IN THE SUPREME COURT OF FLORIDA

THEWELL E. HAMILTON,

Appellant,

v.

CASE NO. 72,502

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Thewell Hamilton was the defendant below and will be referred to herein as Hamilton or Appellant. The State of Florida was the prosecution below and will be referred herein as the State or Appellee. The Appellee will rely on the designation set forth in the preliminary statement of the initial brief.

SUMMARY OF ARGUMENT

I

Hamilton was not forced to trial with a biased juror when the trial judge denied his challenge for cause. Counsel for Hamilton had not exhausted his peremptory challenges at the time he learned of Pamela Smith's opinions regarding guilt. The proper procedure would have been for Hamilton to peremptory challenge Pamela Smith and then request additional peremptories. Pamela Smith sat on this jury because counsel for Hamilton did not strike her. In any event, the trial court judge determined that Smith could put aside any opinion she has and base her verdict solely on the evidence and the law. That is what is required of any juror.

II

The trial court did not err in admitting the per se testimony of Hamilton's 2½ year old son indicating that Hamilton shot his wife and stepson. The record evidence establishes that the statement was made without prompting by the HRS worker and less than two hours after the shock of seeing the gruesome murder occur.

III

Hamilton objected to the prosecutor's use of peremptory challenges to excuse the one black prospective juror. One black prospective juror is not a pattern of discrimination. However, the opposite is true. Hamilton exercised all of his peremptory challenges against members of the white race and offered no explanation for any of them. Even white jurors are entitled to sit on jury duty.

IV

There was no evidence that the shooting deaths occurred during an intra-family argument. There was evidence that Hamilton had to reload his gun at least three times to shoot the victims with the fatal shots. This court has already recognized the time for deliberation required to reload a gun is sufficient to establish premeditated killing. This is especially so where the fatal shots were fired at close range to the heart of one victim and to the head of the second victim. Cold, calculated and premeditated aggravating and especially heinous, atrocious and cruel aggravating factors were properly found.

V

The death sentences imposed in this case are proportionate to this murder. There are three valid aggravating circumstances for the murder of Michael Luposello and two valid aggravating circumstances for the murder of Madeleine Hamilton. The jury was properly instructed on statutory and non-statutory mitigating circumstances and the trial court properly considered such evidence. The jury and court agreed that the statutory aggravation outweighed all mitigation. There was no evidence of a domestic disturbance.

VI

The only evidence that the trial court relied on from the PSI was that Hamilton denied shooting his wife. This statement was presented at trial through the testimony of law enforcement officers on the scene who stated Hamilton told them that the victim's ex-husband had killed her. The court's sentencing order

noted that Hamilton testified at trial and admitted to the shooting. Hamilton testified during the guilt phase and his testimony was obviously not believed by the jury.

VII

The trial court did not err in giving great weight to the jury's recommendation of death. The sentencing order reflects that the trial court found valid aggravating circumstances and weighed them against valid mitigating circumstances and concurred with the jury that aggravation outweighed mitigation in favor of a sentence of death.

VIII

The trial court properly instructed the jury that the sentencing decision was solely the judge's responsibility. The standard jury instructions regarding the jury's role in sentencing were given without objection. Hamilton cannot complain about the jury instructions as he did not object and request and supply a written instruction stressing the role of the jury.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING A DEFENSE CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR WHO HAD FORMED AN OPINION TO GUILT ON THE BASIS OF MEDIA COVERAGE OF THE CASE PRIOR TO TRIAL

Thewell Hamilton was not forced to trial with a juror who had already formed an opinion on the issue of guilt. At the time Pamela Smith stated on voir dire that she had formed an opinion regarding guilt due to the media coverage, counsel for Hamilton had a full compliment of peremptory challenges available. Defense counsel challenged for cause but the trial judge denied the challenge. (TR 56). Counsel did not exhaust his peremptory challenges and ask for new ones until much later and without having challenged Pamela Smith. The only reason Pamela Smith served as a juror at trial was Hamilton's failure to peremptorily challenge her when the court denied the challenge for cause. In **Moore v. State**, 525 So.2d 870 (Fla. 1988), this Court awarded a new trial because the trial court's failure to excuse the juror for cause reduced the number of peremptory challenges available to the defendant. In **Hill v. State**, 477 So.2d 553 (Fla. 1985), the Appellant expended a peremptory challenge on the biased juror Johnson after the trial court denied a challenge for cause. **Hill**, at 555. This juror should have been peremptorily challenged with a request for additional peremptory challenges. This procedure was not followed.

The jurors' statements during voir dire indicate that this was her first appearance as a juror and she did not fully

understand the process. However, the court asked the following question:

> Q: Mrs. Smith, do you feel that, if I tell you that you have, what you have to do here is listen to only what you hear in this courtroom, what you hear from the witness stand, the arguments that the lawyers tell you and the law that I give you, do you feel that you could base your decision on that?
>
> A: Yes, ma'am.
>
> Q: Is there any doubt in your mind that you would be able to do that?
>
> A: No, ma'am, there wouldn't be any doubt.

(TR 55).

Any confusion between the answers given by juror Smith to the trial court and the answers to the questions posed by defense counsel were best resolved by the trial court. As recognized by the United States Supreme Court in **Patton v. Yount**, 467 U.S. 1025 (1984):

> The testimony of each of three challenged jurors is ambiguous and at times contradictory. This is not unusual on voir dire examination, particularly in a highly publicized criminal case. It is well to remember that the lay persons on the panel never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross-section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected

> invariably to express themselves carefully and even consistently. Every trial judge understands, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Id., at 1039.

The trial court did not err in denying the challenge for cause to juror Pamela Smith and Hamilton could have peremptorily challenged Smith in a timely manner and requested additional challenges but this was not done.

ARGUMENT

II

THE TRIAL COURT DID NOT ERR IN ALLOWING AN HRS SOCIAL WORKER TO TESTIFY, UNDER THE EXCITED UTTERANCE OF THE HEARSAY RULE, TO STATEMENTS ALLEGEDLY MADE BY HAMILTON'S 2½ YEAR OLD SON THAT HAMILTON SHOT THE VICTIMS

Appellee agrees that **State v. Jano**, 524 So.2d 660 (Fla. 1988), sets forth the correct standard for the admission of excited utterance testimony as an exception to the hearsay rule:

> The essential elements necessary to fall within the excited utterance exception are that: (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been before there was time to contrive or misrepresent; (3) the statement must be made while the person is under the stress of excitement caused by the event.

Jano, supra, at 661.

The reliability of such evidence is premised on the declarant's making the statements before having time to reflect. **Jackson v. State**, 419 So.2d 394, 396 (Fla. 4th DCA 1982). The length of time between the startling event and the statement is an important factor which must be weighed against the age of the declarant. It is rather obvious that a 2½ year old is going to have a different mental agility regarding the ability to fabricate statements and develop alterior motives. Here, there is no motive for a 2½ year old boy who had witnessed such a terrible crime to fabricate evidence that his father did the killing. In fact, it would be the opposite motive to protect the only living parent.

The trial court made the following finding in admitting evidence:

COURT: All right, well, an hour and a half. The question was, was the statement under stress of the excitement. I think I find under these circumstances that the child was with his father, Officer Tate was there and he couldn't talk to him alone, he was still under that excitement. There were strange people coming and going in the bedroom, there were at least Mr. Tate, the child saw from the testimony, Mr. Godwin, Deputy Tate, and the other Deputy Tate and Investigator Adams, Mr. Godwin, Mrs. Leitner, so those are at least four or five people the child had not seen before. The statement of Mr. Godwin that the child seemed to not to have much emotion, it could be a factor showing the stress he was under. I will find that there has been a sufficient of predicate under the excited utterance exception to the hearsay rule to allow the admission of the testimony. Anything else you wish to put into the record?

DEFENSE: No, Your Honor.

(TR 553).

The trial court ruling was that the utterance was made within and hour and a half of the event and that the comings and goings of the investigators precluded the child from making a statement at that time. Once the child was alone with Mr. Godwin he made the statement and repeated it numerous times. In **Jano**, this Court stated there may be some circumstances where the age of the declarant might justify the admission of such a statement where the record establishes the time period between the events and the statement and there is evidence the statements were made while the child was under the stress of the event. The trial court here held that an hour and a half was sufficiently close to the event and the fact that this was the first opportunity for the child to make such a statement. The statement was not prompted by interrogation as is often the case in sexual abuse situations where there is an interview conducted by a counselor long after the stressful event.

The State would also argue that the admission of this testimony was harmless error given the overwhelming evidence of guilt and the likelihood that a jury would convict a defendant of first degree murder based on the testimony of a 2½ year old. In **Cox v. State**, 473 So.2d 778 (Fla. 2nd DCA 1985), the court held statements of the defendant's wife to a hospital clerk were inadmissible hearsay but found the error harmless given the overwhelming evidence of appellant's guilt. Here, given the amount of evidence put on by the State and the defendant's own admission during the guilt phase that he shot his wife albeit accidentally, the admission of the hearsay statement was harmless

even under this Court's standards set forth in **State v. DiGuilio**, 491 So.2d 1129 (Fla. 1986).

ARGUMENT

III

THE TRIAL COURT DID NOT ERR IN RULING THAT HAMILTON, WHO WAS WHITE, LACKED STANDING TO OBJECT TO THE STATE'S USE OF A PEREMPTORY CHALLENGE AGAINST A BLACK JUROR

Hamilton states the question is whether a white defendant has standing to object to the State's discriminatory use of peremptory challenges to exclude blacks from jury service. That is not the factual scenario presented here. There was only one black juror in the entire venire and the State struck that juror. The striking of one black juror can not create a pattern of discrimination which is the prerequisite to a claim under **State v. Neil**, 457 So.2d 481 (Fla. 1984). Regardless of whether Hamilton has standing to object, he has failed to meet the threshold test of **Neil** and establish that the State has discriminated in the exercise of peremptory challenges. It is obvious that under the test of **Neil** or **Batson v. Kentucky**, 476 U.S. 79 (1986), the striking of one black juror would not be enough to establish discriminatory use of peremptory challenges even if Hamilton were black. Otherwise, the State would be required to change venue to a community where there were more black jurors before a black defendant could get a fair trial. Hamilton has not alleged that the State discriminatorily selected a venire to preclude a black jurors from sitting which is his burden to establish any discrimination in this case.

ARGUMENT

IV

THE TRIAL COURT DID NOT ERR IN FINDING AND CONSIDERING THE AGGRAVATING CIRCUMSTANCES IN THIS CASE

(A)

The trial court properly found that the murders were especially heinous, atrocious or cruel.

Hamilton sets forth the trial court's findings regarding heinous, atrocious or cruel. Hamilton argues that the homicides were nearly instantaneous shooting deaths. This statement is belied by overwhelming factual evidence to the contrary. The evidence presented by the medical examiner and the firearms expert was that Madeleine Hamilton attempted to struggle after her legs had been blown away and attempted to crawl across the floor on her knees because she could not walk before Hamilton fired a third shot directly into her heart. The evidence of Michael Luposello's murder was that he was initially shot in the chest with insufficient force to kill him and then a second shot was placed into the side of his head to finish the job. Each killing was therefore heinous, atrocious or cruel as to each victim without knowledge or consideration of the other murder. The evidence reflects that Madeleine Hamilton was shot in the back of the legs before being executed with a shot to the heart. Everything about the manner of this killing suggests that it was done to cause unnecessary and unbelievable excruciating suffering.

In **Swafford v. State**, 533 So.2d 270, 277 (Fla. 1988), this Court approved findings of heinous, atrocious and cruel based on prior decisions of this Court in **Troedel v. State**, 462 So.2d 392 (Fla. 1984) (trial court found bullet wounds in victim's legs indicated victim was deliberately tormented before the summary execution). The nature of the wounds inflicted on both victims combined with knowledge of what happened to the other victim is beyond gainsay evidence of a shockingly pitiless crime. In **Brown v. State**, 526 So.2d 903 (Fla. 1988), this Court held that a murder was not especially heinous, atrocious or cruel where that finding was premised largely on the victim's status as a law enforcement officer. This is the only explanation for this Court's rejection of the heinous, atrocious or cruel aggravating factor in that case. This Court was wrong in **Brown** to conclude that it was not heinous, atrocious or cruel but, in any event, Brown was a life recommendation from the jury. In order to shoot Madeleine Hamilton in the back of each leg with a separate shot, Appellant had to reload his shotgun. None of the cases cited by Hamilton involved this scenario.

(B)

The trial court did not err in finding that the homicides were committed in a cold, calculated and premeditated manner.

In **Swafford, supra**, this Court reaffirmed its earlier decision in **Phillips v. State**, 426 So.2d 194 (Fla. 1985) regarding the cold, calculated and premeditated aggravating factor where the record conclusively demonstrates that the defendant reloaded his weapon in order to fire the deadly blow after an initial shooting which only wounded the victim. Hamilton used a two shot weapon at close range from the back on an apparently unsuspecting victim, Madeleine Hamilton, and then had to reload before shooting her in the chest.

Hamilton then shot his step-son in the chest in a manner which did not cause death and then had to reload in order to fire a second shot to the boy's head. There is no scenario which can explain these killings which is not cold, calculated and premeditated. At some point Hamilton shot his wife from the back and then finished her off.

In **Rogers v. State**, 511 So.2d 526 (Fla. 1987), this Court held that cold, calculated and premeditated aggravating factor must be proven by evidence of a careful plan or prearranged design. In **Rogers**, the defendant, fleeing from a robbery, shot a victim who "was playing hero". The evidence showed that Smith, the victim, in fact had been shot three times, once in the right shoulder and twice in the lower back. Here, there is the murder of Madeleine Hamilton and then the murder of Michael Luposello.

There was no evidence that either one of the victims was armed or presented any threat to Hamilton's safety. The fatal shots were fired after the victims' had been wounded and were helpless to defend themselves or present a threat to Hamilton. Hamilton's response to their helpless condition was to fire shotgun blasts into the chest of Madeleine Hamilton and the head of Michael Luposello. There is no motive for the killings but they are cold, calculated and with a heightened sense of premeditation. There is nothing more cold, calculated and premeditated than reloading a shotgun three separate times in order to inflict these wounds.

This is not a scared and nervous young man in a convenience store hold-up who is scared out of his wits and makes a mistake that a professional would not have. The judge's sentencing order adequately sets forth a finding of cold, calculated and premeditated and was prepared after this Court's decision in **Rogers v. State, supra.** Specifically, the court found that the defendant's actions "greatly exceed the premeditation required of first degree murder verdicts and this aggravating circumstance is clearly established for each count of the indictment". A defendant who incapacitates a victim and then shoots the fatal blow on two separate occasions and then expresses no remorse whatsoever for the killing, is nothing but a cold, calculated murderer. In contrast, the defendant in **Garron v. State**, 528 So.2d 353 (Fla. 1988), attempted to kill himself after committing a far less calculated murder with strong record evidence that a domestic disturbance exacerbated by alcohol was involved.

ARGUMENT

V

THE TRIAL COURT DID NOT ERR IN SENTENCING HAMILTON TO DEATH BECAUSE DEATH IS PROPORTIONAL TO THE CRIMES COMMITTED

In **Garron**, the court summarized the facts as follows:

> On the night of November 11, 1982, the Appellant, Joseph Henry Garron, shot and killed his wife, LeThi, and his step-daughter, Tina. Appellant's other step-daughter, Linda, escaped the shooting physically unharmed, and later testified against Appellant. Linda, who was fourteen years old at the time of these events, testified at trial that on the night of the shooting Appellant had been drinking wine at home and was in a foul mood. She stated that Appellant touched the outside of her thigh and made an obscene remark just as her mother, LeThi, arrived in a car with Tina. Linda ran outside to LeThi for protection. LeThi entered the house and began arguing with Appellant threatening to take the children away.
>
> While it is unclear how long the argument lasted, Linda testified that she saw Appellant get a gun and hide it under a towel. She heard two shots fired and saw LeThi collapse with a chest wound. Tina then ran to the telephone, called the operator, and requested the police. Appellant followed Tina to the phone, leveled the gun at her, and fired. At this point, Linda ran to a neighbors house hearing shots fired where she presumed were aimed at her. Upon arrival of police, Appellant, who had apparently shot himself, was read his Miranda rights and taken to the hospital.

Garron, at 528 So.2d 354, 355.

The State's own witness, daughter Linda, testified that there was a domestic disturbance and the shootings occurred

nearly instantaneous i.e., no evidence of reloading or execution style shootings. Here, the murders occur with the reflection necessary to reload the gun and shoot the fatal shot to the chest and to the head of each victim. This case bears no resemblance to the facts in **Garron**. In **Garron**, the defendant had apparently shot himself where, here, the defendant attempted to shift the blame of the shooting to Madeleine Hamilton's ex-husband. There is no evidence of drinking, as there was in **Garron** and **Ross v. State**, 474 So.2d 1170 (Fla. 1985).

ARGUMENT

VI

THE TRIAL COURT DID NOT CONSIDER A PRE-SENTENCE INVESTIGATION REPORT CONTAINING VICTIM IMPACT INFORMATION AND OTHER IRRELEVANT EVIDENCE AND OPINIONS CONCERNING POSSIBLE NON-STATUTORY AGGRAVATING CIRCUMSTANCES

Hamilton complains that the presentence investigation ordered by Judge Costello prior to the imposition of sentence contained a victim impact statement. However, there is no evidence in the record that the trial court judge considered any of the alleged victim impact statement in imposing the sentence of death. There was no presentation of this evidence to the jury so the possible prejudice relied on by the United States Supreme Court in **Booth v. Maryland**, 482 U.S. ____, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), and **Grossman v. State**, 525 So.2d 833 (Fla. 1988), are not present here.

Hamilton also complains that the trial court relied on statements in the PSI to explain the factual situation on the night of the double murder. The factual findings set forth in the judge's sentencing order do comport with the evidence adduced at trial. The trial jury convicted Hamilton of two separate acts of premeditated murder. Therefore, the jury, as fact-finder, rejected Hamilton's version of the events on the night in question i.e., Madeleine Hamilton shot her son first and then the gun accidentally discharged killing Madeleine.

Hamilton also complains that the PSI contains a statement that Hamilton lacked remorse for the crime. (R 179). While lack of remorse is not a valid sentencing consideration, there is no

evidence in the record that the trial court considered lack of remorse in imposing death. Hamilton cannot demonstrate any error in the trial court's handling of the information in the PSI regarding the preparation of the sentencing order.

ARGUMENT

VII

THE TRIAL COURT DID NOT ERR IN GIVING UNDUE WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH

A defendant complaining that the trial court gave undue weight or emphasis to a jury's recommendation of death must demonstrate that the sentencing order indicates a lack of independent review and weighing of the aggravating and mitigating factors in imposing the death sentence. Here, the trial court's order set out three aggravating factors as to the murder of Michael Luposello and two aggravating factors for the murder of Madeleine Hamilton. The sentencing order also considered and found mitigating, both statutory and non-statutory, factors and properly weighed them.

The sentencing order states:

> This court is firmly of the opinion that the facts suggesting sentences of death for the commission of these murders are so clear and convincing that no reasonable person could differ. The aggravating circumstances were proven beyond any reasonable doubt and overwhelmingly outweigh the mitigating circumstances. Therefore, the Court finds that the advisory sentence of the jury should be followed and that sentences of death should be imposed upon the defendant.

(R 184).

There is nothing in the sentencing order which indicates the trial court substituted the jury's recommendation for an independent evaluation of the aggravating and mitigating circumstances.

ARGUMENT

VIII

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION REGARDING THE JURY'S ROLE IN SENTENCING

Hamilton relies on **Caldwell v. Mississippi**, 472 U.S. 320 (1985), for the argument that Florida's standard jury instruction improperly diminishes the role of the jury's responsibility for its recommendation. The State would first note that there was no objection to the jury instruction given and requests for a separate instruction emphasizing the great weight which must be attached to the jury's recommendation. In light of the fact that this case was tried three years after **Caldwell**, it was incumbent upon the defendant to object and request an alternative instruction. This was not done. Otherwise, **Combs v. State**, 525 So.2d 853 (Fla. 1988), disposes of this claim.

CONCLUSION

This Court should affirm the judgment and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. Mclain, Esq., Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 16TH day of February, 1989.

Gary L. Printy
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