IN THE SUPREME COURT OF FLORIDA

MANUEL A. COLINA,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

CASE NO. 71,124

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

KEVIN R. MONAHAN, ESQUIRE
JEFFREY W. MONROE, ESQUIRE
613 St. Johns Avenue
Suite 204
Palatka, Florida 32077
(904) 325-8673

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

ARGUMENT

I

THE JUDGMENT AND SENTENCE WERE TAINTED BY IMPROPER APPEALS TO ETHNIC PREJUDICE

There is no argument from the State that an appeal to racial prejudice cannot properly be made in any phase of a criminal trial. This point is as close to a judicial absolute as we currently have in our law, As this Court stated in Robinson v. State, 520 So.2d 1,7 (Fla. 1988), "Racial prejudice has no place in our system of justice."

The State now argues that certain statements made by Felix Castro, the Co-Defendant, were properly before the court after the defense opened the door during their cross-examination. Initially, it should be noted that such an argument misses this fundamental point. If racially inflammatory evidence and argument has no place in a trial then it is immaterial that a party may have opened a door to such matters. This is a door through which the State may not pass,

The question of whether the Appellant opened the door to testimony that he liked to kill white people should be examined as well. Felix Castro, allegedly the less culpable of the two defendants, testified that he had returned to the victims' home on the night of the killings to steal their TV set which he later sold for crack cocaine (R1260-1262). Colina's counsel cross-examined him on his indifference to the fate of his victims. Castro repeatedly responded to his questions by

remarking that he was scared. This fear, such as it may have been, was not of the Defendant as Manuel Colina was nowhere near the area at the time of Castro's return. At this point, Castro was asked:

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

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

(R1307-1308).

Counsel for the Appellant then asked Castro why he was afraid for his family at which time he indicated his fear of Colina. From this record, it is clear that it was the witness for the State who raised the matter of his fear of the Appellant in response to a question which asked only if he had notified anybody about the condition of the victims. To require counsel to live with his own strategy and line of questioning is one thing, but to allow an opposing attorney to program his witnesses to raise issues spontaneously and thereby profit from this lack of responsiveness is another matter.

The State also lays at the feet of the Appllant the prosecutor's practice of calling him a "Marielito." Once again, it is said that the Defendant, himself, raised this matter and the prosecutor's comment was fair. The record, in fact, shows that the Defendant described his origins as follows:

Q. Where are you from, Mr. Colina?

I. He's from Cuba.

Q. How old are you?

I. 35 years old.

Q. When you lived in Cuba what kind of work did you do?

I. He was a merchant sailor?

Q. And when did you come to the United States?

I. May 8, 1980?

Q. And was there a -- how did you come to be in the United States?

I. Because he didn't like communist in Cuba, *so* he arrived on a ship, in a boat.

Q. Were you in the boatlift?

A. Si, senor.

(R1761-1762).

The term "Marielito" was never used once by the Appellant or his attorney. This term, from first to last, was the exclusive property of the prosecution. It is, admittedly, not a term that carries with it the instant recognition of prejudice that is common to most racial slurs nor does it have the harsh ring of such terms as "wetback" or "spic." Nonetheless, it is a term that carries with it heavy negative connotations owing only to one's ethnic origin and the timing of one's emigration.

We have probably seen the last of such overt slurs as were denounced by this Court in Huggins v. State, 176 So. 154 (Fla. 1937). Contemporary appeals to ethnic prejudice will be of the subtle variety. This will not make them any less corrupting nor require any less vigilance.

ARGUMENT

III

THE TRIAL COURT ERRED IN EXCLUDING ALL STATEMENTS OF FELIX CASTRO OFFERED BY THE DEFENDANT

Both parties to this appeal acknowledge that the trial was in large part a swearing contest between the Appellant and Felix Castro. However, this contest was made decidedly one sided by the rulings of the court which improperly limited the Appellant from testifying as to the verbal behavior of Felix Castro.

Shortly after the Defendant began to testify, he attempted to demonstrate that Felix Castro also knew the victims. This question went to the respective motives of the two defendants. To that end, Colina was asked "Did he ever say anything about Mr. and Mrs. --"(R1760)(emphasis added). This question was not permitted on hearsay grounds. It is possible, as the State seems to contend, that Colina's answer would have been that Castro said he knew them. Such an answer would constitute hearsay since that is the matter which the Defense was seeking to prove. However, that answer would not have been responsive since the question asked if Castro had said anything ABOUT the Diazes. A responsive answer may have quoted Castro as describing the retirement of Mr. Diaz, his personality, his former residence in New York; all of which would demonstrate that both Castro and Appellant knew the victims. This question called for an answer revealing Castro's knowledge of the victims, not anything

of pertinence about them.

Not only did this ruling prevent the Appellant from describing Castro's knowledge of the victims but its effects, as revealed by the record, were devastating to the defense. When the Appellant later tried to describe what Castro said to him after putting a knife to his neck, a second objection was raised and sustained on hearsay grounds although it was apparent that the defense was not trying to prove that Manuel Colina was the only witness to Castro's crime but was trying to more fully describe Castro's conduct (R1780). In State v.McPhadder, 452 So.2d 1017 (Fla. 1st DCA 1984), it was held that statements made by a witness to a defendant offered to prove that in fact discussions had taken place and that the witness took part in planning a crime were held admissable as examples of verbal acts. So too, in Decile v. State, 516 So.2d 1139 (Fla. 4th DCA 1987) did the court allow testimony as to an informant's statements to prove the nature of the verbal activity of the declarant as well as his physical activity.

Manuel Colina tried, on at least five occasions, to testify as to the words of Felix Castro during the night of the killings. He was stopped each time. The State contends that Castro's statements to Colina are irrelevant if not true. That is no more true of Castro's statements than it is of Colina's. The State's brief quotes Colina repeatedly as calling Mrs. Diaz a bitch. Is this relevant only if true? The State made great use of Colina's language. The defense should have had a

similar opportunity.

Even in those cases where the testimony might have called for hearsay, it very likely would have been admissable. The first three exceptions to the hearsay rule contained in ¶90.803(1)-(3), Florida Statutes embrace what was once known as the Res Geste exception. Under these exceptions it will be a relatively rare occurrence when a statement made during the course of a criminal event will be excluded. Statements by Felix Castro during the commission and flight from the crime could be admitted as a spontaneous statement if it related to an event he was observing at the time he made the statement. The excited utterance exception would allow inclusion of his statements made while under the stress or excitement of the events of that night, Zeigler v. State, 402 So.2d 365 (Fla. 1981). Statements in which Castro described how he felt and his state of mind at the time he spoke would also be allowed as describing his then existing mental, emotional or physical condition. Peede v. State, 474 So.2d 808 (Fla. 1985).

At a very early stage of the Appellant's testimony the ground rules were established that the hearsay rule would embrace all out of court statements, not merely those embraced by the definition of hearsay. The testimony actually excluded by these early rulings was not of an essential nature but the establishment of the expanded hearsay rule preculuded the Appellant from effectively relating his account of that night's events.

ARGUMENT

IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE DURING THE PENALTY PHASE OF NON STATUTORY AGGRAVATING CIRCUMSTANCES

The State does not dispute that the admission of a t-shirt worn weeks after the killing by the Appellant, coupled with testimony concerning a lack of remorse on his part were error. It is argued, however, that such error was harmless due to the obvious irrelevance of the evidence and the overwhelming weight of aggravation in the case.

The trial court found that four of the aggravating circumstances set out in **921.141,** Florida Statutes, were applicable to the Defendant's crime. The Appellant has attacked three of those four findings. To constitute harmless error it must be said that the error, beyond a reasonable doubt, did not effect the outcome of the case, Chapman v. California, **386** U.S. **18, 87** S.Ct. **824 (1967);** State v. Digiulio, **491** So.2d **1129** (Fla. **1986).**

This question is better viewed in light of how the State fares with respect to the remainder of the challenged findings of statutory aggravation. State v. Burch, **476** So.2d **663** (Fla. **1985).**

ARGUMENT

V

THE COURT ERRED IN FINDING THAT THE MURDERS WERE ESPECIALLY HEINOUS ATROCIOUS AND CRUEL

The State is required to prove any aggravating circumstance beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). It is further required that:

> [I]f the court imposes a sentence of death it shall set forth in writing its findings upon which the sentence is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of court shall be supported by specific written findings of fact based upon the circumstances set out in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings.

¶ 921.141 (3), Florida Statutes.

In this case, the court found that the murders were especially heinous, atrocious and cruel and set forth its findings as required by the statute. The trial court enumerated the following findings of fact in support of this aggravating factor:

1) The victims were of good character

2) The victims had given aid to the Defendant

3) The deaths were effected by repeated blows to the head and face

4) The Defendant apparently enjoyed the killing

5) The Defendant stripped the bodies and left them in a wooded area with their hands and feet tied

Not one of the above listed factors is an appropriate consideration for a finding of heinous atrocious and cruel as described in previous decisions of this Court. Squires v. State, 450 So.2d 208 (Fla. 1984); Stano v. State, 460 So.2d 890 (Fla. 1984).

The State now seeks to substitute findings by this Court for those of the trial court. To that end, the State argues that the evidence at trial was sufficient to conclude beyond a reasonable doubt that the victims consciously suffered, that they regained consciousness prior to their death and that they were aware of their own fate prior to death.

These conclusions are drawn almost exclusively from the highly self-serving account provided by Felix Castro. There is little or no medical evidence to corroborate this testimony and a great deal which directly contradicts it. The Diazes are said to have been aware of their fate, but no defensive wounds were found (R1540, 1550). The State contends that the two victims regained consciousness while in the wooded area, but the medical testimony indicated massive loss of blood from the head area resulting in no lividity (R1540-1541, 1550). No blood was found at the scene to indicate this loss occurred in that area (R1541) while evidence was found inside the trailer of considerable blood loss from Mrs. Diaz (R1374-1376). Castro also testified that a hose was used to wash away a trail of blood from the kitchen all the way back to the clearing (R1249).

It is highly improbable that wounds which resulted in such a loss of blood as was suffered by Mrs. Diaz could be sustained by her and still enable her to regain consciousness several minutes later. Castro also testified that Mrs. Diaz was already dead when he first observed her in the back of the trailer (R1242). It is known that the tying of the bodies occurred in the wooded area behind the trailer. But it is also known that this action was taken after death (R1540, R1550).

The record before the Court does contain evidence in support of the State's argument that Mr. and Mrs. Diaz might not have been unconscious throughout the attacks but the evidence is, by no means, one-sided in this regard as there is substantial evidence to support the Appellant's position as well. The record reveals that the State and the trial court focused upon improper matters in reaching their conclusion that the murders were heinous, atrocious and cruel. It would be inappropriate for this Court to remedy the trial court's failure to make proper findings of fact by looking to a record which so readily supports either side's position.

ARGUMENT

VI

THE COURT EREED IN FINDING THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

The State and the Appellant are in agreement as to the appropriate character of this aggravating factor, It addresses those killings which show "a cold blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder," Nibert v. State, 508 So.2d 1 (Fla. 1987). The legislative history provided as an addendum to Appellee's Answer Brief labels these killings as "execution type."

Where the Appellant and the State disagree is in the application of this definition to the facts of the instant case. In support of their position that this killing was of the more deliberate nature contemplated by the statute, the State, first looks to the fact that a tire iron was used, citing Griffin v. State, 474 So.2d 777 (FLa. 1985) in support of the position that the choice of weapon employed may be considered in weighing this factor. But in this instance, the choice of weapon is indicative of anything but the heightened premeditation contemplated by an execution type killing. The tire iron in question was not brought to the scene by either of the Defendants and, from photographs admitted into evidence, it appears to have been part of a jack that was laying on the kitchen floor

of the trailer (R436). The Defendant apparently grabbed the first weapon within reach. The choice of weapon in this case shows no deliberate planning whatsoever.

The State next looks to the Appellant's act of stripping off the clothing of the victims and tying them up. The record, however, reveals that Mr. Diaz lost his pants when they slipped off into Felix Castro's hands while he was carrying him to the rear (R1240). There is no indication as to how Mrs. Diaz came to lose her clothes, but when coupled with the acts of tying the already lifeless bodies of these two people one is left, not with a sense that this was reasoned contemplative behavior, but that it was the product of an impaired and disturbed mind,

The State next cites the composure of Manuel Colina in sitting down to a meal in the kitchen as proof his coldness was equal to an execution style killer. Felix Castro's account of the moments leading up to the attack indicate that Colina ate a sandwich provided to him by the victims while standing in the doorway of the trailer (R739). This behavior was consistent with what Felix Castro described as Manuel Colina's original plan of knocking the couple out and tying them up in the woods (R743). Which is also consistent with what Castro described as the Appellant's initial intention of getting some money so he could leave town (R1214). The State claims that there is no evidence of frenzy in this case; only evidence of a deliberate murder, The behavior of Colina and Castro that night is not particularly easy to describe or explain. It was

in many respects bizarre, but one thing it was not was the product of considerable thought or deliberation. The attacks on Mr. and Mrs. Diaz were brutal, violent and crude; they were not calculated.

ARGUMENT

VII

THE COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST

Manuel Colina and Felix Castro went to the home of Mr. and Mrs. Diaz for the apparent purpose of robbing them to obtain money to purchase an additional supply of "crack" cocaine. It is accepted that Mr. and Mrs. Diaz knew Manuel Colina. It is disputed as to whether or not they knew Felix Castro (R1760). The trial court found that the murders were committed for the purpose of avoiding a lawful arrest.

This Court has held that to avoid lawful arrest must be the sole or dominating motive and, where the victim is not a law enforcement officer, proof of the requisite intent must be very strong. Oats v. State, 446 So.2d 90 (Fla. 1984); Riley v. State, 366 So.2d 19 (Fla. 1978). The proof must establish this fact beyond a reasonable doubt. Bates v. State, 465 So.2d 90 (Fla. 1985).

The State has cited Harvey v. State, 529 So.2d 1083 (Fla. 1988); Card v. State, 453 So.2d 17 (Fla. 1984); Hooper v. State, 476 So.2d 1253 (Fla. 1985) and Chandler v. State, 534 So.2d 701 (FLa. 1988) in support of their position that these killings were done for the purpose of avoiding a lawful arrest. Yet the evidence in these cases, typically, involved more than merely the fact that the victims knew their assailant which this Court has said is "insufficient to prove intent to kill to avoid lawful

arrest." Perry v. Sate, 522 So.2d 817, 820 (Fla. 1988). See also Caruthers v. State, 465 So.2d 496 (Fla. 1985).

Something more than knowledge of the assailant should be required. In Harvey, not only did the victim know the killers but the defendants discussed the necessity of killing him at the time to avoid later identification. In Hooper, two killings occurred but, while both victims knew the defendant, this factor was found to be supported only in the case of a child who witnessed the first killing and was chased down and killed by the defendant. In Chandler, this Court, in fact, found that the avoid or prevent arrest factor was not established beyond a reasonable doubt. Only in Card did the victim's knowledge of the defendant play a deciding role. However, the language used in that opinion is quite apart from previous holdings of this Court. As noted above, this Court has repeatedly required that the proof must demonstrate beyond a reasonable doubt that the sole or dominant motive for the killing was to avoid lawful arrest. In Card this finding was affirmed when the Court concluded that ''avoidance of lawful arrest was an element involved in this murder." It may have been an element in these murders as well, but ordinarily this factor requires more than that.

The evidence on this point is inconsistent as well. Manuel Colina expressed no motive at the time of the killings. He purportedly told Castro at a later time that he did it because they knew him (R1255). But he also told others that it was

due to a grudge he held over money (R1693-1694).

The testimony of Felix Castro should be viewed with great caution. Despite his own appetite for crack which led him to the Diaz home twice that night, he consistently placed the overwhelming blame for these crimes on Manuel Colina. We are told that the Diazes were widely known in the small Hispanic community (R390) but not by Castro, who had been a member of that community for at least four years; far longer than Manuel Colina (R1388-1390).

The testimony of Felix Castro was largely self-serving and its reliability should be seriously questioned. There is evidence in the record to support this finding but it is not sufficient to meet the very difficult burden of proof set down by this Court.

CONCLUSION

This court should reverse the judgments of guilt and sentence of death.

Respectfully submitted,

KEVIN R. MONAHAN
#348546
613 St. John's Ave,#204
Palatka, Fl. 32077.
(904) 325-8673
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ha5 been furnished by U.S. Mail to Gary L. Printy, Esq., Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 the 30th day of March, 1989.

K R Monahan

Kevin R. Monahan