IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Petitioner,

v. CASE NO. 71,287

RICHARD L. DUGGER, ETC., ET AL.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW Respondents, RICHARD L. DUGGER, et al., pursuant to this Court's order dated December 3, 1987, and file this response to the petition for writ of habeas corpus filed by Petitioner CARY M. LAMBRIX.

I.

The legal authority by which Respondents hold Petitioner is two judgments for first-degree murder and sentences of death on both counts entered on February 29, 1984, and March 22, 1984, in the Circuit Court for the Twentieth Judicial Circuit in and for Glades County, Florida. The judgments and sentences were affirmed by this Court in Lambrix v. State, 494 So.2d 1143 (Fla. 1986).

II.

Petitioner now argues his counsel on appeal was ineffective for failing to raise several issues on appeal. The Eleventh Circuit has held that a defendant is entitled to reasonably effective assistance of counsel on appeal. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984) and Mylar v. Alabama, 671 F.2d 1300 (11th Cir. 1982). To be effective an appellate counsel need not brief issues reasonably considered to be without merit. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981). Counsel cannot be held ineffective for failing to raise issues not preserved for appeal and which are not fundamental error. See, McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).

The Supreme Court has indicated there is no constitutional right to an appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct.

3308, 77 L.Ed.2d 987 (1983). However, when a state undertakes to provide a system of appellate review, that system must comport with due process requirements. This includes the requirement of effective counsel on the first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The requirement of effective counsel does not, however, mean counsel must raise every nonfrivolous issue. Jones v. Barnes, supra.

This Court in Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) held the criteria for proving ineffective assistance of appellate counsel was the same standard as used for ineffectiveness of trial counsel. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. See, Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

III.

On direct appeal, appellate counsel raised the following issues:

ISSUE I

THE TRIAL COURT ERRED IN UTILIZING A JURY SELECTION PROCESS WHICH DENIED THE DEFENDANT A TRIAL BY A JURY REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY AND WHICH CREATED A JURY THAT WAS CONVICTION PRONE.

ISSUE II

THE TRIAL COURT ERRED IN EXCUSING JUROR MARY HILL FOR CAUSE IN VIOLATION OF THE WITHERSPOON AND CHANDLER STANDARDS.

ISSUE III

THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, FRANCES SMITH, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

ISSUE IV

THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF A KEY WITNESS, SPECIAL AGENT CONNIE SMITH.

ISSUE V

THE TRIAL COURT ERRED IN PERMITTING A MEDICAL EXAMINER, OVER DEFENDANT'S OBJECTION, TO TESTIFY AS AN EXPERT WITNESS CONCERNING A FACTUAL ISSUE RELATING TO BOTH DECEASED WHERE INSUFFICIENT PREDICATE WAS LAID, AND SPECIFICALLY UNDER SUCH CIRCUMSTANCES TO EXCLUDE "ACCIDENT" AS A CAUSE OF THE DEATH OF ALECIA DAWN BRYANT.

IV

Petitioner is now saying there were still other issues appellate counsel should have raised.

A. Petitioner first claims appellate counsel was ineffective for failing to raise on appeal the court's denial of his motions for a change of venue and/or voir dire. A careful reading and review of the jury selection proceeding demonstrates the parties were able to select a fair and impartial jury. Thus, denial of these motions was not error; petitioner could not have prevailed on direct appeal had the issues been briefed.

Motions for individual voir dire and change of venue are addressed to the sound discretion of the trial judge. Davis v. State, 461 So.2d 67 (Fla. 1984). In order to reverse such a determination, the petitioner must show an abuse of discretion. Petitioner has failed to, and cannot, demonstrate abuse.

The purpose of voir dire examination is to secure for the defendant a fair and impartial jury. The defendant has not shown that his jury was not impartial. While several prospective jurors were excused because they had formed an opinion on the question of guilt or innocence, the great majority of those questioned knew very little or nothing about the case. (R 1475, 1476, 1522, 1523, 1545 - 1546, 1581 - 1582, 1666, 1683, 1739 - 1740) The transcript of the jury selection proceeding further shows there was relative ease in picking the jury. These factors support the trial court's denial of the motions for change of venue and individual voir dire. Stone v. State, 378 So.2d 765 (Fla. 1979).

The mere fact two persons had some knowledge of a prior trial does not change this ruling. No details were gone into at either instance. Neither the court, defense counsel nor prosecutor made this a feature of their question or arguments. The cases cited by petitioner are not applicable to this case since the information received by jurors in those cases went far beyond the mere mention of some other trial, for example, in United States v. Williams, 568 F.2d 464 (5th Cir. 1978) two jurors heard and saw a local television newscast on the third day of trial. The news show went into the details of a prior conviction and why it was reversed for a new trial. Likewise, in Weber v. State, 501 So.2d 1379 (Fla. 3rd DCA 1987), the jury, during deliberations, sent a note to the judge indicating they had heard the day before the details of the defendant's prior trial, conviction, sentence and appeal reversal.

Some prior knowledge of the case by jurors does not mean they cannot be fair and impartial. Weber v. State, supra. The question to be answered is to what degree any prior knowledge prejudicially influences the jury. The jury selection here demonstrates each juror was extensively questioned and demonstrated himself/herself to be a fair and impartial juror.

B. Petitioner next argues counsel on appeal should have raised on appeal the excusal of two prospective jurors outside of the defendant. The record reflects there was no objection by trial counsel to the questioning and excusal of these persons. (R 1486 - 1487) Therefore, this issue had not been preserved for appellate review. Appellate counsel cannot be held ineffective for failure to raise an issue which was not preserved. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).

The prospective jurors were a man and his wife. The man, Mr. Clemons, had been in jail with the defendant and discussed the case. (R 1486) Mr. Clemons stated he had talked about what he learned with his wife. Defense counsel agreed the Clemonses should be excused and indicated petitioner had told him he had no objection to their excusal. (R 1486 - 1487)

C. Petitioner also argues appellate counsel should have raised on appeal the excusal of prospective jurors where there appears no reason for the excusal. Again, the record will reflect no objection or challenge in the trial court. The issue was not properly preserved for appeal. McCrae v. Wainwright, supra.

D. Petitioner further contends appellate counsel was ineffective for failing to challenge the sufficiency of the evidence in this case. Petitioner asserts there was insufficient evidence to establish premeditation for either of the murders and insufficient evidence to establish that Alecia Bryant died as a result of criminal wrongdoing.

As this Court noted in Hardwick v. Wainwright, 496 So.2d 796 (Fla. 1986), in death penalty cases, this Court is required to review independently each conviction and sentence to ensure that they are supported by sufficient evidence. Sub judice, this Court, after reciting the essential facts of the case stated "[a]dditional evidence exists to support a finding that Lambrix committed the two murders in question." Lambrix, 494 So.2d at 1145. Thus, it is apparent that this Court reviewed the evidence and determined it was sufficient to support the convictions.

Furthermore, counsel was not ineffective for failing to raise this issue. This Court has recognized counsel is not ineffective for failing to raise every nonfrivolous issue. Hardwick, 496 So.2d at 798. See also, Jones v. Barnes, supra. In reviewing the sufficiency of the evidence in a case, an appellate court must determine whether there was substantial, competent evidence to support a verdict of guilty. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Even in a case based on circumstantial evidence, the question whether the evidence failed to exclude all reasonable hypotheses of innocence is for the jury to determine, and that decision will not be reversed where there is substantial, competent evidence to support it. Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied, 469 U.S. 920, 105 S.Ct. 303,

83 L.Ed.2d 237 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

The evidence against Petitioner, cited in this Court's prior opinion was overwhelming. Lambrix v. State, supra. There was ample evidence of premeditation. Petitioner invited the victims to his home for dinner and, during the preparation of dinner, asked Clarence Moore to go outside with him. (R 2204 - 2205) Petitioner returned alone 20 minutes later and asked Alecia Bryant to go outside with him. (R 2207) Petitioner would not let Frances Smith accompany them. (R 2209) When Petitioner returned 45 minutes later, he was alone and covered with blood. (R 2209 - 2210) He told Smith he had killed Moore and Bryant. (R 2210, 2213) After cleaning up and eating dinner, Petitioner forced Smith to help him bury the bodies. (R 2214) Prior to burying Moore, Petitioner went through Moore's pockets and took a gold necklace from him. (R 2221) After the burial, Petitioner took Moore's car. (R 2231)

There was also substantial, competent evidence that Bryant died as a result of criminal wrongdoing. Smith testified that when she saw Bryant, Bryant was lying face down in a pond and her pants were partially down. (R 2225) Bryant's finger was cut. (R 2225) The medical examiner testified Bryant's ear was also cut. (R 2046) The medical examiner could observe no further trauma due to the advanced State of decomposition. (R 2047) In his opinion, Bryant "was strangled . . . probably manually." This testimony clearly established Bryant's death was the result of a criminal act.

E. Petitioner also contends appellate counsel should have urged the admission of a letter alleged to have been written by Petitioner to Frances Smith was reversible error. Petitioner acknowledges the standard for reviewing the admission of evidence is whether the trial court abused its discretion. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); Mikenas v. State, 376 So2d 606 (Fla. 1978).

The trial court did not abuse its discretion in admitting the evidence. The letter was highly relevant, and its relevance clearly outweighed any prejudice that might have resulted due to the markings on the letter. Sergeant Drake's testimony relating to this exhibit was solely for the purpose of establishing the chain of custody of the letter. (R 2126 - 2129, 2136 - 2138) Although Drake stated he put the purplish chemical on the letter to test it for fingerprints, Drake never testified or even implied that Appellant's fingerprints were found on the letter. Surely, if the State had such evidence, the prosecutor would have made that clear to the jury. As to the other obliterations, the court adequately instructed the jury that the obliterations were made by the court and had no bearing on this case.

F. In Issues VI and VII of the petition, Petitioner contends it was error for the trial court to refuse defense counsel's requested instructions on the defenses of intoxication and the justifiable use of force. Where there is any evidence at trial which supports a defendant's theory of defense, the defendant is entitled to have the jury instructed on the law applicable to his or her theory of defense when so requested. Broxson v. State, 12 F.L.W. 999 (Fla. Apr. 10, 1987); Bryant v. State, 412 So.2d 347 (Fla. 1982). It follows that where no evidence has been adduced at trial to support a theory of defense jury instructions to that effect need not be given. Broxson, 12 F.L.W. at 1000.

The trial judge correctly ruled no evidence had been presented which would support a defense of intoxication or justifiable use of force. Although there was testimony that Petitioner had been drinking on the evening of the murders, there was no testimony which would support a theory that Petitioner was too intoxicated to form the necessary intent to commit the murders. This Court has held that jury instructions on intoxication are not required in every case in which there is evidence that the defendant consumed alcoholic beverages prior to the commission of the offense. Gardner v. State, 480 So.2d 91 (Fla. 1985); Jacobs

v. State, 396 So.2d 1113 (Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). Frances Smith, who was with Petitioner that evening testified that Petitioner was not intoxicated. (R 2202, 2300) Ron Council, who saw them earlier in the evening testified Petitioner was drinking but did not say he was intoxicated. (R 2164) There was no other evidence presented relevant to an intoxication defense. The record is totally devoid of any evidence to support a defense of justifiable use of force.

The trial court was clearly correct in refusing the requested instructions on intoxication and justifiable use of force. Appellate counsel cannot be considered ineffective for failing to raise these issues.

G. The next issue Petitioner contends should have been raised on direct appeal concerns the testimony of Polly Moore, a secretary at the Lakeland Community Correctional Center. Petitioner asserts that Moore's reference to his escape from that institution was improper because he had not been convicted of escape.

Evidence of collateral crimes, wrongs or acts is admissible if it is relevant to prove any factual issue. However, if the sole relevance of that evidence is to prove the bad character or criminal tendencies of the accused, it is inadmissible. Williams v. State, 110 So.2d at 663; Styles v. State, 384 So.2d 703 (Fla. 2d DCA 1980). **Section 90.404(2)(a)** provides that such evidence 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 ... ." (emphasis added).

Polly Moore was called during sentencing hearing for the purposes of establishing the aggravating circumstance that the capital felony was committed by a person under sentence of imprisonment, **§921.141(5)(a), Fla. Stat. (1985).** Moore's testimony in this regard was as follows:

Q. [Prosecutor] Do those records indicate when he first entered the correctional system?

A. [Moore] Yes.

Q. When was that?

A. July 1st, 1982.

Q. And was that a sentence of imprisonment?

A. Yes, it was.

Q. For what term of years?

A. Two years.

Q. Do you know what circuit court, what court that was from?

A. It was from Hillsborough County.

Q. Okay. Do you recall when or do you know from the records when he first came to your particular institution?

A. November 1st, 1982.

Q. Okay. Do you recall when he departed your institution?

A. December 23rd, 1982.

Q. Was this departure or leaving of the institution through normal channels?

A. No, it was not.

Q. Through what means was it as the records reflect?

A. Escape.

Q. Ma'am, the records reflect whether he was under a term of imprisonment on the date of February 6, 1983? Would he have still been under a term of imprisonment?

A. Yes, he would have.

(R 2582 - 2583)

Moore's reference to Petitioner's escape was clearly relevant to proving that Petitioner was under sentence of imprisonment at the time he committed the murders and was not used to show bad character or criminal tendencies. Accordingly, there was no error in the admission of this testimony.

H. Petitioner asserts the trial court erred in finding the aggravating circumstance that Petitioner had previously been convicted of another capital felony, **§921.141(5)(b)**, because the

prosecutor told the jury this was not a factor they should consider. The prosecutor's statement that this was not an aggravating circumstance in this case was erroneous. Petitioner was convicted of two murders. It is well-settled that a sentencing court may consider convictions for violent felonies entered contemporaneously with a defendant's conviction for a capital felony. King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979) (remanded on other grounds).

The fact that the prosecutor told the jury not to consider this factor does not invalidate it as an aggravating circumstance. If anything, this statement benefitted Petitioner because it was one less aggravating circumstance that the jury considered. However, the fact remains that this was an aggravating circumstance in this case, and the sentencing court properly considered it.

This issue is patently without merit. In light of the clear case law against Petitioner, appellate counsel cannot be considered ineffective for failing to raise this on direct appeal.

I. In the concluding two paragraphs of this Court's opinion on direct appeal, the aggravating circumstances found by the trial court were discussed. It was agreed, after careful review, that the aggravating circumstances, which included murder committed for pecuniary gain and murder committed in a cold, calculated and premeditated manner, were properly found and supported by the record. The pecuniary gain aspect was found to have applied to the murder of Moore only since petitioner stole Moore's automobile. See Lambrix v. State, 494 So.2d at 1148.

The record supports the fact that petitioner took a gold necklace and the car from the male victim, pecuniary gain. Thus, it is clear petitioner would not have prevailed as a challenge to that aggravating circumstance.

Additionally, the facts also demonstrate both murders were committed in a cold, calculated and premeditated manner. After meeting the two victims in a bar, petitioner invited them to his

trailer for a spaghetti dinner. While petitioner's girlfriend was preparing the meal, petitioner lured the male victim, Moore, outside. Petitioner returned after twenty minutes and then lured Aleisha Bryant outside. He thereafter returned to the trailer alone covered with blood. Lambrix told his girlfriend he had killed Moore and Bryant, then proceeded to eat his spaghetti dinner. Compare, Way v. State, 496 So.2d 126, 129 (Fla. 1986).

With these facts, a challenge on appeal to the finding of cold, calculated would not have been successful. Appellate counsel's failure to raise the issue was not outside the wide range of competency expected of counsel. The decision not to raise such an issue was reasonable under the circumstances. The trial court found five (5) aggravating circumstances in the death of Moore and four (4) in the death of Bryant. No mitigating circumstances were found. Even if one or two of the aggravating circumstances was improper, death is still the appropriate sentence. See, Armstrong v. State, 429 So.2d 287 (Fla. 1983) and Antone v. State, 382 So.2d 1205 (Fla. 1980)

J. Petitioner next argues appellate counsel was ineffective for failing to file a motion for rehearing after this Court rendered its opinion. Petitioner reasons by failing to do so he has been barred from presenting his claims to the federal court. Such an assertion is totally false. The exhaustion requirement of **28 U.S.C. §2254** means the state courts must be given at least one opportunity via direct appeal or collateral review to address the petitioner's claims. Conley v. White, 470 F.Supp 1 (D.C. Mo. 1979). There is no rule or case law requiring a motion to rehear to preserve the claims.

Motions for rehearing are provided for in **Rule 9.330, Florida Rules of Appellate Procedure.** Such motions are not required in every case. Rehearing motions should only be filed where the court has overlooked or misapprehended some point of law or fact. These motions are not a vehicle to simply reargue the brief or express displeasure with the court's judgment. Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983).

CONCLUSION

Based on the foregoing arguments and authorities, Respondent submits appellate counsel was not ineffective for failing to raise the above stated issues on direct appeal.

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. Regular Mail to Gary Michael Lambrix, P. O. Box 747 (482053), Starke, Florida 32091, this 17th day of December, 1987.

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