IN THE SUPREME COURT

STATE OF FLORIDA

KAYSIE B. DUDLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,014

APPEAL FROM THE CIRCUIT COURT
IN THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Appellant contends that she is entitled to a new trial because of erroneous evidentiary rulings made at trial: the trial court erred (a) in admitting as substantive evidence the prior inconsistent statement of a witness that was not taken at a prior proceeding, (b) in violating the Voucher Rule and the trial court abused its discretion by calling a witness for the purpose of circumventing the Voucher Rule, (c) in allowing the state to impeach its witness as a hearsay declarant when the court had found that the statement was not hearsay, and the witness was not a hearsay declarant, (d) in admitting irrelevant, highly prejudicial, highly suspect testimony into evidence.

Appellant contends she is entitled to a resentencing without a jury, or, alternatively, that she is entitled to a remand for the purpose of imposing a twenty-five year sentence without parole on her conviction of first degree murder and sentence of death.

This contention is based upon the premise that the trial court improperly found the existence of two aggravating factors: (A) That the crime was especially heinous, atrocious, or cruel and (B) That the homicide was committed in a cold, and calculated, premeditated manner without pretense of legal or moral justification.

STATEMENT OF THE CASE AND FACTS

On May 9, 1986, Appellant, Kaysie B. Dudley, was arrested and was subsequently charged by indictment with Murder in the First Degree (R.1). On October 2, 1986 she was found guilty by a jury in the Circuit Court, Pinellas County, Judge James R. Case presiding (R.75). The jury by a 9:3 vote recommended the death penalty (R.76). The trial judge ultimately adjudicated the Appellant guilty and imposed the death penalty (R.103).

Appellant appeals a final order adjudicating her guilty of Murder in the First Degree and imposing upon her the sentence of death. The Supreme Court of the State of Florida has jurisdiction pursuant to Article V Section (3)(b)(1), Florida Constitution.

Testimony and evidence was adduced at trial to the following effect:

On September 30, 1985, Appellant, Kaysie, and a friend, Michael Sorrentino, went to visit Mrs. Geneva M. Kane at her home at Redington Beach, Florida. Mrs. Kane was the employer of Kaysie's mother, Mrs. Nancy Dene. Mrs. Dene was Mrs. Kane's housekeeper until some problem arose between the two women and Mrs. Kane released Mrs. Dene from her employment (R.406-409).

Mrs. Dene left Mrs. Kane's home and went to visit Kaysie at Kaysie's home at Ormond Beach, Florida. Mrs. Dene talked to Kaysie about Mrs. Kane's valuable jewelry and other possessions (R.406-409). She convinced Kaysie and Michael Sorrentino to go with her to Redington Beach. She asked Kaysie and Michael Sorrentino to go to Mrs. Kane's home to obtain some papers that belonged to her, while she waited for them on the beach (R.184).

While Kaysie and Michael Sorrentino were at Mrs. Kane's home, Mrs. Kane showed them her rings and told them the story about her husband's purchase of the rings. Mrs. Kane then made some statements about Kaysie's mother that angered Kaysie. Kaysie, Michael Sorrentino, and Mrs. Kane became involved in an altercation (R.184).

Kaysie Dudley's taped statement was admitted into evidence (R.487,184). Kaysie stated that she became angry because of Mrs. Kane's comments and began to struggle with Mrs. Kane, but then Michael Sorrentino took over and killed Mrs. Kane (R.184).

Dr. Edward Corcoran, Assistant Medical Examiner, testified for the State (R.303). His testimony was to the effect that the pressure applied to Mrs. Kane's neck could have been caused by either Kaysie or Michael Sorrentino. Dr. Corcoran further testified that the victim's throat was cut. He stated that death was caused either by cutting or strangulation (R.311).

Robert Bennett was called as the court's witness (R.401). The State requested that the court call the witness because the State could not vouch for his credibility (R.349). Mr. Bennett's testimony was admitted as substantive evidence and the state was permitted to use a prior statement by Mr. Bennett to impeach his in-court statement. Robert Bennett testified that he had a conversation with a detective and a representative from the Pinellas County State Attorney's office (R.362). He could not recall being placed under oath before this conversation because he was on medication at that time (R.362). He testified that Kaysie Dudley and Nancy Dene had mentioned that they admired Mrs. Kane's rings and would like to have them (R.404).

Cindy Echols testified for the State (R.434). Her testimony was for the purpose of impeaching Robert Bennett's in-court testimony, and the jury was so instructed. She testified that Robert Bennett stated to her, on September 29, 1985, that Kaysie and Nancy Dene were going to kill the victim in order to steal her rings (R.437). She also was allowed to testify as to Kaysie's demeanor a few days after the killing occurred (R.439).

Detective Terrell Rhodes also testified for the State (R.452). Mr. Rhodes' testimony was also for the purpose of impeaching Mr. Bennett's in-court testimony. He testified that Robert Bennett stated that he overheard a conversation between Kaysie and Nancy Dene (R.492). The conversation indicated that the two were planning to kill Mrs. Kane (R.492).

The State presented other witnesses, including crime scene technicians. Kaysie Dudley did not testify on her own behalf, nor did she present any witnesses.

The jury unanimously returned a verdict of guilty (R.75, R.585) and made a 9:3 recommendation of death, based on the finding of premeditation (R.76, R.838). The Judge sentenced Kaysie Dudley to death, consistent with the jury recommendation.

The trial court took judicial notice of the facts and evidence presented during the guilt phase, thereby allowing consideration of all evidence previously introduced in the case during the penalty phase of the proceeding. No additional evidence was offered by the State (R.796).

The Appellant introduced a computerized printout of Appellant's criminal history (R.185, R.797) and the Appellant's records and reports of treatment at the Clayton Mental Health Center in Georgia (R.186, R.797). Sentencing arguments were presented to the jury (R.798-832).

The court instructed the jury (R.832-837). The jury recommended the death penalty by a 9:3 vote (R.838).

The trial court then made its findings of aggravating elements as follows (R.100-103):

> D. WHETHER THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR UNLAWFUL

THROWING, PLACING, OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB
FINDING: This aggravating element is present. The crime for which the Defendant has been convicted was committed while the Defendant was engaged in the commission of a robbery. The Defendant by her own admission, talked with her mother about the victim's jewelry all the time. Before the Defendant entered the victim's home it is clear her intentions were to rob the victim of her jewelry which she did after murdering the victim.

F. WHETHER THE MURDER WAS COMMITTED FOR FINANCIAL GAIN
FINDING: This aggravating factor is present in this case. The Defendant for the monetary value of the victim's rings and in a manner calculated only to obtain pecuniary gain, choked and cut the victim's throat.

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.

> I. WHETHER THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRESENCE 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 (sic) Beach and drive to Pinellas County, Florida and gain entrance into the victims (sic) 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 premeditatio to commit this murder in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court made its findings of mitigating circumstances as follows:

> Appellant had no significant history or prior criminal activity.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING AS SUBSTANTIVE EVIDENCE THE PRIOR INCONSISTENT STATEMENT OF WITNESS THAT WAS NOT TAKEN AT A PRIOR PROCEEDING.

The trial court erroneously allowed Robert Bennett's prior inconsistent statement to be admitted as substantive evidence against the Appellant (R.374-375). Although a prior inconsistent statement may be used to impeach a witness, a prior inconsistent statement is hearsay and therefore inadmissible as proof of the facts contained therein. However, there is a limited exception to the rule that a prior inconsistent statement can only be used to impeach a witness. According to Section 90.801(2)(a), Florida Statutes (1987), a prior inconsistent statement may be received as substantive evidence if the statement was made under oath, subject to cross examination, at a prior proceeding. The opportunity for cross examination provides the trustworthiness of the prior statement.

Mr. Bennett testified that his prior statement, given at the state attorney's investigation, was not made under oath (R. 362). The state argued that the statement was given under oath, subject to the penalties of perjury. The state attorney (the prosecuting attorney in this case) went to Mr. Bennett's home to conduct his investigation. Mr. Bennett was at home because he was ill. He testified that he was on medication (including painkillers) and because of the influence of the medication, he could not recall very much about the investigation (R. 425). Even if the state attorney did attempt

to put Mr. Bennett under oath, Mr. Bennett's competency to testify is questionable because of the medication he was taking.

Even if Mr. Bennett was competent to testify and if he did testify under oath, the state attorney's investigation was not a "prior proceeding" within the meaning of the rule. The rule clearly states that the prior inconsistent statement must be made at a proceeding subject to cross-examination. (Cooper v. State, 506 So.2d 1157 (Fla. 3d DCA 1987), introduction as substantive evidence of a witness' prior inconsistent statement was reversible error.) The questioning of Mr. Bennett, at his home, while he was under the influence of medication, was not subject to cross examination. In Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984) a state attorney and an investigator questioned a witness. The witness gave them a statement, and then later recanted that statement. The court held that the prior inconsistent statement given to the state attorney was not admissible under 90.801(2)(a). Again, in Moore v. State, 452 So.2d 559 (Fla. 1984), the Supreme Court discussed Section 90.801(2)(a) and stated that according to that rule, only statements made in proceedings where the witness was subject to cross examination are admissible as substantive evidence against the defendant. The court in Moore made an exception to the rule in the situation where the statement was given under oath before a grand jury. Even though a statement made under oath before a

grand jury is not subject to cross examination, such a statement is so reliable that it's reliability outweighs the dangers inherent in hearsay testimony. Mr. Bennett's statement given to the state attorney, when he was under the influence of medication, did not have the same element of reliability as a statement made before a grand jury. Mr. Bennett's previous statement, allegedly inconsistent, should not have been admitted because it was inherently unreliable hearsay.

The trial court relied heavily on a District Court case to admit Mr. Bennett's testimony; Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983) (R.355-356). In Diamond, the defendant was attempting to admit the sworn, written, exculpatory prior inconsistent statement of an eyewitness to the crime. The witness' statement in Diamond was given to the opposing party. In the instant case Mr. Bennett was not an eyewitness to the crime and his was not a sworn, written statement. His prior statement was given to the party who wished to admit it into evidence. Mr. Bennett was never shown a copy of the statement. The rule, 90.801(2)(a), allows a prior inconsistent statement to be admitted as substantive evidence only in the situation where there is not reason to doubt the reliability of the statement: the prior statement taken at a trial, hearing or other proceeding, subject to cross-examination, subject to the penalties of perjury. Mr. Bennett's statement, taken by the

party attempting to admit the statement into evidence, while he was under the influence of medication, has no indicia of reliability and should not have been admitted as substantive evidence against the Appellant.

II. THE TRIAL COURT ERRED IN VIOLATING THE VOUCHER RULE AND ABUSED IT'S DISCRETION BY CALLING A WITNESS FOR THE SOLE PURPOSE OF CIRCUMVENTING THE VOUCHER RULE.

A. The trial court erred in allowing the state to impeach its witness in violation of the Voucher Rule.

According to the "Voucher Rule", Section 90.608(2), Florida Statutes (1987), a party may not impeach his witness' testimony unless that witness proves to be adverse. The witness must give testimony that is affirmatively adverse; the fact that a witness cannot recall making a prior inculpatory statement is insufficient. (Austin v. State, 461 So.2d 1380 (Fla.1st DCA 1984), Perry v. State, 356 So.2d 342 (Fla. 1st DCA 1978)). The trial court relied on Brumbley v. State, 453 So.2d 381 (Fla. 1984) and McCloud v. State, 335 So.2d 257 (Fla. 1976) to allow the state to impeach the testimony of Bob Bennett as an adverse witness. In Brumbley the supreme court held that a witness becomes adverse if he provides testimony that is actually harmful to the interests of the party calling him. In Jackson v. State, 498 So.2d 906, the court, citing Brumbley and McCloud,

held that the testimony of the witness to the effect that the defendant did not admit his guilt to her cannot be considered adverse to any aspect of the case having been presented by the state. Mr. Bennett merely testified that the defendant had never told him that she was planning to murder anyone (R.404-405, R.408-409, R.411-413), and he did not affirmatively testify that the defendant was innocent. Bob Bennett was not an adverse witness and the trial court erred in disregarding the Voucher Rule and allowing the state to impeach it's witness.

B. The trial court abused its discretion in calling a witness for the state for the sole purpose of circumventing the Voucher Rule.

The state requested that the court call Bob Bennett as a witness because the state could not vouch for Mr. Bennett's credibility (R.349). The general rule under Section 90.615, Florida Statutes (1987) is that a trial court may call a witness as a court witness if his or her testimony is inconsistent with prior statements. In Jackson v. State, 498 So.2d 906, 909 (Fla. 1986), the Supreme Court stated that court witnesses "should be limited to those situations where there is an eyewitness to the crime". The trial court relied on McCloud v. State and Brumbley v. State to bring the witness, Mr. Bennett, in as a court witness. In each of those cases, the court's witness was an eyewitness to the crime. Bob Bennett was not a witness to the crime in the present case. He had no first hand knowledge of the crime (R.414). The sole reason the trial court called the witness was for the purpose of circumventing the Voucher Rule.

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH IT'S WITNESS AS A HEARSAY DECLARANT WHEN THE COURT HAD FOUND THAT THE WITNESS' STATEMENT WAS NOT HEARSAY, AND THE WITNESS WAS NOT A HEARSAY DECLARANT.

The trial court relied on Section 90.806, Florida Statutes (1987) to allow the state to impeach Mr. Bennett's testimony (R. 355). According to that rule, a party may impeach the credibility of a hearsay declarant. Mr. Bennett's in court testimony was not an out of court statement, and was therefore not hearsay. The state was attempting to use Mr. Bennett's prior statement to impeach his in-court testimony. The court allowed Mr. Bennett's prior statement to be admitted under Section 90.801(2)(a) (R.351), which, by definition, is not hearsay. Although Section 806 may be used to impeach a hearsay declarant, Mr. Bennett's in-court testimony was not hearsay, and his prior statement was not hearsay within the meaning of Section 801(2)(a). The trial court said the prior statement was not hearsay, and then allowed the state to impeach the non-hearsay statement according to Section 90.806, which only applies to hearsay.

IV. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT, HIGHLY SUSPECT AND HIGHLY PREJUDICIAL TESTIMONY INTO EVIDENCE.

Mr. Bennett had no first hand knowledge of the crime. He

was not present and was not involved in the crime (R.414). He testified at trial that the Appellant had not told him that she was planning to commit a murder (R.404-405, R.408-409, R.411-413). That testimony was not relevant to this case. In Jackson v. State, 498 So.2d 906 (Fla. 1986), the court was faced with a similar situation. A witness had recanted a prior statement that the defendant had told her that he had committed the crime. Her inconsistent testimony at trial was that the defendant had not told her that he had committed the crime. The supreme court in that case said "we fail to see how that testimony is relevant". Jackson at 908.

Even if Mr. Bennett's testimony was relevant, it's limited probative value was outweighed by it's prejudicial harm. The prior statement that the state alleges that Mr. Bennett made was highly prejudicial to the Appellant's defense. The jury was exposed to various statements about a highly inculpatory statement that the witness denies making.

The state called Cindy Echols as a witness to impeach Mr. Bennett's in-court testimony that he did not make the alleged prior statement. Ms. Echols was allowed to go into much detail about the statement which was very prejudicial (R.243-252). The state also called another witness, Detective Rhodes, to impeach Mr. Bennett's in-court statement that he did not make a prior inconsistent statement (R.452). Mr. Rhodes' detail of

the alleged prior statement was also highly prejudicial. The question of whether Mr. Bennett in fact made a prior inconsistent statement became a crucial issue in this trial. Mr. Bennett denies making the statement. The statement should not have been allowed into evidence because it was unreliable. To allow the alleged prior inconsistent statement into evidence and then to allow the state to go into great detail with several witnesses about the alleged statement was highly prejudicial. The prejudicial harm easily outweighed the probative value of all of the testimony surrounding the alleged statement.

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

In finding that the homicide was especially heinous, atrocious or cruel the trial court relied on the conclusion that the Appellant lured the victim into the victim's kitchen, away from emergency call buttons (R.102). The record reflects that the victim had an alarm system and that she showed it to Appellant, but there is no indication in the record that the victim was lured into the kitchen, or away from the alarm system (R.184)(page 7 of interview with Kaysie Dudley). In fact, the Appellant's confession indicates that she was leaving by the kitchen door when she decided to take the victim's rings

(R.184)(page 7). The location of the crime in the victim's kitchen has no bearing on whether the crime was heinous, atrocious or cruel.

The trial court further relied on the conclusion that the victim had knowledge of her impending death in finding that the homicide was heinous and found that "she was choked by the Defendant while still conscious" and that she "slowly bled to death" (R.102). These conclusions are not supported by the record. The medical examiner testified that death was cause either strangling or cutting the victim's throat and that with strangulation death would take a few minutes (R.321). The medical examiner was unable to give an opinion as to when the victim lost consciousness or the order of application of cutting, or strangulation (R.327-328).

Since the evidence establishes a range of possible times for death to occur, from a few minutes to fifteen minutes (R.321) and there is no evidence as to when the victim lost consciousness.

The State failed to prove heinous, atrocious or cruel beyond a reasonable doubt and the trial court erred in finding this aggravating factor to exist.

The test for determining whether a homicide is heinous, atrocious or cruel was set forth in Dixon v. State, 283 So.2d 1, 9 (Fla. 1973) as whether the cause of death was

> ...designed to inflict a high degree of pain with utter indifference to or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

In Rembert v. State, 445 So.2d 337 (Fla. 1984) the victim was beaten on the head and robbed. "He died several hours later of severe injury to the brain." The court stated that, while reprehensible, the crime did not meet the Dixon test.

The fact that the victim lived more than an hour, in pain from a mortal wound and knew that death was imminent was not enough to set the murder apart from other capital felonies Teffeteller v. State, 439 So.2d 840 (Fla. 1983) citing Dixon.

Neither the evidence, nor the case law sustain the finding of the trial court that the crime of Appellant was heinous, atrocious or cruel.

VI. THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE BY IMPROPERLY APPLYING THE AGGRAVATING FACTOR THAT THE CAPITAL CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court based its finding that the crime was cold,

calculated and premeditated on the conclusion that there was "sufficient evidence for this court to conclude and find the presence of a heightened form of premeditation" (R.102). There is evidence that a robbery or theft was premeditated by the Appellant (R.184)(page 2 of interview with Kaysie Dudley). The trial court erred in transferring the evidence of Appellant's premeditation to commit robbery or theft to the crime of murder.

Heightened premeditation to the intent to commit robbery or theft cannot be transferred to the murder occurring during the course of the robbery, 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).

Since there is no evidence in the record that the Appellant's premeditation of murder, if any, was heightened the aggravating factor of cold, calculated was not proved beyond a reasonable doubt. It was therefor error for the trial court to find the aggravating factor of cold, calculated and premeditated.

CONCLUSION

For the reasons set forth herein and based upon the authorities cited herein in issues I through IV, Appellant requests that the decision of the trial court be reversed and the Appellant given a new trial.

For the reasons set forth herein and based upon the authorities cited herein in issues V and VI, Appellant requests this honorable Court to reverse her sentence of death and to remand this cause for resentencing or to remand for imposition of a sentence of twenty-five years without parole as to the first degree murder sentence imposed herein.

Respectfully submitted,

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