IN THE SUPREME COURT OF FLORIDA

JOHN EDWARDS,

Appellant,

v. CASE NO. 70,004

STATE OF FLORIDA,

Appellee.

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

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

JOHN EDWARDS will be referred to as the "Appellant" in this brief. The STATE OF FLORIDA will be referred to as the "Appellee". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

The appellee accepts the appellant's statement of the case as being a substantially accurate reflection of the proceedings below.

STATEMENT OF THE FACTS

Mary Boyd, the victim's wife, testified that a couple of weeks before Ireland Boyd's death she told the appellant, John Edwards, that she wished Ireland Boyd was dead. (R 736) The appellant responded that "he knew people that got rid of people." (R 736) Mary Boyd told the appellant that she didn't have the money that was necessary. (R 736) The appellant then informed Boyd that she didn't need money.

On April 26, 1986, Ireland Boyd began drinking with Frank Achorn around 10:00 - 11:00 a.m.. (R 652) Frank Achorn left Ireland Boyd at Boyd's residence at approximately 7:00 or 8:00 p.m. (R 652) At this time, both Frank Achorn and Ireland Boyd were drunk. (R 654) Thereafter, the appellant, Sharon Brown, Mary Boyd, and Ireland Boyd were sitting in the Boyd residence when a Kirk Douglas movie was airing on the television. (R 738 - 739) During the movie, Ireland Boyd made drunken sexual advances towards Mary Boyd and tried to pull Mary Boyd's pajamas off in the presence of appellant and Sharon Brown. (R 739) Sharon Brown left and stated that she (Brown) was not going to stay there and watch Mary Boyd humiliated. (R 739) Subsequently, Ireland decided that he wanted to go to a bar in Oneco. (R 740) At Ireland's demand, Mary gathered her children, dresssed herself, and drove Ireland to the bar. (R 741) After staying at the bar for only five minutes, Ireland came back to the car and Mary began the drive home. On the way home, Ireland bought another bottle of liquor. (R 742)

Upon arriving home, Mary was given $20 by Ireland to get cigarettes. (R 743 - 744) Mary then proceeded to the Ecol Station and purchased two packs of cigarettes and returned to her residence. (R 743 - 744) Subsequently, Ireland wanted to go out again. (R 745) Mary threw her keys at Ireland and told Ireland to go. Ireland wanted the appellant to go with him. (R 746) Initially, the appellant did not want to go with Ireland. However, Mary mentioned to appellant that this would "be a good time to get rid of somebody." Subsequently, the appellant agreed to go with Ireland. (R 746) Appellant and Ireland first went to a neighborhood poker game. (R 746 - 747) Appellant and Ireland returned to the Boyd residence. (R 747) Thereafter, Mary helped Ireland out of the car, fixed appellant a drink and brought it to the appellant at the car. (R 747) Mary returned to her apartment and heard Ireland yelling for the appellant to come. Thereafter, Mary laid down on the couch and possibly dozed off. (R 749)

Jeffrey Burrell, also known as Jeffrey Walters, testified that he and James Norman went to the Quick Stop to get gas around midnight of April 26, 1986. (R 869 - 870) While getting gas, Burrell observed a car fitting the description of the Boyd's Cadillac pull up. (R 870) Ireland Boyd was in the passenger seat and appeared intoxicated. Ireland yelled to James Norman during this brief period. (R 871) Burrell identified the appellant as the person with Ireland. (R 872) The Quick Stop is 8/10 of a mile from the Boyd residence. (R 806)

Mary Boyd was woken from her sleep and she went to the door. (R 749) When Mary met the appellant at the door, the appellant gave Mary the keys that she had given Ireland previously that night and told Mary that she did not have to worry about Ireland anymore. The appellant then told Mary that it was time for her to pay her part of the bargain. (R 750) The appellant and Mary Boyd then had sex on the couch. (R 750) A short time later the appellant left. (R 751)

On April 27, 1986, Ireland Boyd was found in a drainage ditch off Palmer Road at approximately 8:30 a.m. (R 660 - 671) The cause of death was due to blunt trauma to the skull. (R 679) Expert testimony was that at least five blows to the head were required for the injury. (R 680)

During the penalty phase, the state presented evidence of appellant's 1975 conviction for second degree murder and the fact that appellant was still on parole for that crime during the commission of the instant offense. (R 1304 - 1305) The appellant presented evidence that: (1) the appellant was hard working; (2) that he did not drink or use drugs to any extent; (3) that he was a non-violent person who broke up fights; (4) that he had no juvenile offender problems although he was from a family of seven children and only had an eighth grade education; (5) that appellant had been an adequate provider for his son; (6) that appellant was a family man; and (7) that appellant helped other people talk out their problems. (R 1308 - 1314) The appellant's counsel also presented evidence that Mary Boyd had been allowed to

plead to second degree murder and had only received a 12 year sentence. (R 1315)

The trial court found three aggravating factors: (1) the murder was committed by the appellant while he was under a life sentence for a previous murder; (2) the appellant had previously been convicted of a felony involving the use of violence to a person; and (3) the appellant committed the instant murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 1586)

The trial court found no mitigating circumstances. (R 1587) The trial court found that the aggravating circumstances were of sufficient net weight to warrant a sentence of death and thus imposed a death sentence upon the appellant, John Edwards.

SUMMARY OF THE ARGUMENT

The appellant failed to prove the threshold requirement that Jeffery Burrel's pretrial line-up was conducted in a suggestive manner. As such, the denial of the appellant's motion to suppress in-court identification was proper.

The standard of review of the instant voir dire issue requires the appellant to show (1) an abuse of discretion by the trial court and (2) that the trial court's ruling prejudiced the appellant. The scope of review of a discretionary act is whether all reasonable men would disagree with the act. The exclusion of a subject on voir dire which has previously been covered by the trial court is a reasonable exercise of discretion. Furthermore, there has been no showing of prejudice. As such, appellant's claim of error in the voir dire ruling by the trial court is meritless.

The Caldwell v. Mississippi claim has been procedurally defaulted as a result of appellant's failure to object below. Furthermore, the case law of this Court holds that the trial court's statements are an accurate statement of Florida law.

The trial court properly denied appellant's request that the jury be instructed that the appellant was under extreme mental or emotional disturbance when the murder was committed, because of appellant's knowledge of Ireland Boyd's abusive treatment of Mary Boyd, since there is no evidence which remotely substantiates such a claim.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY ALLOWED THE IN COURT IDENTIFICATION OF APPELLANT BY JEFFERY BURRELL.

With all respect to counsel for the appellant, the Neil v. Bigger, 409 So.2d 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977) line of cases only exclude identification testimony which has been shown to suffer a taint as a result of an unnecessarily suggestive pretrial identification procedure. When the defense proves an unnecessarily suggestive pretrial identification, the state is permitted to rehabilitate the identification by showing that the identification is reliable under the totality of the circumstances. Appellant argues the inadequacy of the reliability of the identification and cavalierly states the trial judge never ruled as to the suggestiveness of the pretrial lineup. However, the trial court specifically noted that in all the cases relied upon by appellant below, there had been an improperly suggestive lineup and stated that this threshold requirement had not been established in this case. (R 857) After appellant's counsel made argument that it was the state's burden to show that the lineup was not suggestive (R 858), the trial court directed defense counsel that it was his initial burden to show that the in-court identification was based on an impermissibly suggestive pretrial lineup. (R 861) Defense counsel then stated there was no way of knowing. (R 861) Thereafter, defense counsel argued, vis a vis photographs of those who were in the

lineup, that the lineup was suggestive because the lineup consisted of much younger persons than the appellant. (R 861 - 862) The prosecutor then summarily argued that there had been no showing that the pretrial lineup was impermissibly suggestive. (R 863) Thereafter, the trial court denied the appellant's motion to suppress the in-court identification. (R 863)

Looking to the testimony that was taken for the purpose of disposing of appellant's motion to suppress identification, it is clear that there was a lineup of six or seven persons. (R 811, 1495 - 1497) The previous description of the suspect was that the suspect was a black man, with short dark hair, dark eyes, and a round face. When Jeffrey Burrell observed this lineup, he only recognized one person. (R 811) There was nothing which previously suggested a particular person, but rather, Burrell's remembrance was from Burrell's own observation, not the pretrial lineup or a newspaper photograph. (R 811 - 812) The reason Burrell had not identified the appellant at the lineup was because he was afraid of getting involved because he was violating his New York probation by being in Florida. (R 816) At the conclusion of the evidentiary portion of the hearing, the trial judge was provided with photographs of those in the lineup. (R 842) The photographs were made available to the trial court and are part of the instant record. (R 1495 - 1497) During the viewing of the photographs, appellant's counsel asked Detective Fleeman if he knew whether the suspect had been described as being between 30 - 40 years old. (R 851) Fleeman

responded negatively. (R 851) Thereafter, the trial court asked Fleeman whether there was anything about the lineup which made the appellant stick out. (R 852) Fleeman responded that they were all black males of approximately the same height with nothing grotesquely different. The only distinguishing point observed by Fleeman was that some in the lineup were thinner than the appellant. Looking to the photographs in the record, Detective Fleeman's observations and Burrell's testimony is unquestionably substantiated concerning the lack of suggestiveness in the makeup of the lineup. (R 1495 - 1497) As such, appellant's claim must fail due to the failure of showing the threshold requirement of an unnecessarily suggestive pretrial identification procedure.

Appellant's attempt to show minor disparities in the makeup of the lineup to that of previous descriptions of the suspect is meritless. As noted in Manson v. Brathwaite, supra at 116 - 117, a single photograph display may be viewed with suspicion, but is not per se unconstitutional. Sub judice, all those included in the lineup generally fit the vague description given of the suspect. This is not a situation such as found in M.J.S. v. State, 386 So.2d 323 (Fla. 2nd DCA 1980) where only one photo in a three picture photopack vaguely resembled the description of the suspect previously given to the police or a photo lineup consisting of only one person with a mustache other than the defendant (suspect reported as having black mustache) and defendants picture indicated he was charged with crime being investigated as found in Dell v. State, 309 So.2d 52 (Fla. 2nd DCA 1975).

Since the appellant has failed to make a showing that the pretrial lineup resulted in "a very substantial likelihood of irreparable misidentification" the matter is for the jury, Manson v. Brathwaite, at 116, and the denial of the appellant's motion to suppress in-court identification was correctly decided.

ISSUE II

THE LIMITATION OF VOIR DIRE WAS NEITHER AN ABUSE OF DISCRETION OR PREJUDICIAL TO THE APPELLANT.

The case law requires a showing of an abuse of discretion and demonstrable prejudice to obtain a reversal of a judgment and sentence because the trial court's limitation of voir dire. Zamora v. State, 361 So.2d 776 at 780 (Fla. 3rd DCA 1978).

Abuse of Discretion

This Court discussed the "abuse of discretion" standard in Albritton v. State, 476 So.2d 158 (Fla. 1985). In Albritton, the court cites Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), for guidance as to the meaning of "judicial abuse of discretion." Albritton at 160 n. 3. In Canakaris, the Florida Supreme Court discussed the distinction between reviewing a rule of law and an act of judicial discretion. Canakaris at 1202. In doing so, it stated that "the trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participant and events of the trial." Thereafter, the court adopted the "reasonableness test" and cited Delno v. Market Street Railway Company, 124 F.2d 965 (9th Cir. 1942) as authoritative on the "reasonableness" test. Delno states that where reasonable men could differ, an appellate court shouldn't find an abuse of discretion. Delno at 967. The trial court limited voir dire as to matters already covered by the trial court's voir dire. Common sense dictates that a trial court exclusion from voir dire matters which were previously

covered by the trial is not a point which all reasonable men would disagree. This is particularly true when one considers that when the trial court ruling was one of restricting the rehashing of previously covered ground, the trial court was performing its "positive duty to conduct an orderly trial." See Baisden v. State, 203 So.2d 194 at 195 - 196 (Fla. 4th DCA 1967).

The appellant attempts an end run around the trial court's ruling to manifest error by arguing that the trial was erroneously of the belief that the trial court had covered the area of the jurors' attitude towards various legal doctrines. (appellant's brief page 63) Appellee would first point out that a mistaken belief of a trial court does not amount to an abuse of discretion. A mistake as to fact and a mistake in an exercise of judgment are two separate and distinct concepts. Secondly, appellee submits that the trial court's inquiry as to whether the veniremen could apply the various legal doctrines as instructed by the court did, in fact, cover the matters sufficiently. Assuming for argument's sake that the trial court was mistaken as suggested in appellant's brief, the appellee would submit that the appellant's failure to argue the specific deficiency in the trial court's voir dire amounts to a procedural default which precludes the issue from being entertained on the merits. This is because the appellant's argument below did not specifically apprise the trial court of the putative error now being asserted as required by Castor v. State, 365 So.2d 701 at 703 (Fla. 1978), where this Court stated:

> To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.

Looking to the colloquy involved, the appellant's counsel only stated that he "would just make my objection for the record." (R 418) This is a general objection without any specificity. The appellant could simply have directed the trial court to any alleged deficiencies and thereby given the trial court an opportunity to cure any perceived errors. Such is the purpose of the contemporaneous objection rule. See State v. Scott, 439 So.2d 219 at 221 (Fla. 1983). Accordingly, the policy reasons behind the contemporaneous rule preclude the now argued deficiencies of the trial court's voir dire being entertained when raised for the first time on appeal.

Prejudice

The appellant's statement that he was denied a fair trial as a result of the limitation of voir dire is nothing more than a typical spontaneous claim that accompanies every alleged claim of error. A fair trial was best defined by this court as follows:

> A fair trial means an orderly trial before an impartial jury and judge whose neutrality is indifferent to every factor in the trial, but that of administering justice. State ex rel Brown v. Dewell, 179 So. 695 at 698 (Fla. 1938)

Placing appellant's argument in sylogistic form it would appear that appellant's argument is as follows:

> (1) Since appellant was limited on voir dire, he obtained jurors who could not be impartial;
>
> (2) Since impartial jurors determined the verdict, the verdict was not rendered fairly;
>
> (3) The verdict which was rendered unfairly was rendered with either a preference for the state, or a prejudice against appellant.

From the above, it can be seen that appellant's case not only requires speculation, but requires stacking a presumption upon presumption. Neither appellant's initial presumption or his compounded presumptions are supported by the record, and in fact are pure speculation. Such speculation does not substantiate prejudice. Zamora, supra. See also for general purposes Sullivan v. State, 303 So.2d 632 at 635 (Fla. 1974). Appellant seemingly presumes that jurors are prejudicial against criminal defendants and do not follow their instructions as given to them by the trial court. This is contrary to the American scheme of justice and the general presumption that jurors follow their instructions. See generally Menendez v. State, 368 So.2d 1278, 1280, n. 9 (1979)

ISSUE III

THE CALDWELL V. MISSISSIPPI CLAIM IS PROCEDURALLY DEFAULTED AND WITHOUT SUBSTANTIVE MERIT.

Appellant would note that Florida law requires that Caldwell v. Mississippi, 472 U.S. 333 (1985) to be raised in accordance with procedural rules such as the contemporaneous objection rule and the requirement that direct appeal issues be raised or considered defaulted thereafter, unless cause and prejudice can be shown to excuse the default. Pope v. Wainwright, 496 So.2d 798 at 805 (Fla. 1986); Aldridge v. State, 503 So.2d 1257 (Fla. 1987). Appellant acknowledges that there was no objection below. As such, the issue is precluded from being entertained on the merits. Pope v. Wainwright, supra. Furthermore, the claim is without substantive merit. Pope v. Wainwright, supra.

As for a contention that Caldwell is a change in law which amounts to novelty, and as such, the equivalent of a satisfaction of the cause and prejudice requirement for excusing a procedural default; this Court has previously rejected that claim. Card v. Dugger, 512 So.2d 829 (Fla. 1987). This is consistent with footnote 5 of Caldwell which noted that the tools had been available in Florida as early as 1918.

ISSUE IV

THERE IS NO EVIDENCE TO SUPPORT AN INSTRUCTION THAT THE APPELLANT COMMITTED THE MURDER WHILE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

The appellee fully joins in appellant's statement that a capital jury in Florida should be adequately instructed with respect to both statutory and non-statutory mitigating factors. However, a statutory mitigating factor must have some legally sufficient evidentiary basis before an instruction as to that particular statutory mitigating factor is given. Roman v. State, 475 So.2d 1228 at 1235 (Fla. 1985). The appellant's counsel argued that the testimony of Mary Boyd and Paula Van Wormer provided evidence that appellant was emotionally upset due to the brutal treatment that Mary Boyd suffered. (R 1319 - 1321) Nowhere below did appellant substantiate such a claim and the trial judge agreed with the prosecutor that no evidence was offered to support appellant's factual allegations. (R 1321) Furthermore, on appeal, the appellant does not present any record facts to support such a claim. Rather, appellant argues that his claim of factual innocence made it difficult to present the mitigating evidence which would support this mitigating factor. (Appellant's brief page 81) Appellee would submit that appellant made such a tactical choice, which was reasonable on its face, and must now bear the results. Such choices are necessary in almost all criminal cases and there is nothing fundamentally unfair about such settings. Furthermore, appellant ignores that it is his burden to present evidence in mitigation. This issue is

simply disposed of because appellant has failed to meet his burden of proof below and on appeal.

The appellee has closely reviewed the testimony of Mary Boyd and Paula Van Wormer to find any factual support for appellant and has found nothing in a proper context to support appellant's position. Appellee did find a statement by Paula Van Wormer which evidenced that appellant was upset with the victim, Ireland Boyd, because Boyd had been cursing at appellant. (R 985) Such evidence does not even remotely support a claim that appellant was under extreme emotional or mental disturbance due to his knowledge of Ireland Boyd's brutal treatment of Mary Boyd.

CONCLUSION

Based on the above stated facts, arguments and authorities, appellee would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, this 29th day of January, 1988.

OF COUNSEL FOR APPELLEE.