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IN THE SUPREME COURT OF FLORIDA

JOHN S. FREUND,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 70,565

RESPONDENTS BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"PB"	Petitioners Brief on Merits

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as a generally accurate of the proceedings below.

STATEMENT OF THE FACTS

To the extent that it is a nonaugmentative and an unslanted account of the relevant facts in the case, Respondent accepts Petitioner's Statement of the Facts, with such additions and exceptions as are set forth below and in the argument portion of Respondent's Brief:

1. Dr. Augustin J. Schwatz, who practiced medicine with Petitioner and was Petitioner's closest friend in the medical community, testified that Petitioner's personality change after the suicidal attempt was not drastic, although noticeable (R.1682). Dr. Schwartz testified that, after Petitioner's attempted suicide, Petitioner's intellectual ability appeared pretty well intact (R.1683), although Dr. Schwartz could not say whether Petitioner was capable of making the decisions about how to treat patients in the very complicated medical field of oncology (R.1683-1684).

2. Respondent takes exception to Petitioner's representation that Trent had bragged to Eleanor Mills that he (Trent) was capable of controlling and manipulating Petitioner because of Petitioner's mental problems (PB.5). Eleanor Mills

never testified that Trent bragged to her of his (Trent's) ability to control and manipulate Petitioner. Rather, in response to a question on whether John Trent loved the fact that he could manipulate and control Petitioner, Mills replied, "yes" (R.1318). The manner in which the question was framed called for Mills to express an opinion concerning Trent, rather than for Mills to repeat a specific statement made by Trent.

3. The medical examiner, Dr. Hobin, testified that Nordiazepan was recovered from the victim's body (R.1140). According to Dr. Hobin, the body converts valium, diazipam, or tranxenes into nordiazepan (R.1140).

4. After Petitioner had injected the victim for about forty-five minutes with the valium and alcohol mixture, Petitioner said to Bill Daniels, "I wonder what his [the victim's] blood-alcohol level is now" (R.1253). Then Petitioner told Trent, "you know that we cannot let him [the victim] go" (R.1254). After injecting the victim with air, Petitioner stated that he couldn't believe that he had pumped that much air into the victim without causing an embolism (R.1254). Daniels testified that Petitioner appeared normal (R.1255).

5. Respondent takes exception with Petitioner's representation that Eleanor Mills acknowledged that Petitoner was oblivious to the blood and intended to walk straight out of Trent's apartment (PB.10). To the contrary, Eleanor Mills testified that Petitioner appeared to be normal after the killing

when he came into the room where Trent, Daniels and the Mills were residing during the killing (R.1242). Rather than intending to walk straight out of Trent's apartment, Petitioner came into the room and put his bag down before Trent advised him to change his shirt (R.1326-1327). Contrary to Petitioner's representation, Eleanor Mills stated that it was not obvious to her that Petitioner was oblivious to the blood, or that Petitioner intended to leave Trent's apartment without changing his shirt (R.1325,1327). Eleanor Mills testified that on the night of the murder, Petitioner was able to know the differrence between right and wrong, and that Petitioner was able to know that it was wrong to kill the victim (R.1354). Mills stated that both Petitioner and Trent were acting crazy. When Mills stated that they were acting crazy, Mills clarified that she only meant that Petitioner and Trent acted abnormal at times (R.1357).

6. Respondent takes exception with Petitioner's representation that Lisa Mills acknowledged that Petitioner appeared as if he was going to walk out of Trent's apartment with the bloody shirt on (PB.13). Rather, when Lisa was asked the question in a depositon whether Petitioner with blood all over him was just going to walk out of the apartment, Lisa replied, "I don't know" (R.1217).

7. After Petitioner took off the bloody shirt and put on a clean one, he went to Trent's bathroom and washed his hands (R.1245). After Petitioner came out of the bedroom, he put the

bloody shirt into his bag, and then said to Eleanor and Lisa Mills, "You never seen me here tonight." (R.1246). Petitioner then left Trent's apartment.

8. Respondent takes exception with Petitioner's representation that Daniel testified that Petitioner appeared like he wasn't there or could have cared less where he wss (PB.15). Rather, Daniel testified that Petitioner had a hollow look in his eyes (R.1554). Daniel also testified that Petitioner appeared normal (R.1554).

9. Nurse Donna Foster, who attended Petitioner while he was in intensive care after the attempted suicide, testified that a few months after the suicide attempt that Petitioner knew what he was doing, was able to carry on a conversation, and could follow instruction (R.1784).

10. Dr. Barry Gordon testified that Petitioner's principal problem was memory (R.1863). Dr. Gordon testified that Petitioner's mental status was not getting worse when he saw Petitioner on January 9, 1984, approximately six months before the killing (R.1869). Gordon further testified that Petitioner's mental status did not change between January 9, 1984 and when he (Gordon) visited Petitioner in jail after the killing on August 29, 1985 (R.1868).

11. Dr. Almeida, who treated Petitioner after the suicide attempt, testified that Petitioner's IQ was determined to be 110 after the suicide attempt (R.2066). Dr. Almeida also

referred to a report of a neuropsychological examination conducted by Dr. Pevsner on August 18, 1983, in which Dr. Pevsner determined that Petitioner only had minor residual difficulties resulting from the suicide attempt (R.2069). Dr. Pevsner even stated that these minor difficulties would not interfere with Appellant's return to work (R.2069). Dr. Pevsner determined that Petitioner's intellectual functioning was in the bright normal range (R.2072). Dr. Pevsner recognized that Petitioner's strength was his knowledge of the appropriate behavior required in social institutions (R.2071). Dr. Almeida also received a report from Dr. Barry Gordon, who evaluated Petitioner on January 9, 1984, in which Dr. Gordon stated that Petitioner appeared to be back to normal in many respects, and given Petitioner's rate of improvement, Petitioner would be able to return to work in the near future (R.2079). Dr. Gordon and the other doctor saw Petitioner again on June 29, 1984, a month before the murder, and Dr. Gordon's evaluation remain the same, according to Dr. Almeida (R.2079).

12. Deputies Habershan and Rodriquez testified that from their observations of Petitioner in jail, Petitioner displayed no indications of mental illness (R.2147,2156).

13. Respondent takes exception to Petitioner's representation that Dr. Cheshire believed the instant case could only be explained in terms of sexual perversion (PB.20). Instead, Dr. Cheshire testified that the use of a model of sexual

perversion would help in putting together the mass of contradictory and confusing statements to understand what really happened (R.2180). Dr. Chesire determined that Petitioner was legally sane at the time of the killing (R.2179-2180). Dr. Cheshire read into evidence Dr. Almeida's letter of December 14, 1984:

> "Both clinically and test-wise John has maintained a steady improvement in his intellectual function and his behavior.
>
> "I am enclosing a copy of the current psychological testing done by Ramsey Pevsner, PhD. on September 3rd, 1983. I discussed my findings and recommendations with John when I saw him in the office today.
>
> "He is hoping to reopen his office and that the hospital will return his privileges so that he can gradually become active in his practice, which I recommend.
>
> "It has been a pleasure for me to work with John and see him come out of his serious emotional problem. He is now in a state of mind where he is enjoying life and is ready to resume his practice.
>
> "I will be glad to offer any other information you may need. Please, let me know if there is any other way I can be of help.
>
> "Best personal regards, Jose Almeida, M.D."
> (R.2187-2186).

SUMMARY OF THE ARGUMENT

POINT I

This Court should answer the certified question in the negative. This Court disapproved of the old instruction on insanity because it did not apprise the jury that the State had the burden of proving sanity beyond a reasonable doubt. By explicitl instructing the jury that the State had the burden of proving sanity beyond a reasonable doubt, the trial court cured the defect which this court had detected in the old instruction. Where the trial court's instruction was a correct statement of the law of insanity as it existed at the time of Petitioner's trial, the trial court did not err in refusing to give a requested instruction similiar to the instruction on insanity later adopted by this Court.

POINT II

The trial court did not err in denying Petitioner's motion to reduce the charge to second degree murder where there was legally sufficient evidence to submit the first-degree murder charge to the jury. The State presented evidence that refuted Petitioner's claim that he was insane at the time of the offense. This evidence was sufficient for the jury to reject Petitioner's insanity defense. Petitioner's action during and after the killing was sufficient for the court to submit to the jury the question of premeditation.

ARGUMENT

POINT I

THE FLORIDA SUPREME COURT'S HOLDING IN YOHN V. STATE, 476 So.2d 123 (Fla. 1986), WAS NOT VIOLATED IN THE PRESENT CASE WHERE THE TRIAL COURT INSTRUCTED THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE.

The trial court provided the following instruction to the jury on the defense of insanity:

> Now, insanity. An issue in this case is whether this defendant was legally insane when the crime allegedly was committed. All persons are presumed to be sane, however, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt that the defendant was sane.
>
> If the defendant was legally insane, he is not guilty. To find him legally insane there are three elements. These three elements must be shown to the point where you have a reasonable doubt about his sanity. That the defendant had a mental infirmity, defect or disease; that this condition causes the defendant to lose his ability to understand or reason accurately, and because of the loss of these abilities, the defendant did not know what he was doing or did not know what would result from his actions or did not know what was wrong although he knew what he was doing and its consequences.
>
> Now, in determining the issue of insanity you must consider the testimony of expert and non-expert witnesses. The question you must answer is not whether the defendant is legally insane today or has always been legally insane but simply if the defendant was legally insane at the time the crime allegedly was

committed.

> When a person tried for an offense shall be acquitted for the cause of insanity, the court shall then determine tha the defendant presently meets the criteria set forth by law.
>
> The court shall commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or placement or shall order that he receive out patient treatment at any other appropriate facility or treatment on an out patient basis or shall discharge the defendant. (R.2442-2444).

This instruction cured the problem with the old insanity instruction identified in Yohn v. State, supra. The instruction given made it explicit that the state had the burden of proving sanity beyond a reasonable doubt.

In Yohn v. State, supra, this Court disapproved of the former standard jury instruction on insanity because the instruction did not adequately apprise jury that once a reasonable doubt is created in its mind of the defendant's insanity, then the State must prove beyond a reasonable doubt the defendant's sanity. The trial court in the present case cured the defect in the former instruction by instructing the jury that the State had the burden of proving Petitioner's sanity beyond a reasonable doubt.

As Petitioner concedes, this Court had not adopted the new instruction on insanity at the time of Petitioner's trial. Although the new instruction had been proposed, the trial court

had no way of knowing that this Court would eventually adopt the new instruction. Therefore, even if Petitioner's requested instruction on insanity accorded with the proposed instruction which was later adopted, it was not error for the trial court to refuse to give the requested instruction, where the instruction given adequately apprised the jury of the State's burden of proving sanity beyond a reasonable doubt, and the instruction given complied with the law as it existed at the time of Petitioner's trial.

In a labored effort to establish that the trial court's instruction was inadequate and burden-shifting, Petitioner dissects the instruction paragraph by paragraph, and endeavors to construe each paragraph separate, and out of context with the whole of the instruction. However, a reviewing court should look to the entire instruction rather than to one statement out of context in determining whether an instruction is error or misleads jury. Yanks v. State, 261 So.2d 533 (Fla. 3rd DCA 1972); Cronin v. State, 470 So.2d 802,804 (Fla. 4th DCA 1985); Diez v. State, 359 So.2d 55,56 (Fla. 3rd DCA 1978). The trial court specifically instructed the jury that the state had the burden of proving sanity. Therefore, a reasonable jury would not ignore this instruction and shift the burden to the defense.

In support of his argument that the instruction given by the trial court was inadequate, Petitioner points out the difference between the instruction given by the trial court and

the new instruction which was later adopted by this Court. However, in resolving this issue, this Court's focus should not be on the difference between the instruction given and the instruction which was later adopted; instead, the focus should be on whether the instruction given was clear, comprehensive, and correct. State v. Freeman, 380 So.2d 1288 (Fla. 1980). Where the instruction given by the trial court adequately apprised the jury of the State's burden of proving sanity beyond a reasonable doubt, the giving of such instruction did not constitute error because the instruction differed in some aspects from the insanity instruction later adopted by this court.

Petitioner subtly suggests that Yohn requires this Court to analysis the instruction given paragraph by paragraph. However, rather than analyzing each paragraph of the old instruction out of context with the whole, this Court in Yohn only cited to Judge Anstead's review of the former instruction in Reese v, State, 452 So.2d 1079 (Fla. 4th DCA 1984), to determine whether the former instruction said anything about a burden of proof. This court in Yohn, as well as Judge Anstead in Reese, recognized that the bottom line problem with the old instruction was that it did not inform the jury that the state must prove anything in regard to the sanity issue. As previously noted, the trial court in the present case cured this problem by explicitly instructing the jury that the State had the burden of providing sanity beyond a reasonable doubt. Therefore, this Court does not

have to review each paragraph of the given instruction to determine whether the state's burden of proving sanity was mentioned, as Judge Anstead did in Reese. Rather than a paragraph-by-paragraph disapproving the old instruction, as Petitioner contends, this Court in Yohn and Judge Anstead in Reese only examined each paragraph of the old instruction to determine whether it mentioned the State's burden of proving sanity. If Judge Anstead concluded that the old instruction suggested that the defendant must establish a reasonable doubt as to his sanity, Judge Anstead's conclusion was based only on the fact that the old instruction never mentioned that the State had the burden of proving sanity beyond a reasonable doubt. By explicitly informing the jury of the State's burden of proving sanity, the trial court in the present case cleared up any confusion concerning whether the State had the burden of proving sanity beyond a reasonable doubt. Thus the trial court in the present case clearly complied with the mandate of Yohn by instructing the jury of the State's burden or proving sanity. Since the later adopted insanity instruction was not the law in Florida at the time of Petitioner's trial, the trial court was not in error for refusing to give the requested instruction, which was identical to the later adopted instruction.

Petitioner also contends that the instruction given by the trial court was inadequate because it apprised the jury that Petitioner could be discharged. However, Petitioner once again

takes a phrase out of context in a effort to discredit the instruction. If the paragraph from which this phrase is taken is considered in its entirety, the jury was only apprised that if it returned a verdict of not guilty by reason of insanity, the court could either commit Petitioner to the Department of Health and Rehabilitation Services or discharge Petitioner. This is a proper statement of the law on the issue. See Fla.R.Crim.Pro. 3.217. The trial court can involuntarily hospitalize a defendant found not guilty by reason of insanity only after a determination that the defendant meets the criteria set forth by law. If the criteria is not met, the defendant has to be discharged. Thus, the trial court's instruction on this issue was a correct statement of the law. The trial court cannot be held in error for giving an instruction that correctly states the law. In addition, the instruction given by the trial court only had minor semantic differences between the treatment of this issue in the later adopted instruction.

The instruction given by the trial court sub judice adequately apprised the jury that the State had the burden of proving sanity beyond a reasonable doubt. Therefore, the trial court did not err in denying Petitioner's requested instruction. Zuberi v. State, 343 So.2d 664 (Fla. 3d DCA 1979); Gilbert v. State, So.2d (Fla. 4th DCA 1986). However, even if it was conceded that the trial court erred in denying the instruction, such error would be harmless beyond a reasonable

doubt in view of the overwhelming evidence establishing Petitioner's guilt of first-degree murder. Collins v. State, 418 So.2d 318 (Fla. 4th DCA 1982). Respondent will discuss this evidence in Point II.

Accordingly, this Court should answer the certified question negatively.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER AND REQUEST TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.

Petitioner contends that the evidence taken in the light most favorable to the State does not support a conviction for premeditated first degree murder. Respondent submits that Petitioner's conviction for premeditated first degree murder is supported by substantial, competent evidence.

In determining the propriety of the trial court's denial of Petitioner's motion for judgment of acquittal, this Court should be guided by the well-settled principle that a defendant, in moving for a judgment of acquittal, admits all facts stated in the evidence adduced and every conclusion favorable to the prosecution that a jury might fairly and reasonably infer from the evidence. Lynch v. State, 293 So.2d 44,45 (Fla. 1974); T.J.T. v. State, 460 So.2d 508,510 (Fla. 3rd DCA 1984); Herman v. State, 472 So.2d 770 (Fla. 5th DCA 1985). A motion for judgment of acquittal should not be granted unless it is apparent that no legally sufficient evidence has been submitted under which a jury could legally find a verdict of guilty. Busch v. State, 466 So.2d 1073,1079 (Fla. 3rd DCA 1984); Lynch v. State, supra. Because conflicts in the evidence and the credibility of the witnesses has to be resolved by the jury, the granting of a motion for judgment of acquittal cannot be based on

evidentiary conflict or witness credibility. Lynch v. State, supra; Hitchcock v. State, 413 So.2d 741,745 (Fla. 1982).

Premeditation is a question of fact for the jury. Preston v. State, 444 So.2d 352 (Fla. 1958); Pinkney v. State, 142 So.2d 144,147 (Fla. 2d DCA 1962). The record reveals that the State presented legally sufficient evidence for the trial court to submit this question to the jury. Lynch v. State, supra.

Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection. Sireci v. State, 399 So.2d 964,967 (Fla. 1981); Provenzano v. State, 11 F.L.W. 541 (Fla. October 16, 1986). There is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; a few moment's reflection will suffice. Provenzano v. State, supra, relying on McCutchen v. State, 96 So.2d 152 (Fla. 1957). The testimony of Eleanor Louise Mills, Lisa Angelilli Mills, and Bill Daniels - who witnessed the protracted and tortuous killing of Ralph Walker - provided the jury legally sufficient evidence from which the jury could conclude that Petitioner had a fully-formed conscious purpose to kill Ralph Walker.

According to the testimony of Eleanor and Lisa Mills, John Trent and Ralph Walker became involved in a struggle prior to the arrival of Petitioner (R.1222,1379-1382). John Trent

overcame Ralph Walker, and put a gun to Walker's head as Walker lay on the floor (R.1223). Trent then told Eleanor Mills to hold the gun on Walker, while Trent placed handcuffs on Walker (R.1224). Trent then gagged Walker with a bathroom towel (R.1226). While Walker lay helpless on the floor, Trent told Walker that he was going to send him back to Pittsburgh in a box (R.1225). Trent then asked Eleanor Mills to look up Petitioner's telephone number (R.1227). Because Mills was too nervous to find the number, Trent got Petitioner's number from the operator, and called Petitioner (R.1227). Trent told Petitioner to get there right away and to bring his little black bag (R.1227). Trent also called Bill Daniels and Bruce Fullerton, and Trent told Fullerton to bring a trunk, a sledgehammer and a chain saw (R.1228).

Petitioner arrived about fifteen minutes after receiving Trent's call (R.1228). Bill Daniels arrived shortly afterward. Upon arriving, Daniels heard Ralph Walker moan, "Don't let them kill me (R.1502). Trent told Daniels, in the presence of Petitioner, that "he was going to send Ralph [Walker] home to his mama in a box". (R.1504). Within ten minutes after arriving, Petitioner began injecting Ralph Walker with the drugs that Petitioner had brought in his bag (R.1231). When Petitioner ran out of the drugs in his bag, Petitioner asked Trent did Trent have anything that Petitioner could use (R.1232). Trent asked Petitioner whether Petitioner had some kind of drugs that are

supposed to be killer drugs (R.1505). Petitioner answered no and that he would stock up better next time (R.1505). Trent then gave Petitioner some valium pills, which Petitioner crushed with a mortar and pestle, mixed with vodka, sucked up in a syringe, and then injected into Ralph Walker (R.1506). During the injection, Trent stated that Petitioner was going to do Trent a little favor so that Trent would push through a loan for Petitioner to reopen his medical practice (R.1507). Petitioner injected Walker about twelve (12) times with the valium and vodka mixture, over a twenty-five to forty-five minute period (R.1508).

After the valium ran out, Trent provided Petitioner with tranxenes, which Petitioner mixed with vodka and then injected into Walker, making about five or six injections (R.1508-1509). Then Petitioner injected Walker with the straight vodka (R.1509). While Petitioner was doing this, Petitioner walked by Bill Daniels and said, "I wonder what [Walker's] blood alcohol level is now" (R.1509). After another pause in the injections, Petitioner came in front of Daniels and said, "You know, we can't let him go" (R.1510). Trent answered, "No problem, we'll kill him (R.1510). From that point on, Petitioner started to give Walker more injections with alcohol, and then Petitioner began to inject Walker with air (R.1510). Petitioner told Trent that he could not believe that Petitioner had pumped that much air in Walker and not cause an embolism (R.1510).

Unable to take it anymore, Daniels then left the living room, and went into the bedroom (R.1510).

While Daniels was in the bedroom, he could hear air still being injected into Walker (R.1512). Daniels heard the popping of the syringe as Petitioner pushed it into and pulled it out of Walker (R.1512). Daniels could hear the moaning of Walker (R.1512). As Daniels was sitting on Trent's bed, he turned, and Petitioner came into his vision (R.1513). Daniels saw Petitioner holding a Gerber knife in his hands, and Petitioner moved toward Walker with the knife (R.1513). Lisa Mills, as she was returning from the restroom, saw Petitioner stab Walker about three times (R.1394).

About fifteen minutes later, Petitioner appeared in the bedroom, and informed Trent that "It's over" (R.1513). Petitioner's shirt was bloody (R.1397). Trent noticed that Petitioner's shirt was bloody, and Trent informed Petitioner that he could not leave the apartment with a bloody shirt (R.1397). Petitioner then took off his shirt, and put on one of Trent's shirts (R.1397). Petitioner then went into the bathroom and washed his hands (R.1245). As Petitioner was leaving, Petitioner said to Trent, "It was a pleasure doing business with you. Call me again" (R.1397). Petitioner also said, in a threatening manner, to Eleanor and Lisa Mills, "You never seen me here tonight" (R.1246). Trent asked Petitioner if Petitioner would like Trent to walk Petitioner down, and Petitioner answered, "no,

he would be okay" (R.1399). Trent instructed Petitioner to call Trent when Petitioner got home (R.1399). Fifteen minutes after Petitioner left, Trent received a phone call from Petitioner (R.1399).

The State presented the testimony discussed above in its case-in-chief. This eyewitness testimony was clearly legally sufficient for the jury to conclude that Petitioner had the requisite premeditated intent to kill Ralph Walker. Lynch v. State, supra. Unlike those cases in which the period of reflection was relatively short, the period of reflection in the present case was protracted, with Petitioner injecting Walker with anything that Petitioner could get in his syringe, from valium to air, and then completing the murder by stabbing Walker with a knife. Petitioner knew that John Trent intended "to send Ralph Walker home to his mama in a box"(R.1504), and Petitioner even informed Trent that they couldn't let Walker go (R.1510). This statement, in itself, constituted undisputed evidence for the jury to conclude that Petitioner had a premeditated design to kill Walker. The manner in which Petitioner killed Walker and Petitioner's actions after the murder was legally sufficient evidence for the jury to infer that Petitioner committed premeditated murder. Fratello v. State, 11 F.L.W. 2245 (Fla. 4th DCA October 31, 1986)

Since there was legally sufficient evidence for the jury to conclude that Petitioner had a premeditated design to

kill Ralph Walker, the trial court had a mandatory duty to deny Petitioner's motion for judgment of acquittal. Lynch v. State, supra. Whether this legally sufficient evidence established first degree premeditated murder, or whether Petitioner was sane at the time of the offense, were questions of fact for the jury. Byrd v. State, 297 So.2d 22 (Fla. 1974); Preston v. State, 444 So.2d 939,944 (Fla. 1984). Because there was legally sufficient evidence to submit the case to the jury, the trial court did not abuse its discretion in denying the motion for judgment of acquittal. Lynch v. State, supra. Accordingly, this Court has a duty to affirm the trial court.

Petitioner endeavors to circumvent the clear evidence of premeditation by resurrecting on appeal the insanity defense which the jury rejected at trial. To accomplish this goal, Petitioner labors to link the present case with the so called "sudden passion" cases in which the appellate courts have reduced first degree murder to second degree murder. However, the present case cannot be analogized to those cases.

In the "sudden passion" cases relied upon by Petitioner, the victims committed acts that aroused the sudden passion of the defendants; therefore, the evidence in these cases was as consistent with the defendants acting out of sudden passion as with the defendants acting out of premeditation. In Clay v. State, 424 So.2d 139 (Fla. 3rd DCA 1982), pet. rev. den, 434 So.2d 67 (Fla. 1983), the victim, on the evening before the

murder, beat the defendant with a wire coat hanger and forced the defendant to have sexual relationship with him, and the victim again beat the defendant on the morning of the murder. Id. at 140. On these facts, the Clay court held that it was clear from the record that the defendant was under a dominating passion and in fear of the victim,. and thus premeditation was not proved beyond a reasonable doubt. Id. at 141.

In Tien Wang v. State, 426 So.2d 1004 (Fla. 3rd DCA 1983), another case relied upon by Petitioner, the victim also committed acts that aroused the sudden passion of the defendant. In Tien Wang, the defendant killed the victim after the victim attempted to separate defendant from the defendant's wife. Id. at 1006. Prior to the killing, the defendant had pleaded with the victim not to take defendant's wife away. Id. As in Clay v. State, supra, and Tien Wang v. State, supra, the victim in the other cases relied upon by Petitioner committed acts prior to the murder that aroused the sudden passion of the defendants. See Forehand v. State, 171 So.2d 241 (Fla. 1936) (the victim, a deputy sheriff, struck the accused with a blackjack prior to the accused seizing the gun of the deputy and shooting him); Douglas v. State, 10 So.2d 731 (Fla. 1942) (the victim was part of a possee searching for defendant, when defendant's gun discharged).

Unlike in the "sudden passion" cases relied upon by Petitioner, Ralph Walker, the victim in the present case, did not

do anything to arouse the sudden passion of Petitioner. To the contrary, when Petitioner arrived at Trent's apartment, the victim lay on the floor with hands handcuffed behind his back (R.1501) The victim's mouth even was gagged (R.1501). Therefore, the circumstances of the murder in the present case are completely different from the circumstances in the cases relied upon by Petitioner. The evidence in the present case was not consistent with Petitioner experiencing a sudden passion that negated his capacity for premeditation, as in Clay v. State, supra; Tien Wang v. State, supra; Forehand v. State, supra; and Douglas v. State, supra.

Assuming arguendo that the "sudden passion" cases are applicable to the instant case, sufficient evidence was presented for the jury to conclude that Petitioner's psychological state at the time of the offense did not negate the premeditation element of first degree murder. When all conflicts in their testimony are resolved in favor of the State, the testimony of the eyewitnesses was sufficient for the jury to conclude that Petitioner did not experience, at the time of the offense, a sudden passion that overwhelmed Petitioner's ability to form the conscious intent to commit premeditated murder.

According to Lisa and Eleanor Mills, Petitioner appeared normal at the time of the offense, and Petitioner seemed to know what he was doing (R.1261,1395). Petitioner was able to converse normally (R.1257). In addition, Petitioner examined

Bill Daniel's chest with a stethoscope during an interlude in his injections into Walker (R.1515). After the murder, Petitioner told Trent that "it was over" (R.1514). After Trent advised Petitioner to change his shirt, Petitioner changed his shirt, and then Petitioner went to the bathroom and washed his hands (R.1245). As he was leaving Trent's apartment, Petitioner threatened the Mills with these words, "you have not seen me here tonight" (R.1246). This evidence, in addition to the evidence previously discussed, was clearly legally sufficient for the jury to infer that Petitioner's capacity to form the conscious thought to commit premeditated murder had not been overwhelmed by a sudden passion, unlike in Tien Wong v. State, supra, and Clay v. State, supra.

To support the position that Petitioner's mental state negated a finding of premeditation, Petitioner relies on the testimony of his medical experts. Where evidence as to a defendant's sanity is in conflict, it is within the province of the jury to resolve the conflict, even if the conflict is between lay witnesses and expert witnesses. Williams v. State, 275 So.2d 284 (Fla. 3rd DCA 1973); Davis v. State, 319 So.2d 611 (Fla. 3rd DCA 1975); Collins v. State, supra.

Further, the testimony of Petitioner's experts was rebutted by Dr. Cheshire, who testified that Petitioner knew right from wrong at the time of the offense (R.2193). After evaluating the reports and recommendations of Petitioner's

experts, Dr. Cheshire cogently observed that the experts who were assisting Petitioner prior to the murder changed their opinions concerning Petitioner's mental state change after the murder. In their reports and recommendation a couple of months prior to the murder, these experts were of the opinion that Petitioner was almost normal enough to resume his medical practice (R.2183). In addition, it should be noted that Petitioner's experts stated that Petitioner's IQ only dropped to 108 as a result of Petitioner's suicidal attempt (R.1931), which is a high enough IQ to get a person through law school (R.1931).

Florida does not recognize the irresistible impulse theory of insanity. Wheeler v. State, 344 So.2d 244,246 (Fla. 1977) Therefore, contrary to Petitioner's contention, Dr. Cheshire's statement that Petitioner had an irresistible impulse and followed it did not create a reasonable hypothesis of innocence. Dr. Cheshire testified that Petitioner's mental infirmy did not interfere with Petitioner's ability to understand and reason accurately (R.2201). In Dr. Cheshire's opinion, Petitioner was legally sane at the time of the offense because Petitioner could distinguish between right and wrong, and Petitioner knew what he was doing (R.2202).

When all conflicts in the evidence are resolved in favor of the state, the evidence presented by the state was legally sufficient for the jury to find Petitioner guilty of first degree premeditated murder Downer v. State, 375 So.2d 840

(Fla. 1979); Garmise v. State, 311 So.2d 747 (Fla. 3rd DCA 1975). This evidence was sufficient for the jury to reasonably conclude that the evidence excluded every reasonable hypothesis of innocence. Green v. State, 408 So.2d 1080 (Fla. 4th DCA 1982). Therefore, the trial court did not err in denying Petitioner's motion to reduce first degree murder to second degree murder. Accordingly, this Court should affirm Petitioner's conviction.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, this Honorable Court should answer the certified question in the negative and should uphold the lower courts affirmance of Petitioner's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to, DOUGLAS N. DUNCAN, ESQUIRE, Foley, Colton & Duncan, 406 North Dixie Highway, West Palm Beach, Florida 33401, this 21st day of August, 1987.

Eddie J. Bell

OF COUNSEL