connection with an unrelated arrest, and that three months earlier he had been advised of his rights in connection with this case. (Vol. 2, p. 393-399).

In Anderson v. State, 420 So.2d 574 (Fla. 1982), the defendant was arrested in California and implicated in a Florida murder. The defendant was first taken to Minnesota to be prosecuted for murder. He plead guilty. Thereafter, two law enforcement officers from Florida went to Minnesota to bring him back to stand trial in Florida for murder. During the car ride back to Florida, the defendant made admissions about the Florida murder.

This Court noted that the defendant had been indicted prior to the trip. Adversary proceedings against him had commenced. Moreover, the deputies knew during the trip he had no counsel. Under these circumstances, this Court held there was no intentional relinquishment or abandonment of a known right or privilege. Justice McDonald, in his concurring opinion, recognized the psychological persuasion for a person to talk with his captors during periods of prolonged face-to-face contact.

Compare, in the case sub judice, the Appellant had twice refused to talk with his captor, the lead investigator. The first time was three months before on the first occassion they had contact with each other. The second time was three days before the statements were made, which was the second time they had contact with each other. Adversary proceedings (ie. extradition) had commenced. During those proceedings, the Appellant had the services of a California lawyer. During the return trip, the Appellant was in the hiatus period between court appointed counsel in California and court appointed counsel in Florida.

The context within which the incriminating statement was made was as follows. No Miranda warnings were given during the conversation. The statement was made during a long airplane flight while seated next to his captor after prolonged face-to-face contact. The statement was in response to a statement by the lead investigator intimating that he had searched for the Appellant at his father's home in Texas and his grandparent's home in Indiana. Unlike Anderson, the Appellant was not engaged in a rambling narative about his life of crime when the incriminating statement was made. Rather, the Appellant's statement was in response to a specific statement by the lead investigator.

Accordingly, within the aforementioned factual context, the trial court erred in finding the statement free and voluntary after an intentional relinquishment or abandonment of his right to remain silent.

Because of the prejudicial nature of both statements,

whether viewed singularly or cumulatively, their admission was not harmless error. Therefore, the Appellant's convictions should be reversed and the cause remanded for a new trial.

POINT 6

THE TRIAL COURT ERRED IN ADMITTING THE WILLIAMS RULE TESTIMONY.

In its case-in-chief the prosecution introduced the Williams Rule testimony of Adeline Carter. (Vol. 10, p. 1609). Three years earlier, while asleep in her mobile home, she awoke to see the Appellant crawling on the floor of her trailer. When she screamed, he jumped on top of her and threatened to kill her. She struggled with him, and he fled the trailer through the door. (Vol. 1, p. 91-105).

The similiarities between the earlier offense and the case sub judice are: (1) a mobile home was burglarized, (2) the mobile homes were in the same general locale, (3) the entry was at night, and (4) the mobile home was occupied by women. The disimilarities are: (1)no weapon was used in the earlier offense; (2) different words with a different meaning were spoken by the intruder in each case; and (3) in the earlier case entry and exit was through the door, while in the case sub judice entry and exit was through the window.

In Bradley v. State, 378 So.2d 870 (Fla. DCA 1979), the Court held that although three burglaries occurred within the same neighborhood within two weeks of each other, that similiar fabric marks were found at each location, and that entrance was

gained through a window, that these were superficial similiarities. The Court held the evidence had no relevancy other than to show bad character and criminal propensity.

Compare, in the case sub judice, the similiarities were superficial. The similiarities were not distinctive characteristics that would set the burglaries apart from the norm of burglaries. The fact that a mobile home was burglarized is merely indicative of the fact that these are less secure structures which are frequently burglarized. That entry was at night is no significance. At common law the crime of burglary was defined as the entering of a dwelling at night. The fact that both homes were occupied by woman may at first blush seem significant. However, when a burglary occurs during the time period when most people sleep, odds are that the premises will be occupied. If the premises is occupied, there are only three potential combinations of occupants, all male, all female, or a combination of male and female.

The expression of the Second District Court of Appeals in Dix v. State, 485 So.2d 38 (Fla. 2 DCA 1985), properly sums up the Williams Rule evidence, "This case represents an unfortunate instance of prosecutorial 'overkill' which has been warned of by the appellate courts of this state on too many occassions to justify citations." There was sufficient proof (ie. eyewitness identification, fingerprints, and statements) that the prejudice clearly outweighed the relevancy.

Accordingly, the Appellant would pray that this Court hold that the evidence is inadmissible in the prosecution's case-in-

chief during the guilt phase and that the evidence may be admissible as rebuttal evidence during the guilt phase depending on the defense put forth.

POINT 7

THE TRIAL COURT GAVE AN INCOMPLETE AND/OR INADEQUATE INSTRUCTION TO THE JURY'S QUESTION CONCERNING THE INTENT REQUIRED FOR A CONVICTION OF FIRST DEGREE MURDER.

THE TRIAL COURT AS PART OF ITS RE-INSTRUCTION FAILED TO RE-INSTRUCT ON THE DEFINITION OF REASONABLE DOUBT AS REQUESTED BY THE APPELLANT.

After deliberating for approximately seven (7) hours, the jury had a question concerning the intent required for a conviction of first degree murder. (Vol. 16, p. 2698; Vol. 12, p. 2078-2081). Specifically the jury asked:

> Is it possible to find the Defendant guilty of felonious first degree murder without a premeditated design? The law requires felony first degree murder does not require a finding of premeditated design, yet, the charge refers to the indictment which uses both felonious and premeditated design. (Vol. 12, p. 2079).

The trial court asked the jury if they were referring to the jury instruction relating to felony murder, and the foreman answered in the affirmative. (Vol. 12, p. 2079). The trial court, without re-reading any of the instructions, advised the jury that the answer to its question could be found at pages six through eight of the written instructions. The Appellant objected to the incompleteness of the instructions and the fact that the instruction defining reasonable about was not re-read. (Vol. 12, p. 2081-2084). Approximately five to ten minutes later the jury

returned a verdict. (Vol. 12, 2081-2084; Vol. 16, p. 2698).

The Appellant raised the defense of "voluntary intoxication" contending that he lacked the requisite "specific" intent to commit the crime. After hours of deliberation, the jury's only question concerned the "intent" required to be convicted of first degree murder. By referencing the jury to the pages in the jury instructions, the trial court informed them that first degree murder could be committed in two ways. From a premeditated design (ie. specific intent), or by the commission of the enumerated felony of "burglary". The trial court did not reference the jury to the definition of burglary which appears at page 27 of the jury instructions, some twenty (20) pages later. The jury was not verbally re-instructed, nor referenced to the written instruction that a conviction under the theory of felony murder required proof that the Appellant "...had a fully-formed, conscious intent to commit the offense of battery..." (Vol. 16, p. 2615). The jury was not informed that the enumerated felony also required proof beyond a reasonable of a "specific" intent. The incomplete re-instruction left the jury with the impression that one manner of committing first degree murder required proof of a "specific" intent, and the other manner merely required a felonious intent, and not proof of a "specific" intent.

The law is clear that when the jury is instructed as to felony murder, there must be an instruction on the underlying felony. Griffin v. State, 414 So.2d 1025 (Fla. 1982) and cases cited therein. In Griffin v. State supra, the court intially forgot to instruct on the underlying felony. When the

jury had a question, the trial court re-instructed on felony murder and again forgot to define the underlying felony. Within minutes, the court realized the error. The last instruction the jury heard were the elements of the enumerated felony. The case sub judice is clearly distinguishable. The Appellant herein would have welcomed an instruction that in order to be convicted of the enumerated felony, the evidence must show that the Appellant had the requisite ability to form a "specific" intent.

In Griffin v. State supra 1028, the defendant also objected to the court's failure to re-instruct on the presumption of innocence. This Court implied that the failure to do so might be error, but that the issue had not been preserved for appeal. In the case sub judice, the Appellant preserved the issue. (Vol. 12, p. 2082).

The Appellant challenges that the trial court's failure to clearly inform the jury that the enumerated felony was also a "specific" intent crime coupled with the trial court's failure to re-instruct on the definition of "reasonable doubt" denied him a fair trial and due process of law, as guaranteed by the United States and Florida Constitutions. Accordingly, the Appellant's convictions should be reversed and the cause remanded for a new trial.

CONCLUSION

As to the matters raised herein, the Appellant would pray as follows. As to Points 1 through 3, and 5 through 7, the Appellant seeks a new trial. As to Point 1, the Appellant upon retrial

seeks a change of venue, if the news media again prints the substance of his statements. As to Point 2, the Appellant seeks the admissibility of certain expert testimony. As to Point 3, the Appellant seeks the exclusion of eyewitness Salerno's in-court identification. As to Point 4, if the Appellant's convictions are upheld, he seeks to be sentenced to life imprisonment. As to Points 5 and 6, the Appellant seeks the exclusion of certain evidence from the prosecution's case-in-chief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to Assistant Attorney General Joy B. Shearer, Department of Legal Affairs, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, this 9 day of September, 1986.

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