IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY HALIBURTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. 73,974

BRIEF OF APPELLANT

An Appeal from the Fifteenth Judicial
Circuit Court for Palm Beach County

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PRELIMINARY STATEMENT

Appellant was the Defendant in the Circuit Court in and for Palm Beach County, Florida. Appellee was the prosecution. The parties will be referred to as they appear before this Court. Jurisdiction lies in this Court pursuant to Article V, Section 3(b)(1) Fla. Const. and Rule 9.030(a)(1)(A)(i), Fla. R. App. Pr. because Appellant was sentenced to death (R1061).

The symbol R followed by a number will refer to the record on appeal. SR signifies the supplemental record and SSR the second supplemental record. Exhibits will be referred to by number.

The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE

By information filed November 3 (R1073-1076), Appellant was charged with committing a burglary on August 9. On March 24, 1982, Appellant was indicted for murder in the first degree, also allegedly committed August 9 (R940-941). The cases were consolidated for trial.

The cases came on for trial on January 25, 1988 (SSR 1). The Court refused Appellant's request for a verdict distinguishing between felony murder and premeditated murder (R609-613). The jury found Appellant guilty as charged on each count (R708-709, 976). Motion for new trial (R925-934, 1082-1083) was denied (R934, 1122). On February 17, the jury reconvened and recommended the death sentence (R912, 1049). The Court denied (R924-5, 1122) motions to declare Florida's capital punishment statutes unconstitutional (R981-1000, 1002-1029).

On April 11, 1988, Appellant was sentenced to death for first degree murder (R1055-1059, SR25-29), and to twelve years for burglary (R1124, SR29-30).

By notice of appeal filed April 13 (R1126), Appellant seeks review of these convictions. The entire record is now before this Honorable Court for review, having been supplemented on October 31, 1988 and again on January 31, 1989.

This is the third appearance for this case. This Court reversed in 1985 (476 So.2d 192) and confirmed the reversal on remand from the United States Supreme Court (514 So.2d 1088).

STATEMENT OF THE FACTS

At about 5:00 on the afternoon of Sunday, August 9, 1981, the body of Don Bohanon was found by his estranged girlfriend, Teresa Cast (R286). She testified she tried to talk to him and kissed his cheek trying to awaken him (R288). She ran out and got a neighbor to look at him (R190, 288), even though her new boyfriend was waiting in the car (R303, 304).

Teresa had just moved out the week before after a fight (R279, 280). She said she injured her eye. She refused to get stitches as he suggested. She got mad at him because he gave up trying to convince her too soon (R279-280). She came back on the eighth to get her dog, and was bringing it back on the ninth (R190, 283). Though she moved in with her friend, Danny Lee (R302), she still had clothing at Bohanon's (R300, 301). Her bloody shirt was found in the living room (R118-119, 130-131, 299, 408-409). She said the injury under her eye (R147) was from the prior week (R326-328), but the officer said it appeared to be an open wound (R148). Teresa and Danny Lee went riding with Appellant on the 7th (R283-285). She told him she had moved out (R285). She was given her Miranda warnings during police questioning, for her own protection (R322-323).

The victim spent the night of the eighth drinking beer and smoking marijuana with his brother and some friends (R188, 202, 217, 498, 504). The party broke up about 11:30 or 12:00 PM, and he went on up to his room (R500-501).

The pathologist testified that death occurred on August 9, caused by multiple stab wounds (R233). The victim was almost certainly on the bed throughout and was probably nude (R269, 271). He received thirty-one penetrating injuries, two on the neck, twenty-two on the anterior chest, six on the arms (apparently defending himself)(R235), and one on the scrotum (R236). The assailant may also have been on the bed (R258, 264). The wounds were likely made by a weapon of convenience (R247-249). It could have been a pocket knife (R237, 247). The doctor called this a frenzied attack, not consistent with what one usually sees in a burglary (R252-243). He has never seen a premeditated murder carried out with a knife (R276).

Over repeated defense objections (R91-109, SSR21-24), State's Exhibit Twenty was utilized to identify the victim (R182). The picture produced tears (R182-183). The sheet covering the victim had been moved before that picture and other pictures allegedly showing the wounds were taken (R340, 395-396, SSR32-33). Motions for mistrial (R183-184, 341-342, 589-590) were denied (R185, 342, 590). One of the pictures was used by the State again in phase II over objection (R8820883).

Police suspected a burglary, since newly replaced jalousies on the south door had been removed (R339). Latents from those jalousies matched Appellant's prints (R363). The victim allegedly had several hundred dollars the night before (R499-500), which was never found (R115-116). There had also been a burglary with the same point of entry on the Fourth of July weekend (R314). No prints were taken then on the jalousies (R319-320).

The victim ordinarily slept with the door padlocked. Teresa Cast still had her key and his was the only other. The padlock was unlocked when she found the body. The lock was on the kitchen floor (R116, 149). Its key was in the living room (R116).

Initially, the grand jury refused to indict, so he was charged only with the burglary and was able to secure his release on bond.

Seven months after the murder, Appellant allegedly raped his brother's girlfriend at knife point (R466, 468, 474, 481-482). In the process, he allegedly said if she did not submit, he would kill her like he did that man (R469). She finally told the police four or five days later (R478), after the brother took away her clothes (R471).

Appellant's brother also came forward after the alleged attack (R532-553). He described alleged admissions that Appellant killed Bohanon (R527) to see if he had the nerve (R529). The brother also took a shot at Appellant (R536), trying to kill him (R546). He told police:

"Either you get him off the street or I will" (R546).

After the first trial, the brother gave a sworn statement to Appellant's attorney, in which he said he lied at the trial (R540-541). At this trial, he said his sworn statement was a lie, told to try to get closer to his mother (R541-542).

A defense motion to limit the State from using threats

against the girlfriend (R973, SSR24-26) was denied (R454-461), as was a motion (R973, SSR26-27) to exclude evidence of alleged threats against other unspecified persons (R514-517A). The Court also rejected the objection that the girlfriend's testimony was too vague (R452-454).

The jury began deliberating about 9:50 (R692). It returned for a readback of evidence as to condition of door and kitchen entry, nudity of the victim, time of jalousie replacement, search for keys, condition of air conditioner and cut on Teresa Cast (R692-693). Over defense objection, Sergeant Wilburn's testimony that the jalousies had been painted over dirt was omitted (R696-698). The jury returned its verdicts at 3:50 (R708).

At the sentencing hearing, the jury received evidence that Appellant had been previously convicted on pleas to armed robbery and to sexual battery (R767-769, 772-773, 786-7871, although no one could say what facts he admitted to at the time of the plea to the first (R773). Appellant denied having a weapon on the sexual battery (R871-872). It also learned that he was on MCR at the time of this offense (R798). This was described as release under supervision for gain time (R792-794). His MCR was violated for his arrest on this case (R798).

Dr. Hobin told the jury this was probably not a well thought out murder, but was with a weapon of convenience (R808-809). Bohanon was legally intoxicated and asleep when attacked (R809-810). He would have been aware of the attack only for seconds (R813), even if he was still alive for a number of minutes (R816).

The jury also learned that Appellant was a positive influence on his nieces and nephews, and had often brought home hungry strangers to be fed when he was a boy (R820-855). The Judge heard separately that Appellant was well behaved in prison (R905-910).

After deliberating forty-five minutes (R903, 911), the jury voted 9 to 3 to recommend the death sentence (R912).

SUMMARY OF ARGUMENT

Appellant comes before this Court following his second trial with many of the same complaints he raised the first time.

He still questions whether either jury agreed unanimously on either felony murder or premeditation and is aggrieved at denial of a special verdict telling him. He feels it marred his sentencing too and lead the Judge into the error of finding heightened premeditation.

The Judge was in error in the sentencing in finding Appellant was under sentence while on MCR, because gain time is time off the sentence, by definition. He finally saw the light on whether this was a cruel and torturous killing, but not in time. He improperly submitted the issue to the jury, and gave the prosecutor the chance to stir up sympathy with a gory photograph.

Appellant's trial was also marred by that photograph and others, one of which caused a predictable emotional response. All three were of an altered crime scene and were unnecessary. Appellant was also denied his right to point out witnesses the State should have called. The jury was given an incomplete readback as to when the victim's jalousies were replaced and the prosecutor was allowed to make comments tending to transfer the burden of proof. Finally, he was again subjected to prejudicial evidence of other wrongdoing, not relevant to this case. Also, this time the jury was effectively and erroneously told that the first jury convicted Appellant. For any of those reasons and the combination of all of them, a new trial is required.

POINTS INVOLVED

I. THE COURT ERRED IN REFUSING TO USE A SPECIAL VERDICT SO THE JURY COULD DISTINGUISH BETWEEN PREMEDITATED AND FELONY MURDER.

11. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO COMMENT IN CLOSING ON UNCALLED STATE'S WITNESSES.

III. THE COURT ERRED IN REFUSING TO INCLUDE TESTIMONY THAT JALOUSIES HAD BEEN PAINTED OVER IN THE READ-BACK AS TO WHEN THEY WERE REPLACED.

IV. THE COURT ERRED IN ALLOWING THE STATE TO USE POSED AND PREJUDICIALLY GORY PHOTOGRAPHS FOR IDENTIFICATION AND TO SHOW THE WOUNDS.

V. THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL FOR CUMULATIVE IRRELEVANT AND PREJUDICIAL EVIDENCE SUGGESTING OTHER WRONGDOING AND TELLING THE JURY THE RESULT OF THE PRIOR TRIAL.

VI. THE COURT ERRED IN REFUSING TO STOP THE TRIAL FOR REPEATED STATE EFFORTS TO TRANSFER THE BURDEN OF PROOF.

VII. FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL.

VIII. THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER WHETHER THIS HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AND IN ALLOWING THE STATE TO RELY ON A GORY PHOTOGRAPH.

IX. THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

ARGUMENT POINT I

THE COURT ERRED IN REFUSING TO USE A SPECIAL VERDICT SO THE JURY COULD DISTINGUISH BETWEEN PREMEDITATED AND FELONY MURDER.

This Court has consistently allowed the State to charge premeditated murder and secure a conviction by proving felony murder. The State does not even have to give the defense a clue as to which theory or theories it is pursuing.

It is wrong to let the State proceed on either theory without notice as to which it will rely on, because it is impossible to prepare a defense. It is worse to allow the jury to return a verdict without specifying which it found the accused guilty of. This case is a classic example. This Court may recall that the first jury returned after almost three hours of deliberation (R1988, 1989, Case No. 64,510), to ask whether it had to distinguish between premeditated murder and felony murder (R2459, Case No. 64,510). Told it did not (R1990, Case No. 64,510), the jury returned its verdict only twenty-three minutes later (R1991, Case No. 54,510). Thus, it seemslikely each theory had its proponents at the first trial.

The jurors' ambivalence would not be surprising. Any of those who believed Appellant's brother when he said the killing was to see if he had the nerve would deem this premeditated. However, there was much reason to disbelieve him. Not only did he swear it was all a lie and then recant again, but his motivations are highly suspect. For example, he claimed he recanted to get close to his mother, yet he also admitted he was never close to the family (R542, 551-553). Would he really risk a perjury charge to try to get closer to his family? How close can he get while in jail on the other side of the state? And how can one believe his brother would really confess a murder to such an outcast?

The jury would also have to consider the brother's strong desire to kill Appellant. If he would shoot to kill in his anger he would also testify to kill, and it is doubtful he would care whether he spoke the truth or not.

It would seem the jurors would all believe this was a murder occurring during a burglary, but that overlooks the frenzied nature of the attack. Dr. Hobin said it was unusual for a burglary.

A grand jury which knew Appellant was the burglar and even had the confession this Court excluded still refused to indict Appellant for murder. The jurors were not required to find this was a felony murder.

Because it is not just possible, but probable that the jurors here did not unanimously agree on either felony murder or premeditated murder, Appellant has been severely injured by the comingling of offenses. One answer to this problem is to require special verdicts on premeditated and felony murder. This Court was tempted to require this procedure, In the Matter of the USE BY the TRIAL COURTS OF the STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 431 So.2d 594 at 597-598 (Fla. 1981), but apparently did not follow through. However, the requirement made it into some Judge's instruction books. This Court has recently received two cases with special verdicts, LeCroy v. State, 533 So.2d 750 (Fla. 1988) where another Palm Beach County jury found one murder premeditated and the other not, and Lamb v. State, 532 So.2d 1051 (Fla. 1988), where a jury found a murder to be both. It may have wished it had them in Spivey v. State, 529 So.2d 1088 at 1094 (Fla. 1988), where it had to analyze the jury's general verdicts.

Special verdicts are commonplace in civil cases. Even though there is no rule of procedure which requires them, this Court encouraged them in two issue cases, saying:

> "We believe that the 'two issue' rule represents the better view. At first thought, it may seem that injustice might result in some cases from adoption of this rule. It should be remembered, however, that the remedy is always in the hands of counsel. Counsel may simply request a special verdict as to each count in the case. See Harper v. Henry, supra. Then, there will be no question with respect to the jury's conclusion as to each. If the trial court fails to submit such verdicts to the jury, counsel may raise an appropriate objection." Colonial Stores Inc. v. Scarbrough, 355 So.2d 1181 at 1186 (Fla. 1978).

They have been held mandatory in comparative negligence cases, Lawrence v. Florida East Coast Railway Company, 346 So.2d 1012 at 1017 (Fla. 1977). Surely we can require no less in a matter of life and death.

Appellant followed this Court's lead in Colonial, supra, and made his objection upon denial. He should have geen granted a special verdict form so he would know which of his two issues was

found by the jury. His prejudice came at the sentencing here. If any member of his jury did not consider this a premeditated murder, heightened premeditation could not validly be submitted to the jury in Phase II or found by the Judge. With the dubious quality of the witness as to premeditation, this jury should have been asked to clarify its verdict.

Since Appellant may have been denied his constitutional right to a unanimous jury, a new trial must be ordered.

ARGUMENT POINT II

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO COMMENT IN CLOSING ON UNCALLED STATE'S WITNESSES.

Appellant once again presented no evidence at the guilt determination in this case, preferring to rely on deficiencies, conflicts and omissions within the State's case. Counsel suggested Teresa Cast as the possible killer. The theory was not entirely without record support.

Teresa had a fight with the victim a week earlier and immediately moved into another man's home.

She claimed her wound was a week old, but an officer said it was fresh.

She discovered the body, and claimed she tried to kiss him, but the sheet should have been up too high for that according to the police officers.

The killing was frenzied, more like a lover than a burglar. Also, the killer got on the bed and probably straddled the naked victim.

Her bloody shirt was found in the next room.

Her alleged pathway through the apartment to discover the body would have caused her to climb over furniture and was the long way around (R400).

She and her new male friend went riding with Appellant just before the killing, and told him she'd be away.

Though the new male friend was in the car waiting, she ran for a neighbor when she saw the deceased.

Defense counsel sought to point out the need to hear from the new male friend, who was there when she and Appellant went riding and there when she found the body. The prosecutor objected, citing State v. Michaels, 454 So.2d 560 (Fla. 1984). Her objection was sustained over defense protest (R641-645).

State v. Michaels, supra, does not really support the State. There the State was allowed to comment on failure of one claiming self-defense to call his daughter. The daughter was considered not equally available to the State because of her closeness to the accused. On that rationale, Teresa's new male friend was hardly

available to the defense to help it try to prove his good friend was the killer. The comment should have been allowed.

Further the prosecutor exhibited the same lack of understanding of the burden of proof that is reflected in Point VI. It is improper for the prosecution to comment on defense failure to call witnesses unless the defense asserts a defense which assumes a burden, because otherwise the defense never has to prove anything. The standard jury instructions told this jury so (R680).

The same can not be said of the State. The State does have the burden of proof, and reasonable doubt can arise from the evidence or from lack of evidence (R678). Because comment on uncalled State's witnesses is so common, it is difficult to find cases which reverse for limitation of that right. However, a civil case was overturned in Linehan v. Everett, *338* So.2d 1294 (Fla. 1DCA 1976), where counsel was prevented from observing that Plaintiff was sent by the defense to a doctor and the doctor was not called. Surely Appellant's case for reversal is more compelling in view of the different burden of proof in this case.

ARGUMENT POINT III

THE COURT ERRED IN REFUSING TO INCLUDE TESTIMONY THAT JALOUSIES HAD BEEN PAINTED OVER IN THE READBACK AS TO WHEN THEY WERE REPLACED.

A critical issue in this case was when the victim replaced the jalousies where Appellant's prints were found. The evidence from people who saw him the weekend he died was that he replaced them that weekend. However, the crime scene man said the jalousies were just painted over, and that a print could survive painting over. Thus, the evidence was inconclusive as to whether new jalousies were brought in or the old ones were simply painted and replaced.

The prosecutor insisted they were new (R597). Appellant argued the opposite view (R623). The jury wanted to know, and asked for a readback on the subject, to wit:

> "...portions of the testimony that deal with the time of the replacemtnt of the jalousies, i.e., Cindy Miller, Mike Bohannon and Roger Miller." (R693).

Appellant insisted a proper readback would have to include the crime scene man, because his evidence was most relevant to the subject (R697). The Court refused, saying the officer was not on the list of names (R698).

The jurors' request was specific as to subject matter, and Appellant submits it was error not to give them all the evidence on the subject. A full readback would have demonstrated that the jalousies were not new in the sense of being unused. It would have demonstrated the shaky nature of the State's theory that Appellant had to be the burglar because of his prints.

Appellant submits that the enumeration of certain witnesses by the jurors did not purport to be all inclusive. They asked for testimony on the replacement of the jalousies and were given only part, very much to Appellant's prejudice. This can be cured only by a new trial.

ARGUMENT POINT IV

THE COURT ERRED IN ALLOWING THE STATE TO USE POSED AND PREJUDICIALLY GORY PHOTOGRAPHS FOR IDENTIFICATION AND TO SHOW THE WOUNDS.

Rather than photograph the scene as he found it, the crime scene man pulled the sheets down, thus making Exhibit twenty a posed photograph rather than an accurate description of the crime scene. The trial Judge knew it, because it was called to attention by motion in limine (SSR22-23) and he had tried this case before.

In a case where victim identity was not in dispute (SSR24), this gory black and white photograph was used for identification, and that despite the trial Judge's desire to avoid emotional identifications (SSR23-24). If he did not remember, counsel reminded him that a similar picture had the same effect at the first trial (SSR21). At the first trial, two lay witnesses reacted badly. When Teresa Kast looked at it, the Court noted:

> "Well, State's Exhibit 1 was shown to the witness. She was asked if she could identify the person in the exhibit. The witness then moaned loudly, turned her back to the jury and towards the Court. I believe she buried her head in her hands. I could not see her hands at that particular point. However, it was obvious that she had a very emotional reaction to the exhibit, at which point the Court excused the jury to go to the jury room." (R1082-1083 in Case No. 64,510).

The Court did not think the witness could look at it long enough to testify without prejudicing the jury (R1087 in Case No. 64,510).

This Court may examine the instant photograph and judge its effect. That it provoked the predictable emotional reaction in Cindy Miller demonstrates that it was prejudicial to the defense. That the State wanted the jurors to dwell on the bloody scene is clear from the start of its opening statement (SSR140-141). It presented a blatant appeal to sympathy for the victim and nothing else. The pathologist was asked to identify the victim from it (R223), but he was able to work without it at the first trial (R1496-1498, Case No. 64,510) and said he could do so again. He had his own diagrams (R225-226).

The State presented no pertinent justification for this prejudice. Instead, it brought on two additional color photographs

with the medical examiner, even though he admitted he did not need them either. He thought the color photos have an above average emotional impact (R226). Appellant concludes that the pictures do not meet the relevancy test of Welty v. State, 402 So.2d 1159 at 1163 (Fla. 1981). He submits that these pictures should not have been admitted at all. The prejudice far outweighed the marginal value in this case, just as in Young v. State, 234 So.2d 341 at 347-348 (Fla. 1970). There can be no excuse for using a gory picture for identification. For the predictable emotional outburst which followed, a new trial is required. Further, if Exhibit 20 were properly admitted, the additional color photos were wrongly admitted under Young v. State, supra. A new trial is required.

ARGUMENT POINT V

THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL FOR CUMULATIVE IRRELEVANT AND PREJUDICIAL EVIDENCE SUGGESTING OTHER WRONG-DOING AND TELLING THE JURY THE RESULT OF THE PRIOR TRIAL.

Appellant's trial was infected by repeated references to irrelevant and prejudicial evidence.

Sharon Williams should have been excluded entirely. She claimed to have no idea who Appellant was talking about when he said he'd kill her like he did that man. *So* that relevancy of her testimony is marginal. The prejudice of telling the jury about an unspecified murder and a rape far outweighs it and should have precluded admission, just as Appellant argued (R452-454).

Sharon Williams also injected error when she was allowed to testify her body had been violated (R479, 481), even though she wasn't supposed to say she'd been raped. A mistrial was denied (R486). That Appellant allegedly liked to use a knife (R470) was no more relevant to any fact in issue than were the robberies condemned in Franklin v. State, 229 So.2d 892 at 895 (Fla. 3DCA 1969) or the fondness for adolescents condemned in Francis v. State, 512 So.2d 280 (Fla. 2DCA 1987). Mere propensity to use a knife is an abuse of this Court's Williams v. State, 110 So.2d 654 (Fla. 1959), yet this jury got a double dose because Appellant's brother claimed he was told the same thing (R528).

The State claimed the talk of liking to use a knife was so intertwined with what happened that it could not be separated. It cited Tumulty v. State, 489 So.2d 150 (Fla. 4DCA 1986). The argument overlooked that Tumulty's collateral crime was intertwined with the crime charged. Appellant's was intertwined with what was also a collateral crime, and was error.

Appellant's brother also claimed he talked about alleged plans to kill unnamed others (R528-529), including someone he had a confrontation with (R530). Defense objections (R516-518) were denied on grounds that the evidence was relevant to motive. The comments are not unlike those which required a new trial in Jackson v. State, 451 So.2d 458 (Fla. 1984), where the accused

described himself as a thoroughbred killer while threatening a witness with a gun.

Prejuice arose in another area as well. Early on the parties agreed not to mention the fact of a prior trial (SSR29-30). The prosecutor violated this on opening statement when she mentioned that Appellant's brother said he lied at the trial (SSR147). Upon defense objection (SSR 149), the prosecutor was told to be more careful, and to caution her witnesses ro do the same (SSR151-152). The Court noted that the jury had not been told the result of the prior trial.

That changed when Fred Haliburton began blurting out unresponsive answers on cross-examination. He described discussing the appeal with his sister (R558). The Judge was willing to instruct the jurors to disregard the comment and ask if they could, but he denied the motion for mistrial (R558-560).

The fact that Appellant had a lawyer and the case was on appeal would lead any juror of reasonable intelligence to realize Appellant had been convicted. This information should have been kept from this jury.

It is universally held to be improper on retrial to tell the new jury what the old one did. One Court went so far as to call it fundamental error, reversible despite want of objection in a murder case, State v. Lee, 346 So.2d 682 (La. 1977). It was just as devestating here, and there was timely objection. Appellant's motion for mistrial should have been granted.

If this Court is not inclined to deem this error alone sufficiently prejudicial for a new trial, it is urged to weigh the improper evidence of other wrongdoing, the gory photographs, the curtailed argument, the incomplete readback and the undifferentiated verdict as well. Too much went wrong here to conclude that Appellant had a fair trial.

ARGUMENT POINT VI

THE COURT ERRED IN REFUSING TO STOP THE TRIAL FOR REPEATED STATE EFFORTS TO TRANSFER THE BURDEN OF PROOF.

Another bone of contention during trial was the State's subtle effort to shift the burden of proof.

First the prosecutor discussed the weighing of State and defense evidence if the case reached phase 11. Defense motion for mistrial was denied (SSR 73-75).

It continued when the prosecutor discussed guilt or innocence on voir dire. Upon defense objection that the correct issue was whether he was guilty or not guilty, the prosecutor stopped (SSR79-80).

In a case where the defense put on no evidence at the first trial, it was wrong to discuss defense evidence in any context during voir dire. The defense never has to produce evidence, and there was good reason for the State to know it would exercise that option.

It is also wrong to discuss innocence, because it implies that the defense must prove innocence. In fact, as defense counsel correctly pointed out, a not guilty verdict simply says the State did not prove its case (SSR115-117).

A new trial is in order where the State is allowed to transfer the burden of proof improperly, Dixon v. State, *430* So.2d 949 (Fla. 3DCA 1983). This case is too close, and too much is at stake, to refuse to cure this error by granting a new trial.

ARGUMENT POINT VII

FLORIDA'S CAPITAL PUNISHMENT LAW IF UNCONSTITUTIONAL.

Appellant challenges Florida's death penalty scheme on grounds enumerated below as follows:

1. The mitigating circumstances are insufficient and are limited and denigrated (R981-984).

2. Section 921.141 (5)(h) Fla.Stat. is vague, overbroad, arbitrary and capricious (R985-992).

3. Section 921.141 (5)(i) Fla.Stat is vague, overbroad, arbitrary and capricious (R1086-1103).

4. The system is arbitrarily administered in the jury override (R1104-1120).

5. Death by electrocution is cruel and unusual punishment (R993-1000).

6. The penalty is applied excessively to the poor, blacks, and males and where the victim is white and better off (R1002-1029).

The grounds are set forth in detail in the motions and are self-explanatory. Appellant is aware that this Court has repeatedly affirmed validity of Florida's law, and will rely on the arguments below without further comment, except to note that the trial Judge had trouble with (5)(h) himself, first letting it go to the jury and then rejecting it (see Point VIII) and the cases cited in Point IX reflect the difficulty posed by (5)(i).

ARGUMENT POINT VIII

THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER WHETHER THIS HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AND IN ALLOWING THE STATE TO RELY ON A GORY PHOTOGRAPH.

Appellant objected to submission of the issue of whether this killing was heinous, atrocious or cruel to the jury (R734-739). Inasmuch as the victim was asleep and drunk when the attack began, and would have been aware of the attack only for seconds, this was simply not a torturous killing, just as in Demps v. State, 395 So.2d 501 (Fla. 1981) and Simmons v. State, 419 So.2d 316 at 318-319 (Fla. 1982). See also Brown v. State 526 So.2d 903 at 907 (Fla. 1988). As in Parker v. State, 458 So.2d 750 at 754 (Fla. 1984), a brief awareness of impending death is not that cruel.

Any question as to whether it was harmful must be resolved in Appellant's favor because, it allowed the prosecutor to stand before the jury with one of the bloody photographs and make yet another appeal for sympathy for the victim. This was error even if the cruelty of the murder were proper for the jury, because mutilation of the body after death or unconsciousness is not relevant, Jackson v. State, supra, 451 So.2d at 463 (Fla. 1984), Simmons v. State, supra. Halliwell v. State, 323 So.2d 557 (Fla. 1975). Appellant's objection (R882-883) should not have been overruled.

Further, there is no way to guess whether this jury would have recommended as it did without the improperly submitted aggravating circumstance. There is good reason to question whether the jury thought this premeditated at all (see Point I), and it did have non-statutory mitigating circumstances to consider. The gory picture and improperly allowed argument on this issue may well have pushed the vote over to death. A new sentencing hearing is required, without any reference to the heinousness or cruelty of the killing, and without the gory picture.

ARGUMENT POINT IX

THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

Appellant submits that the Court committed error in imposing the death sentence in this cause. The Judge found four aggravating circumstances (R1055-1057), but two do not withstand close scrutiny, to wit:

Crime committed while under sentence of imprisonment.

It is clear that Appellant was on mandatory conditional release due to gain time when this crime occurred. It is also true that release on MCR was on the same conditions as release on parole until October 31, 1981, Section 944.291, Fla.Stat. Nonetheless, this Court's ruling that a person on parole is still under sentence within the meaning of §921.141(5)(a), Fla.Stat. should not apply.

Parole is not quite the same as MCR, because the parolee has not completed his sentence. Rather, he is released from prison early because he agrees voluntarily to certain restrictions on his freedom. There is nothing voluntary about MCR, and it comes only when the sentence is terminated by operation of law.

Section 944.275(1)(a)-(b), Fla.Stat. like its predecessor, Section 944.27(1)(a)-(c), Fla.Stat., says very emphatically that it awards time off the sentence. If the statute means what it says, Appellant's sentence was shortened by his gain time, and he was simply not under sentence any longer. Since the cardinal rule of statutory construction is to read penal statutes most favorably to the accused, this statute must be deemed to mean what it says, Section 775.021(1), Fla.Stat., Reino v. State, 352 So.2d 853 at 860 (Fla. 1977). This aggravating circumstance cannot stand.

Killing was cold, calculated and premeditated.

Because there was no special verdict here, we do not know whether the jury even found this was a premeditated murder, much less so cold and calculated as to trigger this aggravating factor. However, it is clear that not every premeditated murder qualifies. Rather, it is the execution style or contract killing, Cannady v. State, 427 So.2d 723 at 730 (Fla. 1983).

There is no more evidence of advanced planning here than there was in Harris v. State, 438 So.2d 787 at 797-798 (Fla. 1983),

where the burglary victim was killed with something found right in her home. To the same effect is Smith v. State, 515 So.2d 182 at 185 (Fla. 1987), where this Court rejected the finding even though the rock used as a bludgeon did not come from the immediate vicinity. A similarly frenzied knife attack was found not to have heightened premeditation in Mitchell v. State, 527 So.2d 179 at 182 (Fla. 1988). There the medical examiner likewise described the 110 stab wounds as frenzied. The same result must follow here.

Whether this was a spur of the moment killing of opportunity, as Appellant allegedly told his brother, or a crime of frenzy, as Dr. Hobin testified, it was not an execution style killing, or preplanned, so this finding also falls.

Appellant concludes that two of the aggravating circumstances can't stand, which requires reversal of the death sentence because there are mitigating circumstances, Elledge v. State, 346 So.2d 998 at 1003 (Fla. 1977). Specifically, the Judge found he exhibited good prison behavior, and he had brought hungry people home to be fed while growing up, and had counselled nephews and nieces to behave themselves (R1058).

Finally, in the proportionality review required by Brown v. Wainwright, 392 So.2d 1327 at 1331 (Fla. 1981), this Court is urged to compare this case to Burch v. State, 343 So.2d 831 (Fla. 1977), which is similar in repeated attacks with a small knife during a felony, and the frenzy suggesting mental disturbance. Appellant has the additional mitigating factors found by the Judge here. This Court should reduce the sentence accordingly.

CONCLUSION

Appellant respectfully submits that his judgments and sentences must be reversed. A new trial is required with a special verdict on premeditated and felony murder, and without the many errors which combined to deny Appellant a fair trial in this close case. In any event, the death sentence must be reversed because the aggravating circumstances are not all sustained and the jury was allowed to consider one which does not apply and an irrelevant gory photograph.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to JOHN W. TIEDEMANN, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Fla. 33401 this 8th day of March, 1989.

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