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IN THE SUPREME COURT OF FLORIDA

KAYSIE B. DUDLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,014

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/sas

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PRELIMINARY STATEMENT

KAYSIE B. DUDLEY will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment with first degree murder of Geneva Kane (R.1). Trial by jury resulted in a guilty verdict (R.75). Following a penalty phase proceeding the jury recommended the death penalty (R.76). The trial court agreed with that recommendation and in his sentencing order found one mitigating factor and four statutory aggravating factors (R.97-103). Dudley now appeals.

Susan Greacen, a neighbor of Geneva Kane, testified that the victim was in her late seventies and in poor physical condition; she was quite frail and not able to get around much. Mrs. Greacen and her daughter would help out by walking Mrs. Kane's dog (R.208). A few days earlier Mrs. Kane had dismissed the companion who had been living with her - Nancy Dene. Ms. Greacen saw the victim on September 3rd. Mrs. Kane had given her usual signal that everything was okay by closing the drapes in the bedroom (R.209-210). The witness heard some loud noises coming from the other side of Geneva's house but when the voices stopped she assumed it was coming from a different house (R.210). The voices were arguing and it sounded like women's voices (R.210). The next morning, October 1, Mrs. Kane's drapes were open as they should have been, a signal that everything was fine (R.211). Greacen's daughter Jennifer went to the house to walk the dog. There was no answer at the door and Mrs. Kane could not be reached by phone. Mrs. Greacen noticed the newspaper still on the driveway and the garage doors down which was not right (R.212).

Because things didn't add up, Mrs. Greacen called 911 (R.213). The victim continuously wore two rings (R.214) and usually kept cash in the house (R.215).

Paramedic Michael Cox arrived at the scene, noticed blood spots and found the elderly female laying in a large pool of blood. The body was cool, with no sign of respiration or pulse (R.222).

Police Chief Charles Haggerty saw the trail of blood and observed the elderly victim in a pool of blood (R.225). He turned the scene over to Sheriff's Office Identification Technician Levy (R.225).

Crime scene Technician Levy took photos of the crime scene and a videotape was made (R.245). He dusted for fingerprints (R.246). There was watered down blood present leading him to believe someone had attempted to clean themselves off (R.256). The victim's fingernail was torn away (R.249). A ring was found underneath the body (R.266).

Larry Bedor, Chief Investigator for the medical examiner's office, studied the crime scene and described the blood spots. He opined that the assault and death took place in the kitchen (R.287). He also opined that individuals leaving the place dropping blood were walking at a normal pace (R.292).

Dr. Edward Corcoran, an expert in forensic pathology, performed an autopsy on the victim (R.307). There were four cuts on the victim's neck, three superficial and one much deeper (R.310); there were bruises over the cheekbone (R.311). There were hemor-

rhages in the neck, face and eyes consistent with strangulation (R.312). The victim had an arthritic deformity of the hands and spine (R.312). He identified a ligature mark which caused the strangulation (R.315). The wounds and ligature occurred while the victim was alive (R.315). Some of the bruising on the face and neck occurred before death (R.317). The bruises on the hands and wrist occurred before death (R.318). There were defense wounds on the hands (R.318). A contusion on the head was caused by blunt trauma (R.319-320). The cause of death was a combination of the cut to the neck and strangulation (R.320). Either could have been the cause. It would have taken a few minutes for death to occur with strangulation alone and up to fifteen minutes with bleeding from the cut (R.321). The injuries would be painful (R.323).

Fingerprint expert testified that Michael Sorrentino's prints were lifted from the kitchen sink (R.337). Nancy Dene's prints were found on the hall bathroom door (R.339).

Lisa Crabtree, a manager at the Village Inn restaurant, testified that Michael Sorrentino was a cook at the restaurant, Robert Bennett was Kaysie Dudley's boyfriend. Sorrentino and Dudley dated (R.342). Dudley and Sorrentino were off work on September 29th. Her next working day was October 3rd (R.344-345).

Robert Bennett was called to the stand as a court's witness. Bennett was living together with Kaysie Dudley prior to September 30, 1985 (R.402). Bennett knew that appellant's mother

Nancy Dene worked as a housekeeper for an elderly woman in Pinellas County (R.403). She visited and had a conversation with appellant Dudley which Bennett overheard. The woman had bragged to Mrs. Dene that she had paid $19,000 for the rings; they discussed that it would be nice to have those rings (R.404). He also heard a phone conversation about the rings between Dene and Dudley. Mrs. Dene said she was quitting and appellant said:

> ". . . We can do a little commando raid. Make it look like everybody lay on the floor, making you lay on the floor too and then, you know, just take them and leave." (R.407).

The witness denied telling Detective Rhodes and Detective Szumigala that there had been talk of "knocking off the old bat" (R.411). He recalled talking to Cindy Echols and mentioning that appellant was going to rip off some rings (R.413).

After the event, appellant told Bennett that she had strangled the victim and had told Mike Sorrentino to take care of her. She had given the knife to Mike before they went in. Appellant said the old lady was supposed to have a lot of money but didn't have anything. Appellant said she and Sorrentino went to Miami and pawned the rings they had stolen (R.415-416).

Cindy Echols worked with Kaysie Dudley and Michael Sorrentino at the Village Inn restaurant, at Ormond in September of 1985 (R.434). She also met Nancy Dene and Bob Bennett (R.435). Appellant told her her mother took care of an old lady, had gotten mad at her and left her employment. On September 29, Echols saw Mr. Bennett at the Oyster Pub (R.436). He told her appellant and her mother were going to kill the old lady and use Michael

Sorrentino as a scapegoat to drive the getaway car. A few days later Echols spoke to appellant about this conversation with Bennett (R.437). Appellant told her that what Bennett overheard, was just an expression that they were just mad at the old lady, that they were going to kill her. She did admit the statement was made (R.439).

I.D. Technician Tim Whitfield examined Sorrentino's automobile and found blood in it (R.448).

Terrell Lyn Rhodes, a detective with the sheriff's office, observed the crime scene. The residence did not appear to have been ransacked (R.454). He learned that Nancy Dene was a housekeeper previously terminated (R.457). A ring was found under the body of Mrs. Kane and Cindy Echols and Linda Crabtree identified that ring as owned by the appellant (R.461-462).

Initially Mr. Bennett indicated he had no knowledge of the events in Pinellas County; upon being re-interviewed, he admitted he had lied. He admitted being in love with appellant and he did not want to see her get into trouble. In a second interview Bennett admitted hearing statements between Dudley and Dene "about knocking off the old bat and taking her rings" (R.463).

The witness interviewed appellant after providing Miranda warnings. Two oral statements were taken from her (R.480). Appellant admitted going to the victim's house with Sorrentino; she identified herself as Mrs. Dene's daughter and Mrs. Kane let them in. The main purpose of the visit was to scope out the victim's condition, to see how easy it would be to remove the rings

(R.480-481). A transcript of appellant's taped statement was provided (R.486).[1] Appellant admitted that the knife used to cut Mrs. Kane's throat was hers but that she had loaned it to Sorrentino (R.488). Appellant admitted that her mother purchased a replacement ring for her, to provide a ring if questioned (R.490).

The witness acknowledged that Mr. Bennett admitted hearing Dudley and Dene talking about "knocking off the old bat" (R.492).

Timothy Szumigala was present when Bennett stated he heard the appellant Dudley and her mother Nancy Dene talking about knocking off the victim and taking her rings (R.502).

1/ In her taped statement, appellant stated her mother said she had had a fight with Mrs. Kane and had left. Mrs. Dene told appellant that Mrs. Kane had a lot of jewelry but one particular ring was worth thousands of dollars (R.184, p.2). Appellant admitted pushing the victim and had her belt around her neck (R.184, p.7). They struggled. Sorrentino was squeezing as tight as he could and he cut her throat. The rings were taken from her finger (R.184, p.8). They went to Miami and sold the rings (R.184, p.11). Dudley lost one of her own rings during the struggle with Mrs. Kane (R.184, p.13). It was her knife which she loaned to Mike (R.184, p.15).

SUMMARY OF THE ARGUMENT

I. The lower court did not err reversibly in admitting Robert Bennett's prior statement. Bennett's statement was admissible since previously given under oath. F.S. 90.801(2)(a).

II. The lower court did not err in calling Bennett as its own witness. Bennett was an adverse witness because his testimony contradicted that given by Cindy Echols. The instant trial predated Jackson v. State, 498 So.2d 906 (Fla. 1986) and even if the lower court erred it is not per se reversible error since the court instructed the jury not to infer that the court had any opinion on credibility (R 401).

III. The court properly allowed Bennett's impeachment; his out of court statements to the detectives were hearsay and F.S. 90.806(1) is applicable.

IV. Bennett had relevant testimony to offer concerning his overhearing a conversation about a robbery. He thus had relevant testimony. As to his denial about hearing about a murder plan, any error in eliciting such testimony must be deemed harmless since Dudley admitted the statement of murder had been made to Cindy Echols and there was overwhelming evidence of felony-murder. See Brumbley v. State, 453 So.2d 381 (Fla. 1984).

V. The trial court properly found heinous, atrocious or cruel as an aggravating factor in light of the slashing/ strangulation.

VI. The court correctly found the homicide was committed in a cold, calculated and premeditated manner.

POINT I

WHETHER THE LOWER COURT ERRED IN ADMITTING AS SUBSTANTIVE EVIDENCE THE PRIOR INCONSISTENT STATEMENT OF WITNESS ROBERT BENNETT.

ARGUMENT

Robert Bennett testified, properly the state submits, concerning conversations he heard between Nancy Dene and appellant Dudley about a valuable ring owned by Mrs. Dene's employer (Geneva Kane) and that it would be nice to have this property (R 404). In another conversation over the phone between the two women Bennett overheard Mrs. Dene mention she was quitting and appellant told her not to worry, that "we can do a little commando raid" (R 406-407).

The witness was also asked about whether there was a statement about knocking off the old lady. Bennett stated he didn't recall any mention of physical harm to the woman (R 409). The prosecutor then asked about conversations Bennett subsequently had with law enforcement officers in an effort to impeach him (R 410-411).[2]

Appellant urges now that the lower court erred in allowing as substantive evidence Bennett's prior inconsistent statement as substantive evidence. He recognizes that Florida Statute 90.801

2/ Subsequently, the prosecutor did call Detective Rhodes, Detective Szumigala and Cindy Echols who contradicted Bennett's version but for each of those three witnesses the court gave a cautionary instruction to consider their testimony as it related to Bennett's statements solely as it might affect credibility of Bennett but not as substantive evidence of Dudley's guilt (R 442-443, R 500, R 503).

(2)(a) permits introduction of a prior inconsistent statement if made under oath subject to the penalty of perjury at a prior proceeding.[3] Dudley argues in her brief (at page 8) that Bennett testified he was not under oath previously. Appellee submits that Bennett testified only that he didn't recall being under oath (R 362); however, Detective Rhodes testified that Bennett was placed under oath (R 491-492).

Appellant has cited Moore v. State, 452 So.2d 559 (Fla. 1984), but that decision supports the state. There, this Court rejected a defense argument that the unavailability of cross-examination at a grand jury proceeding rendered the use of such testimony invalid; instead this Court held such statements to be admissible as not hearsay under F.S. 90.801(2)(a).

In Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983), witness Hengst had consistently related that the drugs in the car belonged to him, and had so stated in a written statement under oath taken by the state attorney. The defendant Diamond, planned to use Hengst as a witness for the defense. On the day before trial Hengst was arraigned and gave notice that he was recanting his previous statements as untrue and that Diamond was aware of

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3/ Florida Statute 90.801(2)(a), states:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

the drugs. The trial court ruled that Hengst's prior now-inconsistent statement could be employed only for impeachment and Diamond could not call him as a defense witness to introduce the sworn exculpatory statement. The Third District Court of Appeal reversed. The court applied F.S. 90.801(2)(a):

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

The court concluded that Hengst's prior statement under oath is admissible as substantive evidence in the defendant's favor. Thus, according to the appellate court, Diamond would be permitted to call Hengst to the stand and if he testified that the defendant had guilty knowledge of the drugs, Diamond could introduce the sworn statement inconsistent with that testimony under F.S. 90.801(2)(a). 436 So.2d at 366.

As the state attorney urged below Bennett made certain statements to the police under oath during the investigation and that his current testimony would be inconsistent with that (R 350-352). The trial court relied on Diamond (R 356). In his proffer, Officer Rhodes testified he was present when Bennett was placed under oath by an assistant state attorney and Bennett admitted overhearing a conversation between Nancy Dene and Kaysie Dudley concerning "getting rid of the old bat" (R 380-381).

Pursuant to both Moore, supra, and Diamond, supra, appellee submits that it would be appropriate for the jury to consider Bennett's sworn statement to the state attorney and police as substantive evidence.[4]

In any event, even assuming that we are mistaken, it is clear that the trial court instructed the jury to consider the testimony of Rhodes, Szumigala and Echols as it pertained to Bennett's statements only as it affected his credibility and not as to the guilt of the defendant (R 442-443; R 500, R 503).

4/ Appellant's reliance on Austin v. State, 461 So.2d 1380 (Fla. 1984) is misplaced because that was not a sworn statement.

POINT II

WHETHER THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY CALLING A WITNESS TO CIRCUMVENT THE VOUCHER RULE.

ARGUMENT

The state argued below that the court should call Mr. Bennett as its witness because he had given inconsistent statements and the state did not want to vouch for his credibility. The prosecutor relied on McCloud v. State, 335 So.2d 257 (Fla. 1976) and Brumbley v. State, 453 So.2d 381 (Fla. 1984) (R 348-350). See also F.S. 90.615(2) (when required by the interests of justice the court may interrogate witnesses whether called by the court or by a party).

Appellant argues that F.S. 90.608(2) is inapplicable because Bennett's testimony at trial was only neutral not affirmatively adverse to the state's case. We disagree. Cindy Echols testififed as a state witness. She confronted Kaysie Dudley after the murder and inquired whether Dudley had made the previous statement of planning to kill an old lady and that Dudley admitted the statement had been made (R 438-439).

Bennett's trial testimony denying or failing to remember a conversation with Dudley about the opportunity for murder, this was not neutral but would undercut Cindy Echols' testimony of Kaysie Dudley's admission.[5]

5/ Bennett denied hearing a statement about physical violence (R 409) and he denied telling Cindy Echols he overheard a

The state recognizes that subsequent to this trial, this Court decided Jackson v. State, 498 So.2d 906 (Fla. 1986), in which the Court announced the principle that court witnesses should be limited to situations where there is an eyewitness to the crime whose veracity is doubted. It appears that appellant below did not object to the prosecutor's calling Bennett as a court witness (although she did object to Bennett testifying) and if she did not urge the same argument below that she now advances, she may not do so. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Appellee submits that the court need not declare it to be per se reversible error that the trial court called witness Bennett as its own witness especially since the trial court adequately explained to the jury that they should not infer that the court has "any opinion one way or the other as to his crediblity" (R 401).

Moreover, and as appellee argues subsequently in Point IV, infra, any error in this regard must be deemed harmless in light of the fact that Kaysie Dudley conceded to Cindy Echols that Bennett did overhear her statement to Nancy Dene that they were going to kill the victim (R 438-439). Since appellant admitted to Cindy Echols the remark had been made, since Kaysie Dudley obviously participated with Sorrentino in the strangulation-slashing death of Geneva Kane and the stealing of the victim's ring and sharing in the proceeds of its sale, it is difficult to

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conversation (R 413).

see how the introduction of Bennett's testimony can be deemed other than harmless error, if error.

Even if it were determined that there was error as it affected the premeditation issue, still there is overwhelming evidence of Dudley's participation in a felony-murder. Cf. Brumbley v. State, 453 So.2d 381, 385 (Fla. 1984).

POINT III

WHETHER THE LOWER COURT ERRED IN ALLOWING IMPEACHMENT UNDER §90.806, FLORIDA STATUTES.

ARGUMENT

The record reflects a dialogue between prosecutor, defense counsel and the trial court concerning the admissibility of Bennett's testimony and impeachment thereof under the Florida Evidence Code (R 348-358). The prosecutor relied on Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983) and F.S. 90.801(2)(a). The trial court observed that the prosecutor's assertion was similar to that presented in Diamond (R 356) and decided to listen to Bennett's testimony outside the presence of the jury (R 358). Thereafter, the court allowed the testimony concerning Bennett's prior inconsistent statements (R 374-375).

Appellant argues that the trial court erred in relying on F.S. 90.806 because Bennett's in-court testimony was not an out-of-court statement and therefore not hearsay. First of all it is not at all clear that appellant urged this ground below (R 352-358) and if he did not he may not initiate a new argument on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Secondly, the witness Bennett was asked about his out-of-court statements to Detectives Rhodes and Szumigala and to Cindy Echols (R 410-414). His out-of-court statements are hearsay and thus F.S. 90.806(1) is applicable (evidence of a statement or conduct by the declarant inconsistent with those statements are admissible .

POINT IV

WHETHER THE LOWER COURT ERRED IN ADMITTING ALLEGEDLY IRRELEVANT AND PREJUDICIAL TESTIMONY.

ARGUMENT

Appellant relies on Jackson v. State, 498 So.2d 906 (Fla. 1986), and argues that Mr. Bennett should not have been permitted to testify at trial concerning whether appellant mentioned planning to commit a murder. Despite some surface similarity to Jackson, appellee would respectfully submit that the instant case contains facts which would render the Bennett testimony harmless error (if the Court deems it error).

First of all, it is not true that Bennett had no first hand knowledge of the crime. Bennett readily admitted on the stand overhearing a conversation between appellant and her mother regarding the planning of a robbery ("We can do a little commando raid. Make it look like everybody lay on the floor, making you lay on the floor too and then you know, just take them and leave") (R.407). Indeed Bennett admitted telling Cindy Echols that appellant probably had gone to rip off some rings from the lady Mrs. Dene had worked for (R.412-413). Thus, although it is true that Bennett denied hearing a conversation about murder he did concede to hearing about a robbery and thus his testimony was relevant.

Appellant contends that even if Bennett's testimony was relevant, the probative value was outweighed by the prejudicial harm because the jury was exposed to various statements about an

inculpatory statement that the witness denied making. (Brief, p.14). The state submits that the testimony of Cindy Echols and Detectives Rhodes and Szumigala which contradicted Bennett on his version of whether appellant and Mrs. Dene discussed getting rid of the old bat did not unduly prejudice the accused because Kaysie Dudley had admitted to Cindy Echols that Bennett overheard such a comment:

> Q. Did you ever speak to Kaysie Dudley about what Mr. Bennett had told you?
>
> A. Yes, sir. I did.
>
> (R.437)
>
> * * *
>
> Q. Did you confront Kaysie Dudley with this information?
>
> A. Yes, sir.
>
> Q. What happened when you did that?
>
> A. She told me that when Bob had overheard her saying that, it was just an expression that they were just mad at the old lady, that they were going to kill her.
>
> Q. But the statement was made; she did admit the statement was made?
>
> A. Yes. She said Bob had overheard her, like when you get mad at somebody.
>
> (R.438-439)

To the extent appellant is complaining of undue prejudice from hearsay statements of Bennett concerning what the appellant said, suffice it to say that the impeachment testimony of state witnesses to prove what he overheard adds nothing to appellant's admitting that Bennett overheard her discussing killing the old

lady. Since the real damage to appellant's case came from Ms. Dudley's confirmation that she had mentioned a killing, appellant cannot demonstrate reversible error in the cumulative testimony of Bennett's statements. Cf. Ashley v. State, 265 So.2d 685, 694 (Fla. 1972) (the fact that evidence of anotehr crime is prejudicial does not make it inadmissible if it is relevant for all evidence that points to commission of a crime by defendant is prejudicial).

POINT V

WHETHER THE LOWER COURT ERRED IN IMPOSING THE DEATH SENTENCE BY IMPROPERLY APPLYING THE AGGRAVATING FACTOR THAT THE CAPITAL CRIME WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

ARGUMENT

The trial court found that §921.141(5)(h), Florida Statutes, was applicable in the instant case. The order recites:

> H. WHETHER THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.
>
> FINDING: This aggravating factor is present in this case. It is the Court's finding that the Defendant's attack on the victim was vicious and without regard to the pain and suffering the victim must have experienced. Based on the Defendant's statements and the testimony of the medical examiner, the victim was lured into her own kitchen, away from emergency call buttons she had in her home. First there was struggling with her attacker while standing. Mrs. Kane was then knocked to the floor and struck savagely about the face and arms. There were defensive knife wounds and cuts on her hands and knuckles. She was choked by the Defendant while still conscious causing the resulting bursting of blood vessels in her eyes and the pain and knowledge of her impending death. At age 78, still she continued to fight for her life until her throat was slit several times and she lay in her own blood and slowly bled to death. Death, according to the medical examiner, may have been as much as fifteen minutes away. This murder was committed in an especially heinous, atrocious and cruel manner. (R.101-102).

The record shows that the prosecutor relied on the evidence offered at guilt phase for the penalty portion of the proceedings (R.796). The prosecutor correctly summarized the evidence as it

pertained to this statutory aggravating factor (R.806-810)[2]

> (1) Appellant removed her belt, placed it around the victim's neck and choked and choked. The victim was not rendered unconscious immediately but struggled and fought every step of the way. The victim was screaming and struggling.
>
> (2) The victim was seventy-seven years of age; the physical evidence revealed broken blood vessels in the eyes, face and neck.
>
> (3) Appellant and her friend strangled the victim, held her mouth to stifle screams that might be heard by the neighbors.
>
> (4) Dr. Corcoran testified that it would have taken several minutes to die. The victim was slashed with a knife, gouging out the veins in her neck. It would have taken fifteen minutes for the victim to lay in her own blood and bleed to death:
>
> The victim was conscious, struggling for her life and received defensive knife wounds.

In contending that this homicide was not especially heinous, atrocious or cruel, appellant cites Rembert v. State, 445 So.2d 337 (Fla. 1984) and Teffeteller v. State, 439 So.2d 840 (Fla. 1983) but neither of those cases aid Ms. Dudley. Teffeteller involved a single shotgun blast and the court in Rembert contrasted that case with Scott v. State, 411 So.2d 866 (Fla. 1982). Scott, like the instant case, involved a brutal beating with signs of a violent struggle. This Court has repeatedly sustained findings of the presence of this statutory aggravating factor under similar factual circumstances. See, e.g., Duest v. State, 462 So.2d

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2/ See also prosecutor's memorandum of law regarding sentencing, R.83-85, R87-88.

446 (Fla. 1985) (eleven stab wounds); Washington v. State, 362 So.2d 658 (Fla. 1978) (nine stab wounds none of which were instantly fatal); Doyle v. State, 460 So.2d 353 (Fla. 1984) (victim died of stangulation which occurred up to five minutes and victim aware of attack to anticipate her death); Johnson v. State, 465 So.2d 499 (Fla. 1985); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (strangulation when perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear); Adams v. State, 412 So.2d 850 (Fla. 1982) (homicide committed through strangulation is heinous); Mason v. State, 438 So.2d 374 (Fla. 1983).

Appellant's claim is meritless.

POINT VI

WHETHER THE LOWER COURT ERRED IN FINDING AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

ARGUMENT

Appellant, in his last issue complains about the trial court's finding of the presence of statutory aggravating factor §921.141(5)(i), Florida Statutes. The trial court's order recites:

> I. WHETHER THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> FINDING: This aggravating factor is present in this case. There is sufficient evidence for this Court to conclude and find the presence of a heightened form of premeditation over and above that necessary to sustain a conviction for first degree murder. The resulting homicide in this case started with a plan for the Defendant's mother to remain on as the victim's housekeeper until the victim died of natural causes. Since Mrs. Kane was 78 years old they did not think it would take too long. Then, before the paramedics arrived, steal the much coveted rings of the victims. When the Defendant's mother was fired as the housekeeper the plan had to be changed. Now the plan was to stage a commando type raid while the mother was visiting the victim by the Defendant and her accomplice. Next the plan developed into what actually transpired. The Defendant and her accomplices would leave Ormand Beach and drive to Pinellas County, Florida and gain entrance into the victims house under the guise of picking up her mother's mail and while there kill Geneva Kane and steal the cash and rings of the victim. The Defendant demonstrated a heightened form of premeditation to commit this murder in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R.102-103).

Again, the prosecutor's argument below ably summarizes the evidence (R.811-812; R.88)

> (1) Appellant and her mother had talked about getting the victim's rings and "killing the old bat".
>
> (2) The nature of the homicide reflected heightened premeditation. First, strangulation was attempted and when death was not immediate, the victim's throat was cut.

Appellant cites Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1985) and Gorham v. State, 454 So.2d 556 (Fla. 1984) for the proposition that this statutory aggravating factor cannot be found merely because a planned robbery also is shown from the evidence. Appellee has no quarrel with those decisions. Rather, the instant record is more comparable to Mason v. State, 438 So.2d 374 (Fla. 1983) and Squires v. State, 450 So.2d 208 (Fla. 1984) wherein this Court upheld the finding.

In Mason, this Court explained:

> The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable.

(text at 379)

Similarly, in Squires, this Court noted that the defendant's "cold-blooded, calculating and painstaking efforts in effecting the murder" was plainly illustrated by the record. The same can

be said in the instant case. See also Way v. State, 496 So.2d 126 (Fla. 1986) (victim struck in the head followed by setting garage on fire); Puiatti v. State, 495 So.2d 128 (Fla. 1986) (three separate assaults on victim); Lara v. State, 464 So.2d 1173 (Fla. 1985) (clear intent to kill victim).

CONCLUSION

Based on the foregoing reasons, arguments and citations of authority, the judgment and sentence of death should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar #: 134101
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard N. Watts, Esquire, 1135 South Pasadena Avenue, Suite 107, St. Petersburg, Florida 33707, this 7th day of July, 1988.

OF COUNSEL FOR APPELLEE