IN THE SUPREME COURT

of

THE STATE OF FLORIDA

KAYSIE B. DUDLEY,

Appellant,

v. Case No. 70,014

STATE OF FLORIDA

Appellee.

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

APPELLANT'S REPLY BRIEF

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Appellee argues that witness Robert Bennett's alleged prior inconsistent statement made during the state attorney's investigation was properly allowed under Florida Statute Section 90.801(2)(a) because a police officer testified that Mr. Bennett was under oath (Brief for Appellee, p. 11, R.491, 492). Mr. Bennett testified that he was at home sick at the time, was under the influence of medication, and does not remember being put under oath (R.362). But even if Mr. Bennett was under oath during the state attorney's questioning, his alleged statement should not be allowed under Section 90.801(2)(a). The rule allows a prior inconsistent statement to be used as substantive evidence if the statement was made under oath, subject to cross examination, at a prior proceeding. Even if Mr. Bennett was under oath, his prior inconsistent statement should not have been allowed because a state attorney's investigation is not a "prior proceeding" within the meaning of the rule. (Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984) a statement given during a state attorney's investigation was not admissible under Section 90.801(2)(a)).

Also, Mr. Bennett's alleged prior inconsistent statement should not have been allowed because the state attorney's questioning was not subject to cross examination as required by the rule. Appellee cites Moore v. State, 452 So.2d 559 (Fla. 1984), and claims that decision supports the State. The court in Moore allowed a prior inconsistent statement given before a grand jury to be introduced. The Moore court did not find that the availability

of cross-examination is an unimportant element in Section 90.801(2)(a). Rather, the supreme court in Moore made a limited exception to the rule that only statements made in proceedings where the witness was subject to cross-examination are admissible. A statement made before a grand jury is so reliable that its 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 alleged statement was never written (R.431, 432). Mr. Bennett's statement to the state attorney was inherently unreliable hearsay and according to Florida Statute Section 90.802 hearsay evidence is inadmissible.

The trial court and Appellee's brief relied heavily on the Third District Court case Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983), in which a witness made an exculpatory statement. The statement was written and was taken under oath. The witness later recanted the statement. The defendant called him and introduced his prior inconsistent statement. The court held that if the defendant called the witness and if the witness testified that the defendant was guilty, then the defendant could introduce the prior inconsistent exculpatory statement. Mr. Bennett's statement, in contrast, was not written, nor was it adverse. It was taken under unreliable circumstances. Mr. Bennett's prior inconsistent statement was inculpatory rather than exculpatory. Mr. Bennett was not an eyewitness to the crime as was the witness in Diamond.

Mr. Bennett denied making a statement to the state attorney that Kaysie Dudley had planned to murder Mrs. Kane (R.408, 409, 410, 411):

> Q: ...isn't it true that there was a statement made by Kaysie Dudley that they should knock off the old lady...?
> A: I don't recall anybody saying anything about any physical harm to the lady.
> (This line of questioning continues by the State)
> A: I never heard anything about...physical violence.
> Q: Did you make the statement...that you overheard them talking about knocking off the old bat and ripping off her rings?
> A: I don't recall making that statement.

That alleged statement is hearsay, but the State was allowed to bring in that statement under Section 90.801(2)(a) (R.374, 375). A statement of this magnitude is highly prejudicial to both the guilt and penalty phases of the trial and the lower court erred in allowing the hearsay statement to be admitted because the state attorney's investigation was not a prior proceeding within the meaning of the rule.

It is unrealistic to expect that the trial court's instruction to the jury to consider the testimony of Rhodes, Szumigala and Echols as to Bennett's statements only as it affected his credibility, and not as to the guilt of the defendant, cured the error in admitting their testimony. In spite of the instruction, admission of their testimony undermined the reliability of the jury's verdict and the jury's recommendation of the death penalty.

II. APPELLANT'S RESPONSE AND REPLY TO SECOND ISSUE ON APPEAL:

WHETHER THE TRIAL COURT ERRED IN VIOLATING THE VOUCHER RULE AND ABUSED ITS DISCRETION BY CALLING A WITNESS FOR THE SOLE PURPOSE OF CIRCUMVENTING THE VOUCHER RULE.

According to the Voucher Rule, Florida Statute Section 90.608(2), a party may not impeach his witness' testimony. There is an exception to this rule: a party may impeach his witness' testimony if that witness proves to be affirmatively adverse. Mr. Bennett's testimony was not affirmatively adverse to the state's interest.

The Appellee's brief argues that Mr. Bennett was an adverse witness, and so the state did not violate the Voucher Rule by calling him as a witness. (Brief for Appellee, p. 14). However, the state did not argue to the trial court that Mr. Bennett was adverse, rather, since he was not adverse and the state could not vouch for his credibility the state requested that the court call him as a court witness. The record reflects this: "the reason we [the state] are asking that he [Mr. Bennett] be called as a court's witness is that ... we don't feel that we are in a position to necessarily vouch for the credibility of his particular statements" (R.349).

The trial court and Appellee's brief relied heavily on McCloud v. State, 335 So.2d 257 (Fla. 1976), and Brumbley v. State, 453 So.2d 381 (1984), to introduce Mr. Bennett as a court witness. In each of those cases the court's witness was an eyewitness to the crime. Accordingly, the supreme court in Jackson v. State, 498 So.2d 906 (Fla. 1986), stated that court witnesses "should be limited to those situations where there was an eyewitness to the

crime". Mr. Bennett was not an eyewitness to the crime nor was he involved in the crime. The sole reason the court called the witness was for the purpose of circumventing the Voucher Rule; the trial court abused its discretion in calling a witness for this purpose.

In Brumbley, the court held that a party may not impeach its witness unless that witness is affirmatively adverse. "[A] witness may not be impeached by prior inconsistent statements merely because the witness failed to provide the testimony that party calling him desired or expected. However, if the witness becomes adverse by providing testimony that is actually harmful to the interest of the party calling him, then impeachment is permissible". 453 So.2d 381 at 384 [emphasis added]. In Brumbley, "Smith [the witness] testified that he alone [rather than the defendant] had killed Rogers [the victim]. At this point Smith had clearly become an adverse witness and had given testimony that was harmful to the State's case". Id. at 385. Smith acknowledged that he had made the prior inconsistent statement. Conversely, Mr. Bennett did not testify that he committed the crime, rather than the Appellant. He did not testify that the Appellant did not commit the crime. He simply testified that the Appellant had not told him that she was planning to murder Mrs. Kane. His testimony was not "actually harmful" and thus his testimony was not affirmatively adverse to the state's interest.

In Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983), the court held that if the witness testified that the defendant was guilty, then the defendant could introduce the prior inconsistent

statement. The defendant was allowed to introduce the prior inconsistent statement because once the witness testified that the defendant was guilty, the witness' testimony was adverse to the interests of the defendant. Mr. Bennett did not testify that the Appellant was innocent or guilty. Unlike the witness in Diamond and Brumbley, Mr. Bennett was not an adverse witness.

Appellee refers to witness Cindy Echols' testimony. (Brief for Appellee, p. 14). The fact that Cindy Echols arguably qualifies as a witness for the state does not mean that a statement Mr. Bennett allegedly made to the state attorney should be introduced as evidence. Echols' testimony that Mr. Bennett made statements which were inculpatory is not harmful to the state and does not make Mr. Bennett an adverse witness. The state could not vouch for Mr. Bennett's credibility and he was not an adverse witness. The state brought in Mr. Bennett's alleged prior inconsistent statement by circumventing the Voucher Rule.

Mr. Bennett denied making the statement that Kaysie Dudley had planned to murder Mrs. Kane. This is not affirmatively adverse testimony. According to the Voucher Rule, the state was prohibited from calling Mr. Bennett as a witness. The court abused its discretion by calling Mr. Bennett as a court witness for the purpose of circumventing the Voucher Rule and allowing the state to question him about an alleged prior inconsistent hearsay statement.

Appellee argues that any error in this regard must be deemed harmless error because there is overwhelming evidence of Appellant's participation of felony-murder. However, Appellant was not convicted of felony-murder. She was convicted of murder from a

premeditated design (R.75, 1). Although some evidence of participation in a felony was presented, the jury did not find Appellant guilty of the underlying felony. In Mahaun v. State, 377 So.2d 1158 (Fla. 1979), the supreme court held that since the jury failed to find the defendant guilty of the underlying felony, she could not be guilty of felony-murder. In the present case, since Appellant was convicted only of premeditated murder, testimony regarding premeditation which was erroneously introduced into evidence could not be deemed harmless error. Mr. Bennett's alleged prior inconsistent statement regarding Appellant's premeditation was erroneously admitted and the trial court erred in allowing the testimony to be introduced into evidence.

III. APPELLANT'S RESPONSE AND REPLY TO THIRD ISSUE ON APPEAL: WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH ITS 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.

Florida Statute Section 90.801 defines "hearsay". Section 801(2)(a) states that "a statement is not hearsay if ..." [emphasis added]. If a statement is admitted in evidence under that rule it is by definition "not hearsay". Section 90.802 states that hearsay is inadmissible and Section 90.803 lists the exceptions in which hearsay testimony is admissible. Section 90.806 allows for the impeachment of a hearsay declarant when a hearsay statement has been admitted in evidence. Since statements which are introduced under Section 90.801(2)(a) are "not hearsay", then Section 90.806 does not apply because 90.806 only applies to the impeachment of hearsay declarants when a hearsay statement has been admitted in evidence. Since Mr. Bennett's alleged prior inconsistent statement was brought in under Section 90.801(2)(a) as a nonhearsay statement, the state should not have been allowed to impeach that statement according to Section 90.806 which only applies to hearsay statements.

Even if Mr. Bennett's alleged prior inconsistent statement were considered to be "hearsay", his testimony was not subject to impeachment because of the Voucher Rule. Section 90.806 allows for the impeachment of a hearsay statement, but a party may not impeach his own witness according to the Voucher Rule. In Austin v. State, 461 So.2d 1380 (Fla. 1984), the court held that in a situation where a party is calling a witness for the purpose of eliciting a

prior inconsistent statement, the witness must be shown to be adverse. The state was attempting to elicit a prior inconsistent statement from Mr. Bennett, but his testimony was not adverse and so was not subject to impeachment under Section 90.608.

The alleged prior inconsistent statement was found to be "not hearsay" and so was not subject to impeachment under Section 90.806. The impeaching testimony was improperly admitted and was unduly prejudicial. The lower court erred in allowing the state to impeach Mr. Bennett's testimony by admitting the prior inconsistent statement allegedly made by Mr. Bennett to the state attorney.

IV. APPELLANT'S RESPONSE AND REPLY TO FOURTH ISSUE ON APPEAL: WHETHER THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT, HIGHLY SUSPECT AND HIGHLY PREJUDICIAL TESTIMONY INTO EVIDENCE.

Testimony regarding Mr. Bennett's prior inconsistent statement to the state attorney about a plan to murder Mrs. Kane was not relevant to this case. Mr. Bennett's testimony that Appellant did not tell him that she was planning to murder Mrs. Kane is very similar to the situation in Jackson v. State, 498 So.2d 906 (Fla. 1986). In that case the inconsistent testimony at trial by a witness was that the defendant had not told the witness that he had committed the crime. The state wished to impeach the trial testimony by bringing in a prior inconsistent statement. The supreme court in Jackson held that testimony to be irrelevant. Similarly, Mr. Bennett's testimony was that Appellant had not told him (and he did not overhear) that she was planning to commit a murder. Like the testimony in Jackson, Mr. Bennett's testimony regarding what Appellant did not say was irrelevant. Theoretically, everyone in the world could have testified that they did not hear a conversation about a plan to murder Mrs. Kane. Testimony to this effect is obviously irrelevant and has no probative value.

The limited value of testimony that the Appellant did not tell him that she was planning a murder is easily outweighed by the prejudicial harm of that testimony. In balancing the relevance of such a statement with the prejudicial harm, the trial court erred in finding that the testimony was relevant and not outweighed by its prejudicial harm.

Once Mr. Bennett testified that Appellant did not tell him that she was planning a murder, the state attorney was allowed to impeach this testimony by bringing in a prior inconsistent statement that Mr. Bennett allegedly made to the state attorney while Mr. Bennett was at home, sick, and under the influence of medication. Mr. Bennett denied making a prior inconsistent statement (R.408, 409, 410, 411). Other witnesses were then questioned at length in an effort to impeach Mr. Bennett's testimony. The question of whether Mr. Bennett in fact made a prior inconsistent statement to the state attorney became a crucial issue in this trial. The true issue of whether Appellant in fact planned a murder became secondary. Meanwhile, the jury was exposed to lengthy, prejudicial questioning regarding what Appellant in fact said to Mr. Bennett, or what he overheard her say. Mr. Bennett's testimony at trial regarding what Appellant did <u>not</u> say to, or in the presence of, Mr. Bennett was irrelevant. The hearsay statement that Mr. Bennett allegedly previously made to the state attorney was unreliable and suspect. The probative value of all of the testimony surrounding the alleged statement to the state attorney is outweighed by its prejudicial harm and the trial court erred by allowing the prior inconsistent statement into evidence and allowing this to become a major issue in this trial.

V. APPELLANT'S RESPONSE AND REPLY TO FIFTH ISSUE ON APPEAL: 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.

In support of sustaining the trial court in finding the statutory aggravating factor of heinous, atrocious or cruel Appellee cites Scott v. State, 411 So.2d 866 (Fla. 1982) as factually similar to the instant case since the victim in Scott struggled and was beaten. However, the facts in Scott are completely different from the facts in the instant case. In Scott the victim was beaten in Hillsborough County, thrown into the back of his car, driven to a remote location in another county where he regained consciousness and was beaten again before being run over by his car. Death in the instant case resulted from a single episode.

The other cases cited by Appellant to sustain the finding that this homicide was heinous, atrocious or cruel, e.g., Duest v. State, 462 So.2d 446 (Fla. 1985); Washington v. State, 362 So.2d 658 (Fla. 1978); Doyle v. State, 460 So.2d 353 (Fla. 1984); Johnson v. State, 465 So.2d 499 (Fla. 1985); Tompkins v. State, 502 So.2d 415 (Fla. 1986); Adams v. State, 412 So.2d 850 (Fla. 1982); Mason v. State, 438 So.2d 374 (Fla. 1983) deal with the victim's consciousness to perceive impending death. In each of these cases there is testimony that the victim was conscious and had time to anticipate his or her death prior to loosing consciousness.

The case at bar is distinguished from those cited above by Appellee by the range of possible times for death to occur, from a few minutes to fifteen minutes (R.321) and a lack of any evidence as to when the victim lost consciousness.

Without testimony as to when the victim lost consciousness the acts contributing to the death cannot be held to support a finding of this statuary aggravating factor. Jackson v. State, 451 So.2d 458 (Fla. 1984).

VI. APPELLANT'S RESPONSE AND REPLY TO SIXTH ISSUE ON APPEAL: WHETHER THE LOWER COURT ERRED IN FINDING AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellant's Initial Brief cited cases in which this court held that heightened premeditation to the intent to commit robbery or theft cannot be transferred to the murder occurring during the course of the crime, i.e., 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).

While not quarrelling with those decisions, the Appellee maintains that Mason v. State, 438 So.2d 374 (Fla. 1983) and Squires v. State, 450 So.2d 208 (Fla. 1984) are more comparable.

Mason v. State, 438 So.2d 374 (Fla. 1983) is clearly distinguished from the instant case by the fact that the victim in Mason was sleeping and thus did not resist the crime of robbery. This court stated

> Nothing indicates that she provoked the attack in any way, or that Appellant had any reason for committing the murder. Mason v. State at 379.

In the instant case the victim was awake and resisted the robbery by struggling to retain her property (R.184, p. 7). The homicide occurred during the struggle (R.184, p. 7 and p. 8).

The decision in Mason v. State, 438 So.2d 374 (Fla. 1983) further contracted from the instant case by consideration of Proffitt v. State, 510 So.2d 896 (Fla. 1987). In Proffitt the Appellant argued that this court has never affirmed the death penalty for a homicide committed during a burglary where no

additional acts of abuse or torture are shown, and where the Appellant, as here, had no prior record of criminal or violent behavior (R.97). The instant case is more comparable to Proffitt v. State. Proffitt lacked a significant history of criminal activity. Mason had prior attempted murder, rape and arson convictions.

Squires v. State, 450 So.2d 208 (Fla. 1984) is similarly distinguished by the fact of Squires' prior conviction of a life felony and his status as an escapee at the time Squires abducted his victim, took him to a remote area and shot him five times. Four of the shots were fired at close range into the victim's head.

As further authority Appellee cites Way v. State, 496 So.2d 126 (Fla. 1986); Puiatti v. State, 495 So.2d 128 (Fla. 1986); Lara v. State, 464 So.2d 1173 (Fla. 1985).

Way v. State, 496 So.2d 126 (Fla. 1986) is distinguished from the case at bar by the evidence that the defendant Way prevented rescue of his victim while she was struggling in the fire he had started. Way. v. State bears no factual similarities to the instant case.

In Puiatti v. State, 495 So.2d 128 (Fla. 1986) the defendant was shown to have committed three separate and distinct assaults upon the victim as distinguished from the instant case where one continuous altercation is shown.

Lara v. State, 464 So.2d 1173 (Fla. 1985) is more similar to Mason v. State, 438 So.2d 374 (Fla. 1983) and Squires v. State, 450 So.2d 208 (Fla. 1984) than the instant case in that the defendant

Lara had prior convictions of second degree murder and sexual battery. Lara is further distinguished by the fact that the aggravating factor of cold, calculated and premeditated was based on the court's finding of a clear intent to kill the victim following a prior murder upstairs and the defendant's reloading his gun after the second killing and threatening to kill two others.

The cases cited by Appellee are clearly distinguished from the instant case and highlight that this Appellant's sentence should be reduced to life imprisonment consistent with this court's decision in Proffitt v. State, 510 So.2d 896 (Fla. 1987).

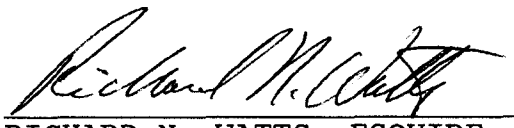
CONCLUSION

For the reasons set forth herein in Issues I through IV, Appellant requests that the decision of the trial court be reversed and that Appellant be given a new trial. In the alternative, Appellant requests a new penalty phase deleting all reference to Mr. Robert Bennett's testimony as a court witness and dealing with prior statements of her, Bennett and all testimony used to impeach Robert Bennett.

As to Issues V and VI, should this court disallow one or both challenged aggravating factors, this cause should be remanded for resentencing by the trial judge to re-weigh the valid aggravating and mitigating circumstances, or in the alternative, this court should summarily impose a life sentence without possibility of parole.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Robert J. Landry, Assistant Attorney General 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 11th day of August, 1988.



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