IN THE SUPREME COURT OF FLORIDA

JOHNNY PERRY,	)	**CASE NO.: 68,482**
Appellant,	)	
Vs.	)	
STATE OF FLORIDA,	)	
Appellee.	)	

DIRECT APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this Reply brief, the Appellant has responded only to certain issues which he believes a response would be helpful to a full discussion of the issues. The failure to respond to certain issues is not an abandonment of those issues. The Appellant simply stands on the argument in his initial brief as being sufficient in light of the Appellee's response.

The Appellee's brief will be referred to as: (Appellee Br. - page no.).

III

THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INSTRUCTION ON THIRD DEGREE MURDER WHERE THE DEFENDANT WAS CHARGED WITH FIRST DEGREE PREMEDITATED AND FELONY MURDER.

The Appellee has argued that failure to give an instruction on third degree felony murder was 1) harmless, 2) not necessary because it is twice removed from first degree felony murder and 3) not preserved by timely objection. These arguments will be discussed in reverse order.

At the charge conference, the Appellant requested an instruction on third degree felony murder (R.1187). The next day, but prior to the jury being instructed, the Appellant again requested the same instruction (R.1201). Appellant's counsel was later asked if he approved of the instructions to which he responded "subject to my previous motions --." (R.1203) Then, at the conclusion of the jury having been instructed the Court itself renewed all prior motions and objections related to the charges and ratified its previous rulings. (R.1296). Defense counsel did everything but stand on his head in the middle of the Courtroom singing the third degree felony murder hymn. Appellee's claim that the Appellant failed to preserve this issue for review is simply bizarre.

However, Appellee's argument that the third degree delony murder instruction was not required to be given due to its remoteness is interesting. The Appellee argues that "because second degree muder is a necessarily included offense of first degree premeditated and felony murder, third degree murder is two steps removed from first

degree murder." (Appellee Br. - 23). The Appellant suggests that there is a closer degree of consanguinity than suggested by the Appellee.

Simply because third degree felony murder is not a necessarily included lesser of any first degree murder, does not automatically make it two steps removed. Furthermore, second degree murder is only a necessarily included lesser of first degree premeditated murder and not of first degree felony murder. The relevant question is, analytically, whether there was any charge between first degree felony murder and third degree felony murder containing all the same elements of the former. See e.g. Fla. Stat. 775.021(4). In this case there are none. The Appellant was chagred with first degree felony murder by, among others, committing a murder during the commission of an armed burglary (R.1-2). A lesser included offense of armed burglary, containing the same elements, is armed trespass, which is the underlying felony to third degree felony murder. Indeed, the lower Court even instructed the jury on armed trespass (R.1278). This is a direct, linear descendant of first degree felony murder with nothing else directly in between. The same is true utilizing the armed robbery half of the first degree felony murder charge. There, grand theft is the lesser. Thus, the lower Court should have instructed the jury on the requested third degree felony murder charge.

Finally, the Appellee argues that the failure to so instruct was a harmless error. It reasons that since the jury found the Appellant guilty of robbery, third degree felony murder would have been excluded from their consideration. Perhaps the jury decided to convict the Appellant of committing the homicide during the course of committing

another crime. Having thus decided, they then had no alternative but to convict for first degree felony murder and, to be consistent, an underlying felony. Although the lower Court had instructed them on armed trespass, it had given no felony murder instruction related thereto. Thus, the jury was given no alternative for a lesser which was analytically consistent with a felony murder theory. Thus, a robbery conviction in this case does not render the failure to instruct on third degree felony murder harmless.

IV

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE APPELLANT WAS PREVIOUSLY CONVICTED OF ANOTHER FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

The Appellee has misconstrued the issue here. Where a contemporaneous conviction is used to establish an aggravating circumstance of a previous conviction, the important question is whether the other, contemporaneous conviction resulted from a crime committed upon the same victim as the homicide and, if so, whether it was a crime inextricably related to the homicide. All of the cases cited by the Appellee deal either with the mitigating circumstance of no prior criminal histsory or deal with situations where the contemporaneous conviction resulted from crimes committed on separate victims in consolidated charges both of which are inapplicable to the issue at hand.

The case which comes closest to the facts and issue here is Hardwick v. State, 461 So.2d 79 (Fla. 1984) despite the Appellee's claim that the Appellant misinterpreted the holding. (Appellee Br. - 27 n.4). In that case, the Court said that a contemporaneous conviction for a crime committed on the homicide victim may be used for this aggravating factor

> "Where the evidence supports a finding of premeditated murder or where the violent felony is not a necessarily included element of felony murder..." (at 81).

Here, the conviction which the lower Court referred to is

Robbery. This was also the felony which was necessary to a felony murder conviction. The evidence at trial did not support a premeditated murder (the Appellee did not argue that it did) and the jury verdict was unspecific as to what type of murder conviction it returned. No Court, to the Appellant's knowledge, has held that the underlying felony in a felony murder may be used to establish the aggravating circumstance under consideration here. The analysis presented by the Appellant in its initial brief as to why permitting this application would be unreasonable was not disputed or discussed by the Appellee and, thus, merits no further extension. The Appellant simply refers the Court to its initial brief.

VI

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPTIAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The Appellant stands by the arguments made in its initial brief in support of his position that the crime was not especially heinous, atrocious, or cruel. The Appellant suggests to this Court that a comparison of the facts in all the cases cited by both parties to the facts of this case clearly shows that the circumstances here do not place this case in the category of being pitiless or unnecessarily tortuous or cruel.

However, the Appellant does wish to respond to certain assertions made by the Appellee in its brief. The Appellee has stated that the victim felt she was drowning, that she was trying to protect herself (Appellee Br. - 33), and that she suffered extreme pain and horror prior to her death (Appellee Br. - 34). These statements do not accurately reflect the testimony of the medical examiner.

The medical examiner stated several times that he did not know in what order the injuries were sustained or whether the victim was conscious when she sustained the injuries. He stated:

> "I have no way of telling what order the injuries occurred in." (R.1385).

> "Q. You cannot pinpoint the time that she lost consciousness?
>
> A. No, that is correct.
>
> Q. And that would likewise impact on the amount of pain that she

suffered, the time of consciousness of loss of consciousness?

A. That is correct." (R.1384).

"Q. But you can't to a medical certainty one way or the other tell whether she was conscious or unconscious at the time of the strangulation or at the stabbing?

A. That is correct." (R.1385-6).

It is clear from the doctor's testimony that there was no way of knowing what pain, if any, the victim actually experienced. The Appellee's suggestions simply were not supported by evidence in the record beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973).

Additionally, the medical examiner testified only that a bruise on the victim's right hand was consistent with being a defense wound (R.768). He did not, and could not, testify that it was, in fact, a bruise sustained by the victim while defending herself. It was a bruise found in an area which sometimes indicates a defensive type wound. However, there was no evidence here that the victim, in fact, ever attempted to defend herself as stated by the Appellee.

VII

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The Appellant stands by the arguments made in the initial brief that the facts of this case do not constitute the aggravating factor of a cold, calculated and premeditated murder.

However, the Appellant does want to reply to one allegation the Appellee makes here. The Appellee has stated that Appellant retrieved a knife from the kitchen which he used to stab the victim and that this, somehow, shows heightened premeditation (Appellee Br. - 35, 37). However, there was no competent evidence to show that a kitchen knife was the murder weapon. The Appellant's confession never stated that he retrieved a knife from the kitchen. To the contrary, he stated that he had "blacked out" and could not remember all of what happened (R.893). The kitchen knife to which the Appellee has referred was tested for fingerprints and blood samples as well as the area around the drawer where it was found all with negative results (R.739-740). There was simply a knife out of place in a kitchen drawer and the Appellee has assumed that it was used in the homicide. There was no evidence of that and certainly not beyond a reasonable doubt.

CONCLUSION

The lower Court erred in permitting certain statements into evidence. It failed to give proper jury instructions. It also erred in finding several aggravating factors and in failing to find certain mitigating factors. The lower Court erred in overriding the jury recommendation of life imprisonment and erred in permitting certain hearsay testimony at the sentencing hearing.

This Court should reverse and remand for a new trial based upon errors during the trial. Alternatively, it should reverse the sentence of death and impose a sentence of life imprisonment.

Respectfully submitted,

LANE S. ABRAHAM, ESQUIRE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this the 6th day of November, 1986, to: MARK BERKOWITZ, ATTORNEY GENERAL, at 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128.

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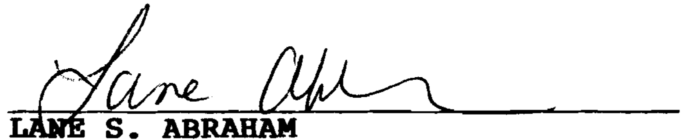

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