IN THE SUPREME COURT OF FLORIDA

MANUEL COLINA,

Appellant,

v.

CASE NO. 71,124

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Manuel Colina was the defendant in the trial court and will be referred to herein as Colina or Appellant. The State of Florida was the prosecution below and will be referred to herein as the State or Appellee. The record on appeal consists of fifteen (15) volumes consecutively paginated from (1) to (2224). References to the record will be designated by the symbol "R" followed by the appropriate page number in parentheses. A copy of the sentencing order is included as Appellee's Appendix "A". A copy of the Legislative Staff Analysis for the 1979 amendment to Section 921.141 is included as Appellee's Appendix "B".

STATEMENT OF THE CASE AND FACTS

During cross examination of Felix Castro, Colina's trial counsel, the following exchanges occurred:

Q. And when you went out there, where were those two people?

A. They were still in the back, I think.

Q. You don't know, do you?

A. I never went back there again.

Q. You didn't care, did you?

A. I was scared.

Q. You were scared?

A. That's right.

* * *

Q. Did you ever go b ck to check on welfar of thos two people?

A. No sir.

Q. Why not?

A. Because I was scared to go back there.

Q. You knew what the situation was, didn't you?

A. No, I didn't know it until I found out.

Q. Did you contact the police?

A. No sir, I was scared.

Q. Did you notify anybody to check on their welfare?

A. I was scared about my family, that's why.

Q. Why were you scared for your family?

A. I know the man, how he is, if he did that, he would have done something else.

Q. Yeah?

A. That's why I went all the way with him.

* * *

Q. And now you are saying you were afraid of him; is that correct?

A. Yes, I was.

Q. You were?

(R 1306-1308)

On re-direct examination, the prosecutor asked Castro the following questions:

Q. You indicate that you're afraid of him.

A. Yes.

Q. Manuel Colina?

A. nods head . . .

Q. Well, could that fear be because of what you saw him do on the 18th of December?

A. Not only that, you know, what he told me before that, too. What I seen that day.

Q. What was your basis for your fear of Manuel Colina, now that that's become relevant?

A. Because he had told me, you know, he had hurt other people before that, you know, and he don't like nobody to - -

MR. **BUTLER:** Your Honor, I object to this line of questioning. I think were getting into an entirely different area which is going to cause some problems.

THE COURT: May be. But I think the door is open. And the objection, if it's based on the fact that it's not brought out on

cross examination, if that's what I understand the legal basis to be.

MR. BUTLER: Yes, sir.

THE COURT: No, sir, it's overruled.

(R 1313-1314).

On further cross examination, the prosecutor asked Castro:

Q. You indicated that you were afraid of Manuel Colina; right?

A. Yes, I was.

Q. And you had basis other than the fact that just what you had seen him do?

A. Yes.

Q. Where was he from?

A. He's from Cuba.

Q. And what had he told you that made you so afraid of him?

A. Well, he told me that he was one - - like - - he was in like a Navy base down there, and they used - - he used to do a lot of things down there, you know, like buy girls with handkerchiefs. When he got over here, he was in a riot, a big riot with a couple of people, and they killed white - - they used to like to kill white people.

Q. Did you believe him?

MR. BUTLER: Your Honor, I object.

A. Well, that day I believed him, *yes*, I believed him.

MR. BUTLER: Your Honor, I object and move for a mistrial.

(R 1314-1315).

The Court then recessed the jury and heard argument of counsel regarding the motion for mistrial. (R 1316-1318). The Court ruled that the witnesses' fear of the defendant was inquired into at length and several times on cross examination and that the basis for his fear of the defendant was relevant and proper on re-direct. (R 1317).

SUMMARY OF ARGUMENT

I.

The admission of evidence on cross-examination or re-direct after one party has opened the door to such evidence is not error. The trial court did not abuse its discretion in allowing the admission of the State's witness' explanation for why he was afraid of the defendant. The alleged improper argument of the prosecutor labeling Colina as a marielito was not objected to and is not fundamental error.

II.

The admission of evidence of other bad acts of the Appellant were only after the defense opened the door or were on rebuttal to impeach testimony of the Appellant. Moreover, evidence of bad character in the penalty phase of a death case is highly relevant and admissible to assist the jury into coming to a proper recommendation as to sentencing.

111.

The trial court did not err in sustaining the objection of the prosecutor regarding hearsay objections to verbal remarks made by other persons which were offered to prove the truth of the matter asserted. The *trial* court likewise did not err in admitting statements of Colina made to the State's witness as these were admissions of a party against intcrest.

IV.

The State agrees that the admission of the t-shirt worn by Colina during the penalty phase was irrelevant to any question presented during a sentencing proceeding and was improperly admitted. The admission of this evidence was harmless error under the test set forth by this Court in similar cases. Defense counsel failed to raise the specific objection that lack of remorse is not admissible to establish heinous, atrocious and cruel.

V.

The trial court did not err in concluding that the murders were heinous, atrocious and cruel. The jury heard evidence and the judge considered evidence that the victims were still alive at the time their bodies were drug to their final resting place and prior to the vicious beating with a tire iron. There was evidence which could be construed as victim impact evidence but there was no timely objection and Appellant failed to preserve this issue for appeal.

VI.

The evidence of heightened premeditation is overwhelming. The manner and mode of killing combined with statements of Colina during the killing and his decision to tie the bodies up even if they were dead evinces a cold, calculated and premeditated deliberate killing.

VII.

The trial court considered the victims familiarity with the Appellant and his own statements that he had to kill them to

eliminate witnesses in concluding that there was strong proof that the sole or dominant motive for the killing was to avoid arrest. Furthermore, hiding the bodies was also done to avoid arrest and succeeded for over two weeks.

ARGUMENT

I

THE JUDGMENT AND SENTENCE WERE NOT FUNDAMENTALLY TAINTED BY AN IMPROPER APPEAL TO ETHNIC PREJUDICE OF THE JURY

Colina argues that the prosecutor introduced testimony and made certain comments for purposes of inflaming the ethnic prejudice of the jury. Colina cites the re-direct examination of State witness Felix Castro as one example of prosecutorial misconduct. The record reflects that on cross examination, defense counsel's inquiry into Castro's fear of the defendant opened the door for the State's introduction of testimony regarding Castro's uncooperative behavior due to his fear of Colina. The trial court permitted the prosecutor to elicit the testimony because the defense had opened the door. See **Thompkins v. State,** 502 So.2d 415, 419 (Fla. 1986); **Johnston** v. **State,** 497 So.2d 863, 869 (Fla. 1986).

Colina also argues that the prosecutor referred to him as a "Marielito." The record reflects that Colina testified that he was a marielito in that he came to this country in the 1980 boat-lift. The prosecutor's comment was a fair comment on the evidence. See **Blanco** v. **State,** 452 So.2d 520 (Fla. 1984). Colina also notes that the trial judge used the term marielito in sentencing Colina. However, the sentencing order further states that the defendant testified that he was not a prisoner or a habitual criminal in the Cuban prison system and the State did not produce any record or copy of judgments from Cuba and therefore the Court "cannot, and will not, consider any Cuban

criminal activity, beyond that to which the defendant admits himself". (R 2218). The trial court's sentencing order specifically states that Colina's Cuban prison record was not used against him except to the extent in which he admitted it existed. The State agrees that racial prejudice has no place in a system of justice and is at a loss to understand how racial prejudice played any role in the guilt or sentencing proceedings in this case. Especially, in light of the fact that the allegedly improper comments were not objected to at the trial by trial counsel. Given the fact that the victims were both Hispanic and the State's main witness was Hispanic and Colina himself is Hispanic, it is hardly unlikely that racial prejudice of the sort condemned in **Robinson** v. **State, 520** So.2d 1 (Fla. 1988) and **Turner** v. **Murray,** 476 U.S. **1** (1986), was involved here. The improper appeal to racial prejudice involves the situation where the victim of the offense is the same race as the jurors. The prosecutor's use of the racial difference between the defendant and the victim could rise to fundamental error if demonstrated by the record. However, it was Colina who conceived and carried out this double murder of Mr. and Mrs. Diaz. There is no question that Manuel Colina was properly singled out by the State as one who deserved the death penalty. See **Enmund** v. **Florida,** 458 U.S. 782 (1982); Woods v. **State,** 490 So.2d **24** (Fla. 1986).

ARGUMENT

II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE PROSECUTION TO PRESENT EVIDENCE OF COLLATERAL OFFENSES AND ON CHARGE CONDUCT

Colina admits that the State properly admitted collateral prime evidence in the guilt phase of the trial either because it was proper or there was no objection. Colina renews his challenge to the re-direct examination of Felix Castro regarding Castro's knowledge of Colina's alleged prior criminal history. This evidentiary ruling was the subject of Claim I of this appeal and the court did not err in holding that defense counsel had opened the door on cross examination. (R 1316).

Colina next complains that the court also allowed an inmate from county jail to testify that Colina claimed to have had a kilo of cocaine while he was in Houston. (R 1886, 1892). This witness, Russell McClintock, was a trustee in the Putnam County Jail at the same time that Manuel Colina was stationed there prior to trial. Specifically, in March of 1987, McClintock testified that he was called to the cell of Manuel Colina because the commode was running over. Colina was upset and cussing and stated that he had "done killed two mother-fucker's and one more won't matter". (R 1710). Manuel Colina testified for the defense that McClintock was lying about making the above statement. (R 1803-1804). Colina also denied using cocaine. (R 1764). On cross examination, the prosecutor attempted to elicit an answer from Colina as to whether he had told somebody down at

the jail that he had a kilo of cocaine in Houston. The defense counsel objected on grounds that the answer would be totally irrelevant. (R 807). The trial court overruled the objection and the prosecutor asked, "do you deny that you told somebody in jail that you had a kilo of cocaine in Houston, Texas?" Colina answered, "it's not true". (R 1811). On rebuttal, the prosecutor asked Russell McClintock, "do you recall ever having a conversation with Manuel Colina where he spoke of cocaine and money in Houston, Texas?" McClintock answered, "he said the motel he was staying in, he had $700.00 underneath the mattress and a kilo of cocaine in an air-conditioner vent." (R 1886). The information was elicited to contradict and rebut Colina's testimony that he only had $180.00 when he arrived in Houston and that he did not use cocaine. Colina and Castro's credibility were directly an issue as each named the other as the perpetrator and more violent of the two individuals. This cross examination and rebuttal was designed to impeach Colina's credibility. The trial court should be allowed wide latitude in rulings on the admissibility of testimony. Muehleman v. **State**, 503 So.2d 310 (Fla. 1987).

Colina complains about testimony of Detective Chris Hord and the cross examination of Colina by the prosecutor. This Court has already held that both the State and the defendant can present evidence during the penalty phase of a capital case that might have been barred at trial because a "narrow interpretation of the rules of evidence is not to be enforced". **State** v. Dixon, 283 So.2d 1, 7 (Fla. 1973). The only limitation on admissibility

is relevancy. **Muehleman** v. **State,** 503 So.2d at 315. The admission of evidence is within the trial court's wide discretion. King v. **State, 514** So.2d 354 (Fla. 1987). The evidence Colina complains about all indicates he has a bad character and compensity to commit crimes which is unacceptable in the guilt phase under **Williams** v. **State,** 110 So.2d 654 (Fla. 1959), if offered to convict a defendant. However, the penalty proceeding is a more wide open procedure designed to ventilate the defendant's character and to allow the jury to have all the facts necessary for a rational evaluation of the defendant's character and the circumstances of the crime in order to come to a just conclusion regarding sentencing. There was no harm in informing the jury that Colina had a criminal history in Cuba as he did so on direct examination. In **Keen** v. **State,** 504 So.2d 396 (Fla. 1987), the prosecutor elicited evidence of a collateral crime after having been informed per a court ruling that the evidence would be inadmissible.

ARGUMENT

III

THE TRIAL COURT DID NOT ERR IN EXCLUDING FROM EVIDENCE ALL STATEMENTS OF FELIX CASTRO OFFERED BY THE DEFENSE

The State agrees that a major aspect of the trial was a swearing contest between Colina and Felix Castro. Colina complains that Felix Castro quoted him extensively during his testimony but the trial court prohibited Colina from telling the jury what Castro said to him. Colina agrees that his admissions against interest were admissible and the trial court did not err in allowing Castro to testify. Colina argues that the precluded hearsay was not offered to prove anything truthful concerning the Diazes but rather to demonstrate that Castro knew who they were. In other words, the statements were offered to prove the truth of the matter asserted i.e., Castro knew the Diazes. There is a distinction between admissions against interest of a party i.e., Colina's statements to Castro and Castro's alleged statements to Colina which are irrelevant if not true. Colina could have asked these questions on cross examination of Castro but did not.

ARGUMENT

IV

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT EVIDENCE DURING THE PENALTY PHASE OF NON-STATUTORY MITIGATING CIRCUMSTANCES

The State agrees that the t-shirt worn by Colina on the date he was arrested was irrelevant and inadmissible in the penalty phase of this trial. The State offered the t-shirt in conjunction with testimony by an investigator that Colina lacked remorse for the killings. This Court's rulings in **Pope** v. **State,** 441 So.2d 1073 (Fla. 1983), leave no doubt that the time of this trial in July of 1987, proof of a lack of remorse was inadmissible to establish heinous, atrocious or cruel as an aggravating factor. The State will argue that the admission of the t-shirt and the investigator's testimony were harmless error and attributable, in part, to defense counsel's failure to make a specific objection as required by law. See Steinhorst v. **State,** 412 So.2d 332 (Fla. 1982).

The trial court heard argument of counsel and admitted the t-shirt and testimony based on his reading of 921.141, Florida Statutes. The trial court was without the guiding hand of defense counsel's specific objection that this Court does not permit the admission or proof of evidence establishing lack of remorse. **Pope** v. **State, supra.** However, regardless of how and why this evidence came before the jury, it is harmless given its questionable relevance which is discernible by any layperson of normal intelligence and experience. There may be some scenario

where the clothes worn by a criminal defendant twenty-six days after a crime could be indicative of his state of mind on the night that the crime was committed but not this case.

In light of the overwhelming weight of aggravation and lack of mitigation presented and the trial court's non-consideration of this evidence as evidenced by the sentencing order, any error in the admission of this evidence is harmless under the test set forth in Pope, supra. The trial court found four aggravating circumstances and no mitigation proved to any sufficient degree to outweigh the mitigating circumstances. (R 389-401). Therefore, there was no rational basis upon which a jury could recommend life and if they had, the trial court would have been proper in overriding their recommendation. Moreover, there was evidence of heinous, atrocious or cruel established in the facts of the murder in the testimony of Felix Castro and the medical examiners. This evidence was cumulative, irrelevant, inadmissible, but of such dubious weight to have had little effect upon a jury and no effect on the trial court.

ARGUMENT

V

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

C lina argues that the victims died or lost consciousness quickly and there is no evidence of the torture or contemplation of death as required by this Court's construction of Section 921.141(5)(h), Florida Statutes (1979), i.e., the heinous, atrocious or cruel aggravating factor. The State agrees that binding the arms and legs of an already dead victim and eventual mutilation by animals is insufficient to prove this aggravating factor. Furthermore, the excellent character and community respect of the victims is legally insufficient basis for a finding of heinous, atrocious or cruel.

However, there is evidence that the victims consciously suffered to the extent necessary to prove beyond a reasonable doubt that the standard set forth in **State** v. Dixon, 283 So.2d 1 (Fla. 1973), was satisfied. Felix Castro, an eyewitness to the murders, testified that after he hit Mr. Diaz, "the old man started getting up again, he hit him again". (R 1238). Castro testified that Colina hit the old man with the tire iron before they dragged him back to the woods. (R 1239). After Colina ordered Castro to go in the house to get a knife to cut some clothesline rope in order to tie up the victims, Castro said he heard Colina hit them again. Colina told Castro, "I had to knock them out again". (R 1244). Castro said that when he came back with the rope, the old lady started waking up. Mrs. Diaz was

making noise like moaning sounds. (R 1245). Colina then hit her again with the tire iron in the back of the head. Colina then said, I should have killed this bitch, you know, while he was in the kitchen because the old lady gave him a hard time. (R 1246). Castro's testimony was sufficient to establish Colina's admission that Mrs. Diaz was aware the crime was occurring. In **Mason** v. **State,** 435 So.2d 374 (Fla. 1983), this Court affirmed a finding of heinous, atrocious and cruel where the victim was stabbed in her own bed and lingered from one to ten minutes before choking to death on her own blood. **Mason,** at 379. The record evidence here demonstrates that both victims did not die from the first blow and regained consciousness prior to their death. This case resembles **Chandler** v. **State,** 13 **F.L.W.** 713 (Fla. December 8, 1988), where the defendant beat an elderly couple to death with a baseball bat. There may not be any evidence that each spouse was aware of what happened to the other prior to death but there can be no doubt that each spouse was aware of their own fate prior to death The evidence of heinous, atrocious and cruel is espec ally strong as to Mrs. Diaz. She was disrobed and regained consciousness before Colina beat her and bound and tied her up.

Moreover, the trial court's findings regarding the character of the victims in how this rendered the crime heinous, atrocious and cruel, may not be relevant to this aggravating factor but is important in the finding of two other factors i.e., cold, calculated and premeditated and witness elimination. The trial court found that the defendant gained knowledge of the victims home and resources because their good character and

generosity led them to befriending Manuel Colina. The unsuspecting nature allowed Colina to deceive them with a ruse in order to commit these brutal murders. Colina's apparent delight in the activity and his reference to Mrs. Diaz as a bitch, are evidence of his state of mind which is a factor in determining cold, calculated and premeditated.

The State would also note the lack of an objection to the testimony regarding the victims character by Captain Miller. (R 2146). This case was tried two weeks after the United States Supreme Court rendered their 5-4 decision in Booth v. Maryland, 107 S.Ct. 2529 (1987), so trial counsel had the working tools to raise a specific objection to this testimony and did not. The lack of objection precludes raising this claim under Grossman v. State, 525 So.2d *833* (Fla. *1988).*

ARGUMENT

VI

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Colina argues that the evidence in this case does not support a conclusion that this double murder was cold, calculated and premeditated i.e., "a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to substain a conviction for first-degree murder. **Nibert v. State,** 508 So.2d **1** (Fla. 1987). The trial court's finding accurately reflects the record evidence and is consistent with the legislative intent underlying the 1979 amendment to Section 921.141(5), which expanded the list of aggravating factors in response to this Court's construction of the heinous, atrocious and cruel aggravating factor and witness elimination set forth in 921.141(5)(e)(h).

Specifically, the Legislature added §921.141(5)(i), cold, calculated and premeditated, without any pretense of moral of legal justification and in response to this Court's opinion in **Menendez** v. **State,** 368 So.2d 1278 (Fla. 1979), and **Riley** v. **State,** 366 So.2d **19** (Fla. 1978). In **Menendez,** this Court rejected a trial court's finding that an execution murder of a storekeeper was heinous, atrocious and cruel. Riley also involved an execution killing where this Court rejected a finding of heinous, atrocious and cruel. The Legislature, by a vote of 36 to 1 in the Senate and 92 to 15 in the House, amended §921.141

to convert what was a very reasonable non-statutory aggravating factor i.e., an execution style killing, into a statutory factor to fill the gap between witness elimination and the torturous, pitiless murder. A copy of the legislative history of the amendment to §921.141, Florida Statutes (1979) is included in the State's appendix.

Here, the trial court's finding in support of heinous, atrocious and cruel, in conjunction with the findings in support of cold, calculated and premeditated, reflect the scenario covered by this amendment. The State admits there is little direct evidence of the victims state of mind in the record as required in determining a victims knowledge of his impending death. However, the defendant chose a tire iron to beat the victims and strip them of their clothes, if not their dignity as living human beings, and tied them up. His composure in sitting down to a meal before attacking the woman in her kitchen betray a coldness equal to that of the murder for hire or poisoning murder. In **Chandler, supra,** this Court affirmed a finding of cold, calculated and premeditated where a defendant beat his victims, an elderly couple similar to the Diaz' with a baseball bat. In **Griffin** v. **State,** 474 So.2d 777 (Fla. 1985), this Court held that choice of weapon employed to affect death should be considered in weighing this factor. Moreover, the movement of the bodies to their final resting place while they were still alive prior to the repeated blows to the head coupled with moaning and attempts to get up, is the same kind of evidence approved in **Rose** v. **State,** 472 So.2d 1155 (Fla. 1985), in

affirming this factor. Colina's conduct during the killings, including his references to Mrs. Diaz as a bitch and ordering Castro to go in the house and get a knife in order to get rope to tie up the victims and tieing up the victims, completely rebuts any evidence of a frenzied crack killing. This was a deliberate murder. There is no evidence of frenzy and all evidence does suggest that this murder was cold, calculated and premeditated without any pretense of moral or legal justification.

ARGUMENT

VII

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDERS WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

In **Harvey** v. **State,** 529 So.2d 1083 (Fla. 1988), this Court affirmed a finding of witness elimination where the defendant was known to the victims and they were killed to avoid the victims identifying the defendant in a robbery of their home. Here, Castro testified that witness elimination was the dominant motive for the killing because Colina appreciated the fact that the Diaz' could and would identify him. (R 1235-1250).

In Card v. **State,** 453 So.2d 17 (Fla. 1984); **Hooper v. State,** 476 So.2d 1253 (Fla. 1985), and **Chandler, supra:** this Court affirmed the findings of cold, calculated and premeditated coupled with witness elimination where the record evidence leads to the inescapable conclusion that the victim or victims knew the defendant from prior dealings with him and they could have identified him. Here, the only possible motive for the murder was to eliminate witnesses given the vulnerability of the elderly couple and the isolated location of the crime scene coupled with tieing the arms and legs of the victims. The State would note that in **Harich v. Dugger,** 844 F.2d 1464 (11th Cir. 1988), the Court affirmed this Court's conclusion that witness elimination was the dominant motive for killing the victim where one of the victims had her throat slit and survived. Colina took the added steps of tieing the victim which precluded any **Harich** type

miraculous survival. Colina's actions prevented the bodies from being discovered for over two weeks. This time period allowed Colina to get to Texas in the victims' automobile and also cause the destruction of evidence by natural means which lessened available circumstantial evidence which could have supplied more evidence of heinous, atrocious and cruel.

CONCLUSION

This Court should affirm the judgment and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Jeffrey W. Monroe, Esq., 613 St. Johns Avenue, Suite 204, Palatka, Florida 32077, this 3rd day of March, 1989.

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OF COUNSEL