

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUN 13 1989

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MICHAEL T. RIVERA,

Appellant/Defendant,

vs .

CASE NO. 70,563

Cir. No. 86-11716CF

STATE OF FLORIDA,

Appellee/Plaintiff,

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APPELLANT'S REPLY BRIEF

Death Penalty Appeal from the Circuit Court of the  
Seventeenth Judicial Circuit, Honorable John G. Ferris

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POINT 2

THE "REVERSE WILLIAMS RULE" EVIDENCE WAS  
RELEVANT EVIDENCE TENDING TO DISPROVE RIVERA'S GUILT.  
EXCLUSION OF THE EVIDENCE CONSTITUTES REVERSIBLE ERROR.

Rivera sought to introduce evidence of an abduction and rape-murder similar to the Jazvac case. After his arrest and incarceration, a woman riding a bicycle was abducted, sexually assaulted, murdered by asphyxiation, and her body dumped within a few feet of where Jazvac's body had been found. As in the Jazvac case, pantyhose and perverse sexual paraphernalia were found in close proximity to the body. The thrust of the State's argument is that the facts did not show the pattern of similarity required to establish relevancy and hence admissibility. The State challenges that the facts did not satisfy the "unusual test" or the rule of similarity set forth in Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

The introduction of collateral crime evidence by a criminal defendant to disprove his guilt, or to prove his innocence should be governed by the interrelationship of Florida Statutes 90.401, 90.402, 90.403, and 90.404(2)(a). Florida Statute 90.401 provides, "Relevant evidence is evidence tending to prove or disprove a material fact." Florida Statute 90.402 provides, "All relevant evidence is admissible, except as provided by law." Florida Statute 90.403 provides, "Relevant evidence is inadmissible if its probative value is substantially out weighed by the danger of unfair prejudice, confusion of

issues, misleading the jury, or needless presentation of cumulative evidence. . . " Florida Statute 90.404(2)(a) provides, "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."

Relevant evidence is evidence with a legitimate tendency to prove or disprove a material fact in controversy or to render a proposition more or less probable. In this case, a material fact in controversy was whether Rivera perpetrated the crime. Evidence that would tend to disprove that he was the perpetrator, or indicating the proposition less probable would be relevant. Florida Statute 90.402 provides that relevant evidence is admissible unless prohibited by law. The Law Revision Counsel Note to this statute states, "Succeeding sections in this Chapter, in response to the demand of particular policies, require the exclusion of evidence despite its relevancy." Florida Statute 90.404(2)(a) is a succeeding section which limits the introduction of relevant evidence. It provides that collateral crime evidence is admissible when relevant to prove a material fact in issue, and then lists the types of material facts that may be in issue. The statute qualifies or restricts the admissibility of collateral crime evidence if its relevance is solely to prove bad character or propensity. The introduction of collateral crime evidence is further modified by the

preceding section, Florida Statute 90.403. This statute provides that relevant evidence is inadmissible if its probative value is substantially out weighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. The Law Revision Counsel Note the statute states that the Statute is derived from Williams v. State, supra. The statute's origin is criminal law and its purpose is to limit the prejudicial effects of collateral crime evidence to proof of material facts in issues. It prohibits the prosecution from engaging in mere character assassin. The purpose of the restriction on the introduction of collateral crime evidence was to protect an accused, not to restrict his introduction of relevant evidence.

The State argues that even if the evidence should have been admitted, its exclusion is harmless error. The doctrine of harmless error focuses on the effect of error on the trier-of-fact (ie. in this case the jury). The question is whether there is a reasonable possibility that the error effected the outcome. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). If the evidence is of probative value and tends in anyway, even indirectly, to prove a defendant's innocence, it is error to deny its admission. Evidence which tends to disprove the defendant as the perpetrator, or evidence suggesting that it is less probable that the defendant is the perpetrator could reasonably be expected to effect the outcome of the trial. Therefore, exclusion cannot be harmless error.

In conclusion, the jury was allowed to hear the collateral crime evidence in support of the proposition that he was the perpetrator, but not allowed to hear the collateral crime

evidence that he may not have been the perpetrator. The "reverse Williams Rule Evidence" should have been admitted for the jury to give it what, if any, weight it deemed appropriate. The State's able trial counsel, as he did in the motion in limine, would have argued that it be accorded no weight.

Rivera's conviction should be reversed and the cause remanded for a new trial.,

### POINT 3

#### THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY.

Rivera challenges the propriety of his death sentence because of errors in the trial court's findings concerning aggravating circumstances, and statutory and non-statutory mitigating circumstances. The trial court found four aggravating circumstances. In his initial brief, Rivera did not challenge two of the aggravating circumstances. He did not challenge the finding that the murder was committed while he was engaged in the commission of one of the enumerated felonies. He did not challenge the fact that he had previously been convicted of offenses relating to violent personal crimes. However, since his initial brief some of the prior convictions relied upon in support of this aggravating circumstance have been reversed by the District Court of Appeal. The undersigned has petitioned this Court for permission to file a brief concerning what, if any, effect this later legal development would have on the trial court's findings. The undersigned will not argue this development until this court has ruled upon the motion.

The State argues that the third aggravating circumstance, that the murder was "especially heinous, atrocious, and cruel," is a proper finding of a proper aggravating circumstance. The Oklahoma statutory scheme of aggravating circumstances is substantially similar to Florida's. See Oklahoma Statute Title 21 Section 701.12 as compared to Florida Statute 921.141(5). The Oklahoma statute lists eight aggravating circumstances, and five of the eight are identical to five of Florida's aggravating circumstances. One of the identical aggravating circumstances is that the killing was "especially heinous, atrocious, or cruel". Contemporaneous with the filing of Rivera's initial brief, the United States Supreme Court rendered its decision in Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The Court affirmed the Tenth Circuit Court of Appeals holding that the statutory aggravating circumstance that the killing was "especially heinous, atrocious, or cruel" did not adequately inform juries what they must find to impose the death penalty, and as a result leaves the sentencer with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 405 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In light of this decision, the State cannot rely upon this aggravating circumstance to support a sentence of death.

Notwithstanding the United States Supreme Court's pronouncement, the State cannot rely upon this aggravating circumstance to support a sentence of death. The Florida case law holds that the State must prove beyond a reasonable doubt that the homicide was a pitiless crime which was unnecessarily

torturous to the victim; extremely wicked or shocking or evil; outrageously wicked and vile; and designed to inflict a high degree of pain with utter indifference to, or enjoyment of the suffering of the victim. Eight days after Jazvac disappeared, before her body was found, and before Rivera was arrested, the State contends that he telephoned Star Peck. He told her that he had done something terrible to a girl named Staci. He said he didn't mean to kill her and that her body was by Lake Okeechobee. He said he drugged her with ether and pulled her into the van. He told Peck that he dragged her into the van and she was dead, but he put it in her and she bleed and then he put it in her anyway. Before his arrest, the State alleged that he called Gail Mastendo and told her that he did not like men or women but that he liked children. He told her that he had a child. He said he liked to drive by school yards and watch children. He said he had grabbed a little girl and hurt her real bad.

After his arrest and while incarcerated the Broward County Jail, the State alleges that he made incriminating statements to three inmates. He told Frank Zuccarello that he only intended to fondle and molest Jazvac, but things got out of hand and he choked her. He told Peter Salerno that he did not mean to kill Jazvac. He said he just wanted to look at her and play with her.

The medical examiner detected an ether-like odor in her body tissues, which would be consistent with asphyxiation by use of ether. (Vol. 5, p. 857, 869-870)

In light of this evidence, it is reasonable to assume that she was approached from behind as she walked her bike

through the field. An ether soaked rag was placed over her mouth and nose rendering her unconscious or helpless. She was then pulled into the van. There was an attempt to sexually assault her vaginally, but she bled. Nonetheless he continued the sexual assault. In the process of becoming conscious again, he panicked and choked her. The goose-egg bruise on her forehead could have easily been obtained during the process of putting her in the van or sexually assaulting her while she was alive, but unconscious. In other words, the sexual assault, the bruise to the forehead, and any choking could have occurred while she was alive but unconscious, or in that twilight state between total unconsciousness and conscious. The facts reasonably suggest that the death and sexual assault may not have been torturous, or have inflicted a high degree of pain because of the effects of the ether. Because she was attacked from behind and rendered unconscious by the ether, there is reason to believe that she suffered no fear or emotional strain before her death.

The State contends that the aggravating circumstance that the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification was proven beyond a reasonable doubt. The State relies upon Rivera's statements to Star Peck, Detective Scheff, Frank Zuccarello, and Peter Salerno. See pages 26 through 27 of the State's brief. He told Peck that his encounter with Jazvac was a sudden, unplanned encounter in response to an urge to expose himself. That he approached her from behind, rendered her unconscious with ether and dragged her into the van. He sexually

assaulted her but did not mean to kill her.

He told Scheff that in response to his urges he would look for young girls, and render them unconscious with ether.

He told Zuccarello that he was sexually aroused by young girls. When he encountered Jazvac his original intent was to molest her but he choked her when things got out of hand. "Things getting out of hand" may refer to his fantasies as well as a struggle as the State suggests.

He told Salerno that he did not mean to kill Jazvac. In discussing with Salerno the two pending cases against him, the Jazvac murder and the attempted murder of Jennifer Goetz, he commented about the evidence against him. In the Goetz case he inferred there were eyewitnesses, but in the Jazvac case there were no eyewitnesses. This was a correct statement of the evidence against him.

Obviously her death would not fall within that genre of murders which are characterized as execution or contract murders. The totality of his statements does not suggest that the sexual battery or death was a careful plan of prearranged design. To the contrary, Rivera went to a local carnival, ingested drugs, and borrowed a van. Having an urge to expose or molest a young girl, within a short distance from the carnival, he had a sudden, chance encounter with Jazvac. Such an impulsive, senseless act resulting in death does not rise to that level of premeditation contemplated by Florida Statute 921.14(5)(i).

Court appointed expert, Dr. Ceros-Livingston, rendered an expert opinion on two statutory mitigating circumstances. She opined that within a reasonable degree of psychological certainty

that Rivera's schizophrenic condition may have caused him to conclude that he was under the substantial domination of another person, his alter ego "Tony". (Vol. 11, p. 2047; Vol. 12, p. 2048) She also opined that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. The trial court totally rejected her uncontradicted, unrebutted expert opinion. However, the trial court did find that Rivera committed the crime while under the influence of extreme mental or emotional disturbance. This finding must have been predicated upon the testimony of Dr. Ceros-Livingston, the only psychological expert that testified. Evidently, the trial court felt uncomfortable in totally rejecting its court-appointed expert's testimony. Instead it used her testimony to find one statutory mitigating circumstance rather than three statutory mitigating circumstances. Finding three statutory mitigating circumstances, each relating to his mental capacity, would have put the statutory mitigating circumstances on a par with the aggravating circumstances.

If the aggravating circumstance of "especially heinous, atrocious, and cruel" is declared unconstitutionally infirm or inapplicable, and the aggravating circumstance of "cold, calculated and premeditated" is declared inapplicable, there would remain only two aggravating circumstances. If the two aforementioned statutory mitigating circumstances were recognized, there would be three statutory mitigating circumstances. One of the remaining aggravating circumstances

would relate to the crime that was committed (i.e. that the killing was committed while the defendant was engaged in the commission of an enumerated felony). The other aggravating circumstance would relate to his prior record of committing sexually exploitive crimes. However, this last aggravating circumstance would interrelate with the three statutory mitigating circumstances relating to a diminished mental capacity resulting in deviant behavior.

In conclusion, the record supports the finding of two aggravating circumstances, three statutory mitigating circumstances and non-statutory mitigating circumstances. As such, the death penalty was proportionally incorrect and Rivera should be sentenced to life.

#### CONCLUSION

For the reasons expressed in Points 1 and 2 Rivera's conviction should be reversed and his cause remanded for a new trial. For the reasons expressed in Point 3, Rivera's death sentence should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to Assistant Attorney General Joan Fow er, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 10 day of June, 1989.

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