IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY HALIBURTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

CASE NO.: 72,277

APPELLANT'S REPLY BRIEF

CHARLES W. MUSGROVE
Congress Park, 1-D
2328 South Congress Avenue
West Palm Beach, Fla. 33406
407-968-8799 / Fla. Bar #095137
Attorney for Appellant

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ARGUMENT POINT I

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

Appellant realizes this Court has held that special verdicts are not required to assist in sentencing in capital cases, Brown v. State, 473 So.2d 1260 at 1265 (Fla. 1985), Buford v. State, 492 So. 2d 355 at 358 (Fla. 1986). See also Wool v. State, 537 So.2d 630 (Fla. 2DCA 1988) and North v. State, 538 So.2d 897 (Fla. 5DCA 1989). However, this Court has not addressed the problem Appellant raises -- possible denial of a unanimous verdict. Concommitantly, if jurors are not required to make special findings, debate in the jury room may be prematurely cut off when the jurors are really not in agreement about anything.

The State urges this Court to adopt a rule from other jurisdictions that a unanimous jury is not required to agree on which of alternate theories of guilt it accepts. Appellant would submit that any such jury verdict should not be permitted for several reasons.

First of all, Article I, Section 22 of Florida's Constitution secures the right to trial by jury and that means a unanimous jury. How can a jury on which half accept premeditation and half accept felony murder be considered unanimous. They are just as split as they can be. Even the Sixth Amendment, which is not violated by majority verdicts, Johnson v. Louisiana, 406 U.S. 356 (1972), would not allow an even split.

Further, if only half the jurors find felony murder beyond a reasonable doubt, then half do not. If only that other half finds premeditated murder beyond a reasonable doubt, then the first half does not. By the same logic which the State says supports a conviction for murder in the first degree, Appellant says he is entitled to an acquittal! After all, half not finding him guilty of premeditation plus another half not finding him guilty of felony murder should also equal twelve votes for not guilty.

On the evidence in this case, such a split is a very real possibility, because the only evidence of premeditation came from Appellant's brother and his story was never very credible. Why would Appellant confess a murder to an outsider like Freddie, to whom he was not close. Even before Freddie changed his story, his desire to kill Appellant made his credibility suspect.

As for felony murder, it must be remembered that the State could not convince a majority of the first Grand Jury to indict Appellant for felony murder even with his confession that he'd been in the apartment that night to commit a burglary.

The only way to avoid this guessing game is to require special verdicts and unanimity as to the findings. Where special verdicts are required in civil cases, this Court does not condone decisions by evenly split juries. How can it require less in a capital case.

This Court should also not overlook the effect on sentencing. In the cases of LeCroy v. State, 533 So.2d 750 (Fla. 1988) and Lamb v. State, 532 So.2d 1051 (Fla. 1988), the use of special verdicts facilitated the counting of aggravating circumstances. In the case at bar, we do not know if the jury found this to be a premeditated murder or a murder in the course of a burglary or both. This Court has refused to infer enhancement from a contemporaneous conviction. In State v. McKinnon, 540 So.2d 111 at 113 (Fla. 1989), this Court ruled that manslaughter could not be reclassified without a specific finding in the verdict as to use of a firearm, even though the verdict on another count found McKinnon guilty of use of a fire-arm in commission of a felony. Again, can it require less precision in the findings in a death case?

To say, as this Court did in Brown, supra, that this Court and the Judge decide whether death is appropriate is to ignore the role of the advisory verdict. If the jury recommends life, this Court will not approve an override unless virtually no reasonable person could differ, Tedder v. State, 322 So.2d 908 (Fla. 1975). If the jury had a basis to reject arguable aggravations or to find arguable mitigations, the verdict is approved, Welty v. State, 402 So.2d 1195 at 1164 (Fla. 1981). However, jurors do make mistakes and this Court has overturned many death sentences approved by jurors. For meaningful appellate review, the jurors must make findings. Otherwise, their role as the conscience of the community and the original finders of fact is denigrated. It is as though they were allowed to return a general verdict of guilty on a charge with lesser offenses, and the Judge then fixed the offense.

Appellant submits that this Court should require findings by the jury whether the Constitution requires it or not. At a minimum, where the issue of premeditation is presented on such uncreditable testimony, the jury should be required to say if it found the evidence of premeditation sufficient.

ARGUMENT POINT II

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

The State's argument ignores the burden of proof. It also ignores the standard jury instruction that a reasonable doubt may arise from the lack of evidence. How can Appellant be prevented from arguing the lack of evidence arising from failure of the party with the burden of proof to call a witness present when the body was discovered? State v. Michaels, 454 So.2d 560 (Fla. 1984), deals with comments by the State as to uncalled defense witnesses. This Court should make it clear that it does not apply to defense comments on uncalled State witnesses.

Needless to say, Appellant can not agree that the evidence here was overwhelming.

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.

The relevance of evidence that the jalousies had simply been painted over to the requested readback on when the jalousies were replaced is evident, particularly in light of arguments of counsel on the subject.

Appellant does not believe the jurors were attempting to limit the readback to the enumerated witnesses. They asked for portions of the testimony dealing with replacement of the jalousies. Having undertaken a readback, the Court was required to make it complete and did not do so.

ARGUMENT POINT IV

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

The issue in this case was whether Appellant was responsible for the gory death, not whether there was a gory death. Since the picture challenged here does not accurately represent the crime scene and was cumulative to what the medical examiner used for the wounds, it was not relevant. It's use for identification was solely to create an emotional response from witnesses, just as it was at the first trial, and that is error. Appeals to emotion and sympathy are universally condemned by case law and the Standard Jury Instructions.

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.

To the extent that the State argues these points were decided adversely to Appellant on the prior appeal, it overlooks that this Court does not decide issues which may not arise again on retrial, Coxwell v. State, 361 So.2d 148 at 149, citing Duke v. State, 134 Fla. 456,185 So. 422 (1938). The State has previously recognized that there were unaddressed issues here. In its Notice to Dispose of the Cause served March 31, 1986, in appeal no. 64,510, it requested this Court to "continue with and dispose of the remaining ten (10) issues, not considered by this Court in its initial opinion" (page 2).

On the merits, Appellant can not find the relevance to his alleged talk of liking to kill with a knife. It is mere propensity as in Jackson v. State, 451 So.2d 458 (Fla. 1984), not motive as in Jackson v. State, 498 So.2d 406 (Fla. 1986). It does not arguably involve the same weapon as in Medina v. State, 466 So.2d 1046 (Fla. 1985). Correll v. State, 523 So.2d 562 at 566 (Fla. 1988) approved redacting immaterial matters from a confession. The same should have been done here.

The State can hardly claim that Appellant wanted a second degree murder conviction. Appellant requested the omission of second degree murder. It was the State which insisted on it (R599). Further, Freddie Haliburton's testimony does not make this "grossly" premeditated or "highly" motivated. His testimony does not exclude a spur of the moment killing with a weapon of convenience.

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.

The State, which did not cross-appeal, claims the Judge should have found this killing to be heinous, atrocious or cruel. Its reliance on Hansborough v. State, 509 So.2d 1081 (Fla. 1987) is misplaced. There the victim was obviously not asleep or drunk at the time of the attack, and did not die as quickly as the victim here. Our victim was not stalked and did not flee as in Phillips v. State, 476 So.2d 194 (Fla. 1985). This was not a strangulation as in Johnson v. State, 465 So.2d 499 (Fla. 1985).

Had the Judge found this circumstance again, this Court would have been compelled to reverse by the cases cited in Appellant's initial brief, to wit: Demps v. State, 395 So.2d 501 (Fla. 1981), Simmons v. State, 419 So.2d 316 at 318-319 (Fla. 1982), Brown v. State, 526 So.2d 903 at 907 (Fla. 1988) and Parker v. State, 458 So.2d 750 at 754 (Fla. 1984). As noted in Point V, this Court's failure to discuss the sentencing in its prior decisions does not mean it approved the sentencing order, Coswell v. State, supra.

As the State says, aggravating circumstances on which there is evidence should be submitted to the jury. There was none here on this circumstance, and the submission was prejudicial, especially with the improper use of the gory photograph.

ARGUMENT POINT IX

THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

Contrary to the State's claim, this Court would not have addressed sentencing on remand for a new trial. The evidence on the new trial would not be the same. The result of the trial would not necessarily be the same. It would have been a waste of time to address sentencing in the prior decisions in this case, and the State does not cite a single case where this Court did *so.*

The authorities cited to show that this case has heightened premeditation are not persuasive. In Mason v. State, *438* So.2d *374* (Fla. 1983), for example, the entire crime consisted of breaking in and killing the victim. There the planning that went into the break-in was planning for the murder as well. In Johnson v. State, *438* So.2d *774* at *779* (Fla. 1983), Johnson expressed his intent to kill if necessary as he started out on the evening of the robbery.

The expressions of "premeditation" and "forethought" attributed to Appellant all came after the killing. There is nothing in this record to say that his alleged desire to see if he could kill was not spur of the moment, or that his alleged predilection for knives did not develop at that very moment. There is simply no support for the State's claim that use of a knife this time was pre-planned. As in Schafer v. State, *537* So.2d *988* at *991* (Fla. 1989), prearranged plan or prior design are not shown.

Further, the defense did not engage in "skillful manipulation" of Dr. Hobin. His candid description of the frenzied stabbing with a weapon of convenience does make one case cited by the State applicable. In Hansborough v. State, supra, this Court recognized that a similarly frenzied killing was just a burglary that got out of hand. It rejected a finding that the killing was cold and calculated. Based on that decision and Mitchell v. State, *527* So.2d *179* at *182* (Fla. 1988), the same result must follow here.

The sentence in this case is based on erroneous circumstances, and must be reversed.

CONCLUSION

Based on the foregoing, and the reasons and authorities set forth in Appellant's initial brief, Appellant submits that his judgments and sentences must be reversed.

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 1st day of June, 1989.

Charles W. Musgrove

CHARLES W. MUSGROVE
CONGRESS PARK, Suite 1-D
2328 South Congress Avenue
West Palm Beach, Fla. 33406
407-968-8799 / Fla. Bar #095137